

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CIVIL APPLICATION [MCA] NO.1039 OF 2016
IN
SECOND APPEAL NO.57 OF 2016 (D)

- Appellants/Applicants** : 1] **Sou. Jyoti w/o Arunrao Bhongade,**
(Original Defendant/
Respondent No.5) Aged about 45 years, Occupation : Agriculture,
R/o Kanholibara, Tahsil Hingna, District Nagpur.
- (Original Defendant/
Respondent No.2) 2] **Shri Kishor s/o Mannalal Sanchariya,**
Aged about 54 years, Occupation : Agriculture,
R/o Anji (Mothi), Tahsil & District Wardha.
- Versus –
- Respondents/
Non-Applicants** : 1] **Sumant s/o Pandhari Chafle,**
(Original Plaintiff/
Appellant No.1) Aged about 27 years, Occupation : Student,
R/o Sukli (Ubar), Tahsil Arvi, District Wardha.
- (Original Plaintiff/
Appellant No.2) 2] **Sou. Manisha w/o Naresh Nistane,**
Aged about 36 years, Occupation : Household,
R/o Telipura, Wardha, Tahsil & District Wardha.
- (Original Plaintiff/
Appellant No.3) 3] **Sou. Bharti w/o Bhaskarrao Dadhe,**
Aged about 34 years, Occupation : Household,
R/o Ganesh Nagar, Near Hanuman Mandir,
Wardha, Tahsil & District Wardha.
- (Original Plaintiff/
Appellant No.4) 4] **Ku. Bhakti d/o Pandharinath Chafle,**
Aged about 28 years, Occupation : Student,
R/o Sukli (Ubhar), Tah. Arvi, District Nagpur.
- (Original Defendant/
Respondent No.1) 5] **Shri Pandhari s/o Yadavrao Chafle,**
Aged about 58 years, Occupation : Agriculture,
R/o Pulai, Tahsil & District Wardha.
- (Original Defendant/
Respondent No.3) 6] **Sou. Jijabai w/o Pandhari Chafle,**
Aged about 55 years, Occupation : Household,
R/o Sukli (Ubhar), Tahsil Arvi, District Wardha.

(Original Defendant/
Respondent No.4)

7] **Sau. Swati w/o Dhirajrao Kawale,**
Aged about 32 years, Occupation : Service,
R/o D-34, Maroti Building, Shruti Complex,
Sector-2, Near Bhakti Vedant Hospital,
Meera Road, East Thane, Mumbai.

Shri P.D. Randive, Advocate for the Applicants/Appellants.
Shri M.P. Dhruv, Advocate for Non-Applicant/Respondent Nos.1 to 4 & 6.

CORAM : **S.M. MODAK, J.**
RESERVED ON : **11th OCTOBER, 2021.**
PRONOUNCED ON : **29th OCTOBER, 2021.**

J U D G M E N T :-

Heard learned Advocate Shri P.D. Randive for the
applicants/appellants and learned Advocate Shri M.P. Dhruv for
non-applicant/respondent Nos.1 to 4 & 6.

02] This is an application for review by the appellants in the second
appeal. Defendant No.2 is the original purchaser on the basis of one of the sale-
deeds executed by defendant No.1-Pandharinath. Whereas, defendant No.5 is a
subsequent purchaser. Plaintiff Nos.1 to 4 are the legal heirs of defendant No.1-
Pandharinath. During his life time, they have challenged various sale-deeds
executed by defendant No.1 and they have asked for partition of the suit land.

03] Their suit was dismissed by the trial Court, whereas the first appellate Court in an appeal filed by the plaintiffs reversed the judgment and decreed the suit. Amongst the five defendants, only defendant Nos.2 & 5 have preferred Second Appeal No.57/2016. This Court as per the judgment dated 25/08/2016 dismissed the second appeal without admitting and without framing substantial questions of law.

04] This is the grievance of the applicants that no substantial questions of law were framed. One more ground taken is “this Court has not properly considered the observations of the Hon’ble Supreme Court in the case of Bhanwar Singh vs. Puran and Ors. - AIR 2008 SC 1490”. To support this contention, the observations made by the Hon’ble Supreme Court in subsequent judgment in the case of Uttam vs. Saubhag Singh and others – 2016 DGLS (SC) 146 is relied upon. The observations in the case of *Uttam (supra)* were very much there when this Court decided the second appeal. The learned Advocate for respondent Nos.1 to 4 & 6 opposed the application on the ground that there is no error apparent on the face of record and dismissal of the second appeal without framing substantial questions of law is justified. Further more, it is submitted that the substantial questions of law need to be formulated, if this Court might have reversed the decision of the first appellate Court.

05] So, the following points arise for my determination:

S.N.	POINTS	FINDINGS
(i)	Whether not framing of substantial questions of law amounts to an error apparent on the face of record?	In the affirmative
(ii)	Whether there can be said to be error apparent on the face of record for the reason that the observations in the case of <i>Bhanwar Singh</i> (supra) were not considered properly?	In the negative
(iii)	What order?	As per final order

As to Point No.1 :

06] For appreciating the grievance, it will be necessary to consider the facts only for the limited purpose. Yadavrao Chafle was the common ancestor. He expired in the year 1968 leaving behind some properties. He is survived by two sons and wife. Defendant No.1-Pandhari is one of the sons, whereas, Purushottam is the another son, to which we are not concerned in the proceedings. Jijabai-defendant No.3 is the wife. Plaintiff Nos.1 to 4 are the daughters of defendant No.1-Pandhari. Swati-defendant No.3 is the another daughter. There was a partition in between two brothers i.e. defendant No.1-Pandhari and his brother Purushottam in the year 1970. Defendant No.1-Pandhari got some of the properties. He sold the land vide three different sale-deeds. Defendant No.2 is the purchaser, whereas defendant No.2 in turn sold the suit property to defendant No.5.

07] It is the bone of contention of the plaintiffs before the trial Court that the property devolved on Pandhari does not belong to him as exclusive property, but the plaintiffs were having right in it. So, the issue before the trial Court was, whether the property acquired on partition is a separate property or joint family property. The trial Court gave a finding that the suit property is an ancestral property, however, the suit came to be dismissed as other points could not be proved by the plaintiffs. The first appellate Court gave a finding in favour of the plaintiffs and confirmed the findings about nature of property as ancestral property. Accordingly, the suit came to be decreed. This judgment was challenged by defendant Nos.2 & 5 by way of second appeal.

SECOND APPEAL

08] I have perused the record of the second appeal in order to ascertain at what stage the second appeal is dismissed. This Court has issued a notice to the respondents vide order dated 24/02/2016. Respondent Nos.1 to 6 were served and service of notice to respondent No.7 was awaited. When the matter came before the Court on 25th August, 2016, the only appellants through their Advocate were present. None of the respondents have appeared. In order to ascertain, is there any error apparent on the face of record?, I have perused the judgment in the light of grounds of the review taken before me. This Court has given following reasons:

- i. The judgment in the case of *Bhanwar Singh* is referred in paragraph No.3.
- ii. In paragraph 4, this Court observed that plaintiff No.1 (the son of defendant No.1) was born in the year 1986-87 and alienation dated 04/01/2007 is challenged. This Court concluded that the suit property became separate property in the hands of defendant No.1, cannot be accepted.
- iii. The facts in the case of *Bhanwar Singh* are considered in paragraph 5.
- iv. In paragraph 6, this Court concluded that after the birth of plaintiff No.1 in the year 1986-87, the property in the hands of Pandhari became joint family property and, hence, alienation without legal necessity was held not permissible.

09] For the above reason, this Court opined that no substantial questions of law had arisen. Both the learned Advocates have relied upon the various judgments on the point of scope of review under Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure.

(1) *SASI (dead) through L.Rs Vs. Aravindakshan Nair and others -2017(5) Mh.L.J. 550.*

- (2) Chairman and Managing Director, Central Bank of India and Ors. Vs. Central Bank of India SC/ST Employees Welfare Association and Ors. - AIR 2016 SC 326.*
- (3) Park View Cooperative Housing Society Limited Vs. Union of India - 2014 BCI 489.*
- (4) Haryana State Industrial Development Corporation Ltd. Vs. Mawasi and Ors. Etc. - AIR 2012 SC 3874.*
- (5) Inderchand Jain (D) through L.Rs. Vs. Motilal (D) through L.Rs. - 2009 DGLS (SC) 1067.*

The above judgments are relied upon by learned Advocate Shri Randive for the applicants, whereas learned Advocate Shri Dhruv for the non-applicants relied upon the following judgments:

- (1) Chandrabhaga Ananda Kudle and another Vs. Proposed Sanjay Sahakari Grah Nirman Sanstha Maryadit, Sangli and others - 2019(6) Mh.L.J. 184.*
- (2) Jijabai Namdev Satardekar and others Vs. Luis Sales De Andrade E Souza - 2019(4) Mh.L.J. 906.*
- (3) Esther W/o Ashok Yeshu Sankwalkar Vs. Manuel Filandro De Carvalho - 2017 (3) Mh.L.J. 127.*
- (4) Saraswatibai Mahadeorao Pawade and others Vs. Harishchandra Mahadeorao Pawade and others - 2017 (3) Mh.L.J. 133.*
- (5) Asharfi Devi (D) thr. L.Rs. Vs. State of U.P. and others - 2020 (1) Mh.L.J. 133.*
- (6) Water and Land Management Institute, Kanchanwadi, Aurangabad Vs. Sudhakar Namdeo Gaikwad and others - 2020 (2) Mh.L.J. 244.*

(7) Apparaju Malhar Rao vs. Tula Venkataiah @ Venkat Rao – 2018(2) Mh.L.J. 14.

10] If we peruse the judgments relied upon by both the sides. The following principles emerge:-

- (a) Error has to be self-evident and is not be found out by process of reasoning.
- (b) If the decision by the writ Court was rendered on the basis of wrong authority, error is self-evident. If the decision of the first appellate Court is reversed by not framing the substantial questions of law, it certainly amounts to error apparent on the face of record.
- (c) An error which has to be established by long drawn process of reasoning can hardly be said to be an error apparent on the face of the record.
- (d) The error should be apparent and if continued would lead to continuous failure of justice. When, no new or important evidence was brought, in spite of due diligence, then it does not amount to error apparent on the face of the record.
- (e) There is a difference in between review jurisdiction and appellate jurisdiction.

- (f) The review would not mean an appeal in disguise for correcting an erroneous decision.
- (g) The review does not lie if it was filed on the basis of old and overruled arguments.
- (h) Review application should be placed before the same judge.

Not framing substantial questions of law:

11] Learned Advocate Shri Dhruv is right in his submission that while dismissing the second appeal, this Court has not reversed the decision of the first appellate Court. These were the facts in case of *Park View Cooperative Housing Society*, as referred above. It was held in that case, the judgment of the first appellate Court cannot be reversed without framing substantial questions of law. It is also true that in case of *Apparaju Malhar Rao vs. Tula Venkataiah @ Venkat Rao – 2018(2) Mh.L.J. 14*, the Hon'ble Supreme Court has set aside the judgment passed by the High Court. By the impugned judgment delivered in the second appeal, the High Court set aside the judgment passed by the first appellate Court. In that case, though the submission were recorded, but substantial questions of law were not formulated.

12] In order to ascertain, whether the mandatory requirement of formulating of substantial questions of law has been followed or not, I have perused the judgment of the trial Court and the first appellate Court. The following facts emerge:-

- (a) Defendant No.1-Pandhari/vendor has not contested the suit. It was contested by purchasers. The trial Court concluded that the suit property is an ancestral property.
- (b) Whereas, the first appellate Court also confirmed the findings of the trial Court that the suit property is an ancestral property.

13] It will be material to consider the reasoning given by the first appellate Court, while confirming those findings. In paragraph 12, the appellate Court observed that “defendants have not filed cross appeal, hence, the findings of the learned trial Court attains finality. So, one thing is clear that the suit property is ancestral property”. It is important to note that the said appeal was filed by the plaintiffs and present applicants were the respondents therein. There was no need to file a cross appeal, because there is no decree against the present applicants. In fact the suit was dismissed. As per the provisions of Order 41 Rule 22 of the Code of Civil Procedure, the respondents are having two options, first one, to support the findings which are in their favour and second one, to

challenge the findings which ought to have been in their favour. So, there was no need to file a cross appeal. On this background, I have perused the memo of second appeal and the proposed substantial questions of law. One of the proposed question is -

“Whether after the death of Yadavrao, property inherited by Pandhari becomes his individual property or ancestral property?” (Question B).

14] From the above, it is clear that the appellants were desirous of challenging those findings. On this background, when the judgment passed by this Court is perused, second appeal was dismissed mainly for the reason that after the birth of plaintiff No.1, the property becomes ancestral property in the hands of defendant No.1 and as such he cannot alienate it solely. This Court feels that if substantial questions of law could have been framed, parties could have afforded an opportunity to address the Court at length in order to show perversity if any.

15] It is no doubt true that the second appeal was not disposed of without issuing notice to the respondents. It is also true that while issuing notice, no substantial questions of law were framed, but plain notice was issued. It is no doubt true that on 25/08/2016, the respondents have not appeared. However, it is no doubt true that the first stage of admission has crossed. The Hon’ble

supreme Court in the case of Ashok Rangnath Magar vs. Shrikant Govindrao Sangvikar – (2015) 16 SCC 763, in paragraph 18 has laid down the stages of the second appeal and its co-relation with formulation of substantial questions of law.

16] So, this Court feels that there was need to frame substantial questions of law. The purpose of formulating such substantial question is well known. It gives a notice to the parties on which substantial question, the Court is going to hear the matter.

17] While arriving at a conclusion, except the reasons as reproduced above, this Court does not find any other discussions/consideration on the evidence adduced before the trial Court. So, this can certainly be said to be an error apparent on the face of the record. For coming to this conclusion, this Court has not undertaken long drawn process of reasoning. Hence, Point No.1 is answered in the affirmative.

As to Point No.2 :

18] This Court does not feel that there is an error apparent on the face of record while considering the ratio laid down in the case of *Bhanwar Singh*. There is a difference in between the appellate jurisdiction and review jurisdiction. This has rightly been held in the case of Saraswatibai Mahadeorao Pawade &

others vs. Harishchandra Mahadeorao Pawade & others, reported in *2017(3) Mh.L.J. 133*. The review jurisdiction should not be resorted in disguise for correcting an erroneous decision.

19] In view of that, I am not inclined to accept that ground. Hence, the decision in the case of *Uttam* and other decisions on the point of interpretation of provisions of Section 7 and Section 8 of the Hindu Succession Act relied upon by both the sides are not considered. Hence, Point No.2 is answered in the negative. In the result, the following order is passed:

ORDER

- i. The review application is allowed.
- ii. The judgment dated 25/08/2016 passed in Second Appeal No.57/2016 is reviewed and the second appeal is restored to file.
- iii. The second appeal be fixed for admission on 27/11/2021.
- iv. Respondent Nos.1 to 4 and 6 be supplied with memo of appeal and other documents. They are at liberty to remain present on that date and oppose the admission.

(S.M. MODAK, J.)