

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.35 OF 2018
WITH
CIVIL APPLICATION NO.9871 OF 2016**

1. Prashant s/o. Raosaheb Kohok,
Age : 16 years, Occ. Education,

2. Rushikesh s/o. Raosaheb Kohok,
Age : 14 years, Occ. Education,

Both minors u/g. of mother
Rohini wd/o. Raosaheb Kohok

3. Rohini wd/o. Raosaheb Kohok,
Age :42 years, Occ. Agri.,
All 1 to 3 – r/o. Bandkhel, Tq. Ashti,
Dist. Beed
c/o. Mandhava, Post Sandava,
Tq. and Dist. Ahmednagar

..Appellants
(Orig. Plaintiffs)

Vs.

Sulabai wd/o. Babasaheb Kohok,
Age:67 years, Occ. Agri. and Household,
r/o. Bandkhel, Tq. Ashti, Dist. Beed

..Respondent
(Orig. Defendant
no.2)

Mr.A.D.Ostwal, Advocate and Mr.K.D.Jadhav, Advocate for appellants
Mr.Tushar M. Tandale, Advocate for respondent-sole

**CORAM : R.G. AVACHAT, J.
DATE : JUNE 23, 2022**

ORDER :-

Heard learned counsel for the parties.

2. With the consent of learned counsel for the parties, the appeal is decided finally at admission stage on the following substantial questions of law:-

(a) Whether the First Appellate Court has misconstrued Section 10 of the Hindu Succession Act, 1956, dealing with distribution of property among heirs in Class-I of the Schedule ?

(b) Whether the First Appellate Court was justified in excluding the agricultural land ostensibly sold by the deceased defendant no.1 to his mother (respondent herein/defendant no.2) without there being either an appeal or Cross-Objection challenging the judgment and decree passed by the trial Court ?

3. The appellants herein are original plaintiffs in Regular Civil Suit No.25 of 2009. It was a suit filed by the mother (appellant no.3 herein) on behalf of her two minor sons for partition and separate possession of the agricultural land bearing survey no.47 admeasuring 7 H 16 R. The suit was filed against the husband (Raosaheb) of appellant no.3/plaintiff no.3 and his mother,

defendant no.2. Pending the suit, defendant no.1 - Raosaheb passed away. The appellants and the respondent herein were already on record of the suit. They are the only legal representatives of deceased no.1 – Raosaheb.

4. It was the case of appellants/plaintiffs that the suit land had fallen to the share of original defendant no.1 in partition between him and his brother. The relations between deceased defendant no.1 and his wife (appellant no.3 herein) were not good. The appellants/plaintiffs were, therefore, driven out of the house. The suit for partition and separate possession of the agricultural land was, therefore, filed. It is the case of the respondent, mother of original defendant no.1, that defendant no.1 was not keeping good health. A lot of expenditure was incurred on his medical treatment. He, therefore, sold one half partition of the suit land to her. The said land should not have been a subject matter of the suit.

5. On appreciation of the evidence in the suit, the trial Court decreed the suit declaring the plaintiffs and defendant no.2 to have one forth share each. The trial Court has specifically answered issue no.1 holding that deceased defendant no.1 had no legal

necessity to sell out the land to his mother. As such, relief came to be granted in respect of the entire suit land.

6. It is the plaintiffs, who preferred first appeal against the judgment and decree passed by the trial Court. According to them, the trial Court erred in quantifying share to the extent of one fourth each. It was their case that each of the appellants/plaintiffs ought to have been given one third share each in the entire suit land.

7. The first appellate Court, by its judgment and decree dated 28.09.2015, partly allowed the appeal, declaring appellant nos.1 and 2 (brothers interse) to have together one sixth share and their mother (appellant no.3 herein) and grand-mother (respondent herein) to have one third share each in the suit land excluding the land sold by the deceased defendant no.1 to his mother, defendant no.2 on 13.01.2009. The appellants/plaintiffs have, therefore, preferred present appeal.

8. Learned counsel for the appellants/plaintiffs would submit that the first appellate Court was not justified in passing the impugned judgment and decree reducing shares of the

appellants/plaintiffs in the suit land for want of their being an appeal or Cross-Objection preferred by the respondent/defendant no.2. According to him, the first appellate Court ought not to have excluded the land sold by deceased defendant no.1 to his mother (respondent/defendant no.2). Learned counsel, therefore, urged for setting aside the impugned judgment and decree. He, however, did not make any submission as to how the appellants/plaintiff would have one third share each in the suit land.

9. Learned counsel for the respondent/defendant no.2 would, on the other hand, submit that in exercise of the powers under Order XLI Rule 33 of the Code of Civil Procedure (C.P.C.), the first appellate Court was very much justified in passing the impugned judgment and decree. In support of his contentions, learned counsel has relied on the following authorities:-

- (i) Narayanrao (dead) Through L.Rs. and ors. Vs. Sudarshan, 1995 Supp (4) SCC 463;
- (ii) Mahant Dhangir and anr. Vs. Madan Mohan and ors., 1987(Supp)SCC 528;
- (iii) Pannalal Vs. State of Bombay and ors., 1963 Mh.L.J. 616;

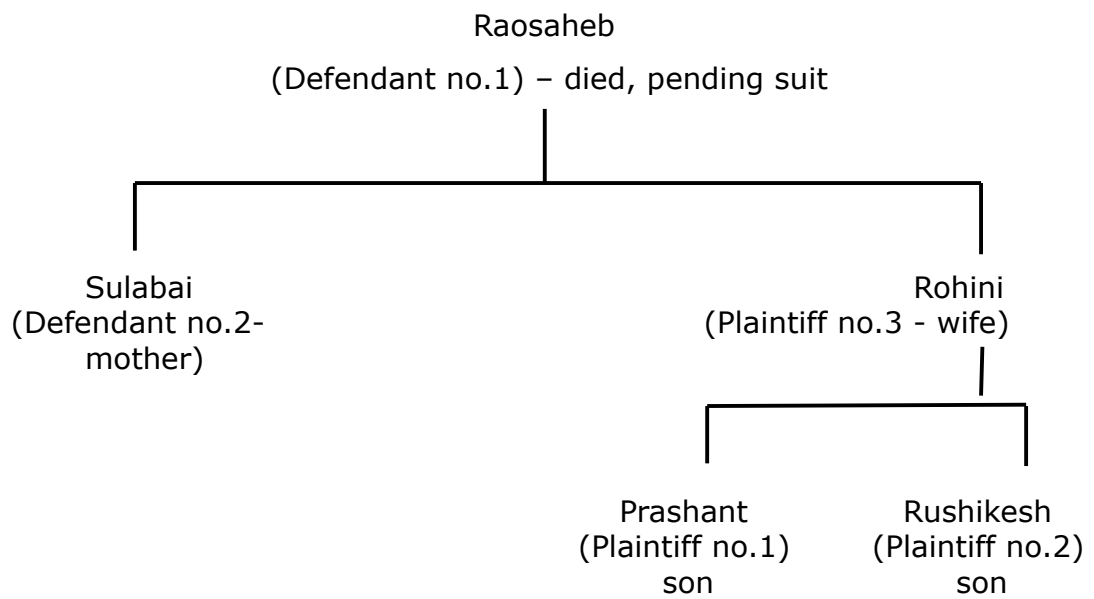
(iv) Sharda Loveleen Kumar Merck Vs. Loveleenkumar Chamanlal Merck, 2000(2)Mh.L.J. 410;

(v) Sayed Akbar s/o. Sayed Noor Vs. Dhondiba s/o. Namdeo Bhosale and anr., 2011(1)All.M.R. 791;

(vi) Sattarsha Dibarsha and ors. Vs. Ajizabi Dilbarsha and ors., 2017(4)Mh.L.J. 889

10. Considered the submissions advanced. Perused the pleadings, evidence and the citations relied on.

11. Admittedly, the suit land had come to the share of defendant no.1 – Raosaheb. For better appreciation, the family tree/relation interse of the parties to the suit is given as under:-



12. There is overwhelming evidence to indicate that all was not well between deceased – Raosaheb (defendant no.1) and his wife Rohini (appellant no.3/plaintiff no.3). She along with her two sons (appellants/plaintiffs) was residing away from her matrimonial home. Deceased – Raosaheb executed sale deed in respect of one half portion of the suit land in favour of his mother, respondent herein. The trial Court held that the respondent/defendant no.2 failed to prove that the said sale was for legal necessity. The trial Court, therefore, granted the appellants/plaintiffs and the respondent/defendant no.2 equal share in the suit land. When the case of the respondent that the land sold by the deceased defendant no.1 in her favour should not have been subject-matter of the suit has been specifically negated by the trial Court granting the appellants/plaintiffs share in the suit land as well, the decree passed by the trial Court was necessarily against the respondent/defendant no.2. She should have, therefore, either filed an appeal or cross-objection taking exception to the decree passed by the trial Court. The same has not been done by her. In view of this Court, the decree passed by the trial Court, therefore, attained finality so far as against the respondent/defendant no.2.

13. This Court carefully gone through the citations relied on by learned counsel for the respondent. The facts in the case of **Narayanrao** (supra) indicate that in a suit for partition and separate possession, no decree regarding mesne profit was passed. The appellate Court, in exercise of the powers under Order XLI Rule 33 of C.P.C., passed decree in that regard. The appellate Court has upheld the same.

In **Mahant Dhangir** (supra), Cross-objections were filed. It has been observed therein that when an objection is not maintainable under Order XLI Rule 22 of C.P.C., it can be considered under Order XLI Rule 33 of C.P.C. It has also been held therein that the Court should not refuse to exercise discretion under Order XLI Rule 33 of C.P.C. on mere technicalities.

In **Pannalal** (supra), the Apex Court observed :-

“ Appellate Court can grant relief to respondent where he could not have filed cross-objections as also where he could have filed but failed to do so.

Plaintiff, a building contractor, sued for damages the State, the Deputy Commissioner and other two parties for whom the constructions were made. The trial Court decreed the suit against the State and dismissed it against other defendants. The State appealed in the High Court against the decree. The plaintiff did not appeal nor did he file any cross-objection, but prayed that if the claim cannot be decreed against the State it should be decreed against other defendants (respondents). The High Court

declined to consider the prayer on the ground that the plaintiff should have filed cross-objections to seek such relief.

Held, that the cross-objection was not maintainable at the instance of the plaintiff against other respondents and there was no question of omission to do so. The High Court ought to have considered the plaintiff's prayer under Order 41, Rule 33. Even where a cross-objection is maintainable, but is not filed, the appellate Court has power to grant relief under the provisions of Order 41, Rule 33."

In said case, in paragraph 12, it has been held thus :-

"12. Even a bare reading of Order 41, rule 33 is sufficient to convince any one that the wide wording was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as "the case may require." In the present case, if there was no impediment in law the High Court could therefore, though allowing the appeal of the State by dismissing the plaintiff's suits against it, give the plaintiff a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the section make this position abundantly clear the illustration puts the position beyond argument."

On the similar lines are the observations in rest of the authorities referred to herein above.

14. The question is whether the first appellate Court was really justified in excluding half of the suit land that was sold by deceased defendant no.1 to his mother under the registered sale deed when the trial Court granted share to the appellants/plaintiffs in the suit land and the respondent/defendant no.2 has not preferred an appeal or cross-objection thereagainst. In view of this Court, the first appellate Court was not justified in excluding the land sold by deceased defendant no.1 to his mother (respondent/defendant no.2) for want of there being an appeal or cross-objection.

15. In the case of **S. Nazeer Ahmed Vs. State Bank of Mysore and ors., AIR 2007 SC 989**, the Apex Court observed that the respondent in an appeal is entitled to support the decree of the trial Court even by challenging any of the findings that might have been rendered by the trial Court against himself. For supporting the decree passed by the trial Court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial Court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief

which had been negated to him by the trial Court and in addition to what he has already been given by the decree under challenge.

16. In the case in hand, the respondent herein/original defendant no.2 did not prefer an appeal or cross-objection against the judgment and decree passed by the trial Court. The said decree, thus, attained finality so far as regards her claim in the suit was concerned. The first appellate Court, without there being any challenge by the respondent to the trial Court's decree, interfered therewith granting her relief.

17. The trial Court declared the appellants and the respondent to have one fourth share each in the suit land. The appellants claimed to have one third share each and therefore, preferred this Second Appeal. The first appellate Court, without there being an appeal or cross-examination preferred by the respondent/defendant no.2, reduced the share of the appellants/plaintiffs and enhanced that of the respondent/defendant no.2. When the trial Court declared the appellants/plaintiffs and the respondent/defendant no.2 to have one fourth share each in the suit land, it declared the respondent/defendant no.2, to have one third

share. Admittedly, the respondent/defendant no.2 had not preferred an appeal or cross-objection against the judgment and decree passed by the trial Court. The first appellate Court, therefore, ought not to have increased the quantum of her share. Moreover, when the appellants/plaintiffs had preferred the first appeal claiming to have share more than one granted by the trial Court, the first appellate Court ought not to have reduced the same when so was nobody's case. The first appellate Court misread Section 10 of the Hindu Succession Act. In paragraph 21 of its judgment, the first appellate Court has observed as under :-

“21. As discussed above, on the date of presentation of the suit, the plaintiffs were not entitled to ask for partition in the suit property because it is a defined share of the defendant no.1. However, after his death, though the necessary amendments are not made, the devolution of the property came into the existence. As per Schedule to Sec. 8 the defendant no.2 being mother of deceased defendant No.1 is Class-I heir. The plaintiffs No.1 to 3 being sons and widow of deceased defendant No.1 are also Class-I heirs and therefore, the property is devolved to plaintiffs No.1 to 3 and defendant No.2. For above reasons, so far as sold property, admeasuring 3 H 58 R is concerned it is not liable to be partitioned. Therefore, the remaining property 3 H 58 R is liable to be partitioned. For the purpose of partition, the Rule provided under Section 10 of the Hindu Succession Act, 1956 is applicable. It is reproduced as under:-

“10. Distribution of property among heirs in class I of the Schedule - The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:-

Rule 1 – The intestate’s widow or if there are more widows than one, all the widows together, shall take one share.

Rule 2 – The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3 – The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4 – The distribution of the share referred to in Rule 3.

[i] among the heirs in the branch of the pre-deceased son shall be so made that his widow [or widows together] and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion;

[ii] among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions”.

18. Sub-rule (2) quoted herein above has specifically been misconstrued holding appellant nos.1 and 2 (brothers interse)/original plaintiff nos.1 and 2 i.e. sons of defendant no.1, to be entitled to one share. When the Rule specifically states that each of the sons or daughters and mother of deceased shall take one share.

19. For the aforesaid reasons, both substantial questions of law referred to herein above are answered accordingly. Resultantly, the Second Appeal deserves to be allowed, setting aside the impugned judgment and decree passed by the first appellate Court and restoring that of the trial Court's judgment and decree.

20. Hence, the following order:-

- (i) The Second Appeal is allowed.
- (ii) The judgment and decree dated 28.09.2015 passed by learned District Judge-3, Beed in Regular Civil Appeal No.167 of 2010 is set aside.
- (iii) The judgment and decree dated 19.11.2010 passed by learned Civil Judge, Junior Division, Ashti, in Regular Civil Suit No.25 of 2009 is restored.
- (iv) Pending Civil Application No.9871 of 2016 stands disposed of.

[R.G. AVACHAT, J.]

KBP

