

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

**SECOND APPEAL NO. 85 OF 2020  
WITH  
CIVIL APPLICATION NO. 8469 OF 2020  
IN  
SECOND APPEAL NO. 85 OF 2020**

- |    |                                      |   |
|----|--------------------------------------|---|
| 1. | Pandurang Shivaji Suryawanshi        | ] |
|    | Age : 25 Yrs., Occu. Agri.,          | ] |
|    | R/o. Kaij, at Present Kothalwadi,    | ] |
|    | Tal. Kallamb, Dist. Osmanabad.       | ] |
| 2. | Kalpana Shivaji Suryawanshi          | ] |
|    | Age : 27 Yrs., Occu. & R/o as Above. | ] |
| 3. | Nandubai Shivaji Suryawanshi         | ] |
|    | Age : 35 Yrs., Occu. & R/o as above. | ] |

... Appellants.  
(Orig. Plaintiffs)

***Versus***

- |     |                                         |   |
|-----|-----------------------------------------|---|
| 1.  | Shivaji Sahebrao Suryawanshi            | ] |
|     | Age : 40 Yrs., Occu. Agri.              | ] |
|     | R/o. Shukrawarpeth, Kaij                | ] |
|     | Tal. Kaij, Dist. Beed.                  | ] |
| 2.  | Mankabai Sahebrao Suryawanshi           | ] |
|     | Died Lrs.                               | ] |
| 2A. | Sau Mangal Ambadas Jadhav               | ] |
|     | Age Major, Occu. : Household            | ] |
|     | R/o Shukrawar Peth, Kaij,               | ] |
|     | Tq. Kaij, Dist. Beed.                   | ] |
| 2B. | Savita Sahebrao Suryawanshi             | ] |
|     | Age : Major, Occu. : Household          | ] |
|     | R/o, Kaij, Tq. Kaij, Dist. Beed.        | ] |
| 2C. | Latabai Chandrakant Sonwane             | ] |
|     | Age : Major, Occu. Household            | ] |
|     | R/o Hinganwadi, Tq. Dharur, Dist. Beed. | ] |

|     |                                       |   |                                       |
|-----|---------------------------------------|---|---------------------------------------|
| 2D. | Sunita Balasaheb Jadhav               | ] |                                       |
|     | Age : Major, Occu. : Household,       | ] |                                       |
|     | R/o Ambalner, Tq. Patoda, Dist. Beed. | ] | ... Respondents<br>(Orig. Defendants) |

. . .  
 Advocate for Appellants : Mr. Abhijit S. More  
 Advocate for Respondent No.2-A and 2-D : Mr. Akash D. Gade  
 Advocate for Respondent No.2-B : Mr. S. J. Salunke  
 Advocate for Respondent No.2-C : Mr. Pramod S. Gaikwad  
 . . .

**CORAM : MANGESH S. PATIL, J.**

**DATED : 28 MARCH 2022.**

**ORAL JUDGMENT :**

1. This is a Second Appeal by the original plaintiffs who had succeeded in obtaining a decree for partition and separate possession of their share in the suit property, which decision has been quashed, set aside and reversed by the Judgment and Order under challenge, by the lower appellate court.
2. I have heard the learned Advocates of both the sides.
3. There is no dispute as to the fact that though initially there was dispute raised in respect of relationship between the parties inter se, as is pointed out by the lower appellate court the issue no more survives and stands concluded.

4. The appellants who are the wife and sons of the respondent no.1 filed the suit for partition and separate possession of the land Survey No. 401 asserting that it was a property purchased by Sahebrao Fakirji Suryawanshi, who was the grandfather of appellant nos.1 and 2. The appellant Nos.1 and 2 are the sons and appellant No.3 who is the wife of respondent - Shivaji. Shivaji's mother was arrayed as defendant no.2. It was averred that though Sahebrao had purchased the suit property the appellants were entitled to partition and separate possession of their share.

5. Once having admitted that Sahebrao had purchased the suit property, it was imperative for the appellants, if they were to assert that it was a joint family property to come with a specific averment regarding the source from which he had purchased it. In the absence of any such pleadings and even the evidence, the trial court ought to have refused to conclude that it was an ancestral and joint family property and could not have allotted shares to the appellants.

6. As has been rightly pointed out by the lower appellate Court, since according to the appellants the suit property was purchased by Sahebrao, one ought to have proceeded on the premises that it was his separate property and not an ancestral and joint family property. The lower appellate court has rightly appreciated this fact while recording the conclusion on the same lines.

7. Once it is found that the suit property is the separate property of Sahebrao, two consequences would follow; firstly, he was entitled to deal with it according to his own wish and had sold a part of it to his own wife Mankabai, regarding which no one could have put up a legal challenge.

8. So far as the property that was left behind by Sahebrao, since he died intestate, it would devolve on his heirs, namely wife Mankabai-original defendant No.2, son Shivaji-defendant no.1 and Shivaji's sisters. By virtue of the provisions of section 8 read with section 19 of the Hindu Succession Act, 1956, relying upon the decision in the case of **Commissioner of Wealth Tax, Kanpur and Ors Vs. Chander Sen and Ors.; (1986) 3 SCC 567**, the property would devolve on this heirs as their separate property, as tenants in common and not as joint tenants. Paragraph 22 of the Judgment reads as under :

*22. In view of the preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under section 8 of the Hindu Succession Act would be HUF in his hand vis-a-vis*

*his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under section 8 of the Act included widow, mother, daughter of predeceased son etc.*

9. Consequently, the appellants who can lay the claim if at all through the respondent no.1 Shivaji and who is entitled to receive a share on demise of Sahebrao and takes his share absolutely, the appellants are not entitled to claim partition and share. Though not in so many words, the lower appellate court seems to have correctly applied the law and has rightly quashed and set aside the judgment of the trial Court.

10. Again, there is one more hurdle. Though Sahebrao is survived by his wife original defendant no.2-Mankabai, son Shivaji-respondent No.1 and few daughters, these daughters were brought on record after demise of Mankabai as her legal heirs, but the suit was subsequently withdrawn even to their extent and their names were deleted. When as daughters of Sahebrao, these women were entitled to inherit a share along with their brother Shivaji and mother Mankabai, the suit was not maintainable for non joinder of necessary parties as well. Both the courts below have also recorded a concurrent finding in this respect.

11. No fault can be found in the judgments and the concurrent

findings of the Courts. No substantial questions of law arises for determination in this Second Appeal.

12. Second Appeal is dismissed with costs.
13. Pending Civil Application stands disposed of.

**( MANGESH S. PATIL, J.)**