

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

**SECOND APPEAL NO.674 OF 2018
WITH CA/11434/2017 IN SA/674/2018**

1. Rambhau s/o Gopinath Lokhande,
(Mali), Age : 64 years, Occu: Agril.,
R/o. Pangaon, Tq. Kallam,
Dist. Osmanabad.
2. Siddheshwar s/o. Rambhau Lokhande,
(Mali), Age : 40 years, Occu: Agril.,
R/o. Pangaon, Tq. Kallam,
Dist. Osmanabad.

... APPLICANTS
(Org. Deft Nos. 7 and 8)

VERSUS

1. Shila w/o Satish Surwase,
Age : 39 years, Occu: Household,
R/o. Behind Dayanand College,
Latur, Tq. & Dist. Latur.
2. Mahadeo Shankar Mali,
Age : 63 years, Occu: Agril.,
R/o. Pangaon, Tq. Kallam,
Dist. Osmanabad.
3. Sou. Mainabai w/o. Mahadeo Mali,
Age : 57 years, Occu: Household,
R/o. Pangaon, Tq. Kallam,
Dist. Osmanabad.
4. Vijaya Anil Newase,
Age : 36 years, Occu: Household,
R/o. Piracha Mala, Tq. Bhor,
Dist. Pune.
5. Dattakumar Mahadeo Mali,
Age : 29 years, Occu: Labour,
R/o. Pangaon, Tq. Kallam,
Dist. Osmanabad.
C/o. Tukaram Borate,
Dehu Road, Borate Vasti, Deepak
Niwas, Moshi, Tq. Haveli,
Dist. Pune.
6. Satyabhamabai Mahadeo Mali,
Age : 23 years, Occu: Education,
R/o. Pangaon, Tq. Kallam,
Dist. Osmanabad.
7. Swati Mahadeo Mali,

dismissed vide order dtd 16.12.15

Age : 22 years, Occu: Education in R.C.A. No.22/14
 R/o. Pangaon, Tq. Kallam,
 Dist. Osmanabad.

8. Sunita w/o. Bhaskar Surwase,
 Age : 38 years, Occu: Agril & Household,
 R/o. Behind Agni Temple, Malkapur Road,
 Near Durga Hotel, Karad,
 Tq. Karad, Dist. Satara.

... RESPONDENTS
 (No.1 Org. Pltf & No.2 to 8
 Org. Deft. 1 to 6.

...
 Advocate for Appellants : Mrs. M.A. Kulkarni
 Advocate for Respondent Nos.1 to 6 : Mr. R.K. Jadhavar

...
CORAM : MANGESH S. PATIL, J.
Reserved on : 08.02.2022
Pronounced on : 11.02.2022

ORDER :

I have heard both the sides at the stage of admission and perused the papers including the written notes of arguments tendered by the learned advocate Mrs. Kulkarni for the appellants.

2. In spite of the mandate of Section 100 of the Code of Civil Procedure the appeal memo does not contain specific substantial questions of law calling upon this Court to respond to. Perhaps realizing this irregularity, Mrs. Kulkarni in her written notes of argument has provided following substantial questions of law :

- “i) In the absence of prayer for setting aside sale deeds is the suit maintainable ?
- ii) The learned Judge granted 1/6th share to plaintiff by applying provisions of Amended Act which came into force on 09.09.2005 can provisions of Amended Act are applicable to the present case ?
- iii) During the lifetime of parents can plaintiff being daughter has

birth right to claim partition married long back ?

- iv) Can alienation be quashed by plaintiff under Amended Act and can daughter claim share in alienated property which took place prior to effect of Amended Act ?”

Apart from such substantial questions devised by Mrs. Kulkarni, having considered the facts and circumstances, couple of additional substantial questions of law need to be answered in this Second Appeal :

- Whether the courts below have committed gross error in not allocating an equal $1/6^{\text{th}}$ share to each of the other sharers even though it was a suit for general partition of all the ancestral and joint family properties ?
- Whether the courts below have committed gross error in not directing adjustment of equities to the extent of the share of the defendant Nos.1 and 2 in favour of the defendant Nos.7 to 9 ?

3. In order to appreciate the genesis for formulation of such points by the learned advocate one needs to refer to the material facts. The appellants are the original defendant Nos.7 and 8, whereas respondent No.1 is the original plaintiff, respondent Nos.2 to 7 are the original defendant Nos. 1 to 6 and respondent No. 8 is the original defendant No.9. For the sake of avoiding confusion the parties would hereinafter be referred to by their status in the suit.

4. The defendant Nos.1 and 2 are the parents of the plaintiff and defendant Nos.3 to 6. The family owned the suit properties described in the

paragraph No.1 of the plaint. Avering that all these suit properties are the ancestral and joint family properties but have been illegally sold by the defendant Nos.1 and 2 in favour of the defendant Nos.7 to 9, the plaintiff claimed partition and separate possession of her share with a declaration that the sale deeds executed by the defendant Nos.1 and 2 were not binding on her share.

5. The defendant No.1 did not contest the suit whereas defendant Nos.1 to 6 by their respective written statements conceded to the claim put up by the plaintiff. The defendant Nos.7 to 9 also filed their separate written statements. They did not dispute the relation between the plaintiff and the defendant Nos.1 to 6. They denied that the suit properties were the ancestral and joint family properties. They admitted about the defendant Nos.1 and 2 having sold the portion of the suit properties to them. However, they contended that they had sold it to meet the legal necessity of the family. They further contended that since the sale deeds were executed more than three years prior to the filing of the suit it was time barred.

6. The defendant No.4 who is the only son of the defendant Nos.1 and 2 while admitting the claim filed a counter claim and prayed for his share to be separated. The parties went to trial. Conspicuously, only the plaintiff stepped into the witness box but she was neither cross-examined by the contesting defendant Nos.7 to 9 nor they themselves stepped into the witness box to substantiate their contentions. Holding the issues to have been duly proved the trial court decreed the suit further declaring that the

sale deeds executed by the defendant Nos.1 and 2 were not binding on plaintiff. It held that she and the defendant No.4 to be entitled to 1/6th share each which they were entitled to claim by way of partition.

7. Being aggrieved and dissatisfied by such a decree the defendant Nos.7 to 9 preferred Regular Civil Appeal No.22/2014 raising all the grounds which they had raised before trial court including that the suit was decided ex parte against them. By the judgment and order under challenge the appellate court has dismissed the appeal. Hence this Second Appeal.

8. The learned advocate Mrs. Kulkarni in consonance with the points formulated by her, submitted that there was no specific prayer for setting aside the sale deeds executed by the defendant Nos.1 and 2. The plaintiff being a married daughter was not entitled to claim any benefit by virtue of the amendment carried out in the Hindu Succession Act which came into force on 09.09.2005 and that by virtue of the proviso to Sub-Section 1 of Section 6, she was not even entitled to question the dispositions effected prior to 20.12.2004. In support of submissions she placed reliance on the recent judgment in the case of **Vineeta Sharma Vs. Rakesh Sharma and Ors.; (2020) 9 Supreme Court Cases 1** and few other decisions :

- **Ramti Devi Vs. Union of India ; 1994 DGLS (SC) 966,**
- **Prem Singh & Ors. Vs. Birbal & Ors.; 2006 DGLS (SC) 383**
- **Ganduri Koteshwaramma and Anr. Vs. Chakiri Yanadi and Anr.; 2011 DGLS (SC) 847**
- **Badrinarayan Shankar Bhandari and Ors. Vs. Omprakash Shankar Bhandari and Ors.; 2014 (5) B.C.R. 481**

- **Prakash and Ors. Vs. Phulavati and Ors.; 2015 DGLS (SC) 1006**

9. The learned advocate for the defendant Nos.1 to 6 vehemently contended that in view of the decision in the case of **Vineeta Sharma** (supra) no substantial question of law arises for the determination in this Second Appeal. He would submit that specific issues were framed touching the aspect of the challenge put up to the alienations made by the defendant Nos.1 and 2. The burden was on the defendant Nos. 7 to 9 to demonstrate that some of the suit properties were sold to them for legal necessity of the family. However they had failed to substantiate such contentions having not participated in the trial. No error is committed by the courts below in recording a concurrent finding on facts which cannot be interfered in this Second Appeal.

10. I have carefully considered the rival submissions and perused the papers. As far as the first bone of contention of Mrs. Kulkarni that there was no challenge to the alienation made by the defendant Nos.1 and 2 it would be sufficient to remember that specific Issue Nos.2 to 5 and additional Issue No.1 were framed by the trial court touching this very aspect. The wording of the issues clearly indicated that the burden was cast on the defendant Nos.7 to 9 to prove that these alienations were made for the legal necessity of the joint family. In spite of such state of affairs, the defendant Nos.7 to 9 failed to not only cross-examine the plaintiff but even conspicuously remained absent from the witness box. In view of such state of affairs, no exception can be taken to the observations and conclusions of

the courts below in drawing an adverse inference and recording a finding to these issues against them. There is no substance in this submission of Mrs. Kulkarni that there was no specific challenge put up to the alienations.

11. As far as the nature of the suit properties is concerned, again their being no contrary evidence to disprove the testimony of the plaintiff which was duly corroborate by the documentary evidence in the form of consistent revenue record and the Mutation Entry No.546, the courts below have rightly arrived at an inescapable conclusion of the suit properties being the ancestral and joint family properties of the family.

12. As far as the effect of the amendment in the Hindu Succession Act which has come into force w.e.f. 09.09.2005, none of the issues being raised by Mrs. Kulkarni are *res integra* in view of the decision in **Vineeta Sharma** (supra). It has been settled that such amendment has the effect of elevating a daughter, married or otherwise and born before or after the enforcement of such amendment, to the status of a coparcener entitled to claim a share in the ancestral and joint family property. It has also been laid down that the amendment has the retroactive application.

13. Obviously, even the Supreme Court has saved a challenge to the transfer of properties of the joint family effected prior to the specified date in view of the proviso to Sub-Section 1 of Section 6 which reads thus :

“6. Devolution of interest in coparcenary property. — (1)

(a) ...

(b) ...

(c) ...

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.”

14. In my considered view, this proviso does not have and cannot be interpreted to put any prohibition on the power of a coparcener including a daughter, who has been elevated as a coparcener, of putting up challenge to such alienations made prior to such amendment which have been hitherto available to a son to question those on the ground of want of legal necessity, which challenge he has been entitled to put up under the personal law applicable to the parties. This would bring about a harmony between the two concepts of saving the challenge to the alienations made prior to 20.12.2004 as also right of a coparcener to challenge the alienations made by the Karta or the Manager on the ground of want of legal necessity. Such a right now would be available even to a daughter. If the proviso is to be interpreted to mean that a coparcener particularly the daughter has no power to challenge the alienations effected prior to 20.12.2004 it would be clearly be inconsistent with the personal law. No such interpretation can be accepted.

15. In view of such an interpretation, irrespective of the fact that the defendant Nos.1 and 2 had executed the sale deeds of some of the suit properties prior to the amendment in the Hindu Succession Act which came into force w.e.f. 09.09.2005, the plaintiff even if she is a daughter has a right to challenge such alienations on the ground of want of legal necessity, the

burden to prove which was taken over by the defendant Nos.7 to 9, but who have miserably failed to discharge it.

16. No error much less giving rise to any substantial questions of law as formulated by Mrs. Kulkarni arise for the determination in this Second Appeal.

17. In view of such state of affairs, there is no substance in the Second Appeal and it is liable to be dismissed *in limine*.

18. However, there is one more aspect which needs to be considered which calls upon this Court to correct the error committed by the courts below in, firstly, not allotting any share to the defendant Nos.3, 5 and 6 who are along with the plaintiff entitled to receive same $1/6^{\text{th}}$ share. Secondly, in ignoring the fact that the defendant Nos.1 and 2 having executed the sale deeds which though not binding on the plaintiff and the defendant Nos.3 to 6, both the courts below could have passed appropriate orders for adjusting the equities vis-a-vis the share of the defendant Nos.1 and 2 which they had consciously sold to the defendant Nos.7 to 9. It is only to this extent that a substantial questions as formulated herein above by me arise for the determination of this Court and have to be answered in the affirmative.

19. Once it is found that it was a suit for general partition where apart from the plaintiff, defendant Nos.1 to 5 are having $1/6^{\text{th}}$ share each, courts below have fallen in error in not directing separation of everybody's share and merely directing the share of plaintiff and defendant No.4 to be

separated.

20. As a logical and legal corollary, though the plaintiff and the defendant Nos.3 to 5 are entitled to raise a dispute about the alienations of some of the suit properties by the defendant Nos.1 and 2, the latter would be bound by such dispositions. Therefore to this extent, the courts below ought to have directed the equities to be adjusted in favour of the defendant Nos.7 to 9. I therefore answer these substantial questions formulated by me (supra) in the affirmative.

21. In the result, in substance the Second Appeal fails, however, to the limited extent discussed herein above a modification in the judgment and decree would be needed.

22. The Second Appeal is partly allowed. The Second Appeal to the extent of challenge to the judgment and decree is dismissed. Pending Civil Application is disposed of.

23. However, the decree shall stand modified and shall be read with following directions:

- i) The plaintiff and the defendant Nos.1 to 5 are entitled to have 1/6th share each in all the suit properties.
- ii) While effecting partition, as far as possible, the share to be allotted to the defendant Nos.1 and 2 to the extent they have sold the portions of the suit properties to the defendant Nos.7 to 9 shall be allotted to them (defendant Nos.7 to 9).

(MANGESH S. PATIL, J.)