

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

**SECOND APPEAL NO. 832 OF 2012
WITH CA/14322/2012 IN SA 832/2012**

Smt. Rukhminibai Maruti Pachankar,
Age 76 years, Occ. Household and
Agriculture, r/o. Dighol, Tq. Jamkhed,
Dist. Ahmednagar, Through General
Power of Attorney Holder
Shri. Sandipan s/o Wamanrao Ratnaparkhe,
Age 57 years, Occ. Agril. & Service,
R/o. Gawande Galli, Chaware Wada,
At post Tq. Karjat Dist. Ahmednagar.

**... Appellant
(Orig. Plaintiff)**

VERSUS

Prakash Nivrutti Pachankar,
Age 56 years, Occ. Service,
R/o. Panchayat Samiti, Karjat,
Tq. Karjat, Dist. Ahmednagar.

**... Respondent.
(Orig. Defendant)**

...

Advocate for the Appellant : Mr. V.D. Hon, Senior Advocate with Mr.
A.D. Sonkawade.

Advocate for the Respondent : Mrs. Anjali Dube (Bajpai)

...

WITH

**SECOND APPEAL NO. 833 OF 2012
WITH CA/14323/2012 IN SA 833/2012**

Smt. Rukhminibai Maruti Pachankar,
Age 76 years, Occ. Household and
Agriculture, r/o. Dighol, Tq. Jamkhed,
Dist. Ahmednagar, Through General
Power of Attorney Holder
Shri. Sandipan s/o Wamanrao Ratnaparkhe,
Age 57 years, Occ. Agril. & Service,
R/o. Gawande Galli, Chaware Wada,
At post Tq. Karjat Dist. Ahmednagar.

... Appellant

VERSUS

- 1) Prakash Nivrutti Pachankar,
Age 56 years, Occ. Service,
R/o. Panchayat Samiti, Karjat,
Tq. Karjat, Dist. Ahmednagar.
- 2) Balbhim Sona Tagad,
Age 53 years, Occ. Agriculture,
R/o. Dighol, Tq. Jamkhed,
Dist. Ahmednagar.

... Respondents.

...

Advocate for the Appellant : Mr. V.D. Hon, Senior Advocate with Mr.
A.D. Sonkawade.

Advocate for the Respondent No. 1 : Mrs. Anjali Dube (Bajpai).

Advocate for the Respondent No. 2 : Mr. L. V. Sangit.

...

WITH

**SECOND APPEAL NO. 206 OF 2013
WITH CA/11603/2013 IN SA 206/2013.**

Balbhim s/o Sonba Tagad,
Age 46 years, Occ. Agriculture,
R/o. Dighol, Tq. Jamkhed,
Dist. Ahmednagar.

... Appellant
(Orig. defendant No 3)

VERSUS

- 1) Neelawati Shamrao Lohakare,
since deceased through her
legal heirs and representatives.
- 1A) Shamrao s/o Eknath Lohakare,
Age 70 years, Occ. Agriculture.
- 1B) Ramchandra s/o Shamrao Lohakare,
Age 38 years, occ. Agriculture.
- 1C) Sakharam s/o Shamrao Lohakare,
Age 33 years, Occ. Agriculture.

All r/o. Loni Vyankatnath,
Tq. Shrigonda, Dist. Ahmednagar.

- 2) Mangal Nivrutti Pachankar,
@ Anuradha Nandkumar Bipetkar,

Age 40 years, Occ. Agriculture,
R/o. Pandharpur, Tq. Pandharpur,
Dist. Solapur.

- 3) Rukhminibai Maroti Pachankar,
Age 60 years, Occ. Agriculture.
- 4) Changdeo s/o Tryambak Pachankar
...abated as per order dt. 25.09.2013.
- 5) Prakash s/o Nivrutti Pachankar,
Age 40 years, Occ. Agriculture,
R/o. Shrigonda, Tq. Shrigonda,
Dist. Ahmednagar.
- 6) Sandipan s/o Waman Ratnaparkhe,
Age 45 years, Occ. Agriculture.
- 7) Dattatraya s/o Maroti Pachankar,
Age 40 years, Occ. Agriculture.
- 8) Dilip s/o Maroti Pachankar,
Age 36 years, Occ. Agriculture.
- 9) Sundarabai Maroti Pachankar,
@ Sundarabai Asaram Pandit,
Age 46 years, Occ. Agriculture,
R/o. Ekdara, Tq. Majalgaon,
Dist. Beed.
- 10) Usha Ramesh Pandit,
Age 40 years, Occ. Household,
Respondent Nos. 6 to 8 and 10
R/o. Dighol, Tq. Jamkhed,
Dist. Ahmednagar.

... **Respondents.**

(Resp Nos. 1 & 2 Orig.plaintiffs,
respondent Nos. 3 to 10 original
defendants.)

...

Advocate for the Appellant : Mr. L. V. Sangeet.

Advocate for the Respondent Nos. 1A to 1C & 2 : Mr. D.B. Rode & S.S
Kulkarni.

Advocate for Respondent Nos 3, 7 to 10 : Mr. V.D. Hon, Senior Advocate
with Mr. A.D. Sonkawade.

Advocate for the Respondent No. 14 : Mrs. Anjali Dube (Bajpai)

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

RESERVED ON : **14.02.2022.**

PRONOUNCED ON : **26.02.2022.**

JUDGMENT :

Heard both the sides.

2. The appeals arise from the following set of facts :

(a) The appellant in Second Appeals No. 832/2012 and 833/2012 is the original plaintiff whereas the respondent Prakash in Second Appeal No. 832/2012 and respondent No. 1 in Second Appeal No. 833/2012 is the defendant.

(b) The appellant averred that the respondent had agreed to sell the suit property by receiving Rs. 75,000/- towards earnest and executed an agreement of sale on 13.12.2000. It was agreed that the sale-deed was to be executed till 30.03.2001. He having refused to execute the sale-deed she filed the suit for specific performance.

(c) The respondent contested the suit and denied to have executed any agreement of sale and even about having received any earnest money.

(d) The Trial Court refused specific performance but granted the relief of refund of the earnest money and directed it to be refunded with interest at the rate of 18% per annum.

(e) Being aggrieved, both the sides that is the appellant to the extent of refusal of specific performance filed Regular Civil Appeal No. 323/2006 and the respondent to the extent aggrieved by the rate of interest awarded by the trial court preferred Regular Civil Appeal No. 330/2006.

(f) Both these appeals were decided by the common judgment and

order under challenge.

(g) The appellate court confirmed the decree to the extent it refused specific performance of the contract but allowed the appeal of the respondent and reduced the rate of interest to 6% per annum. Hence the first two appeals.

3. Learned Senior Advocate Mr. Hon would submit that the trial court was grossly in error in refusing specific performance on the sole ground that the respondent had already agreed to sell and had actually sold the suit property to respondent No. 2 Balbhim Sonba Tagad. Even the appellate court failed to appreciate such a lapse on the part of the trial court in refusing specific performance for this peculiar reason. In fact, such conduct of the respondent Prakash clearly demonstrates a collusion between him and respondent No. 2 Balbhim. He would further submit that in fact even respondent No. 2 Balbhim had also filed the suit seeking specific performance and both these suits were decided by the trial court on the same day and therefore it is not that the suit property was already sold by the respondent and was not available for being sold to the appellant. Both the courts below, therefore, have not exercised the discretion vested in them within the prescribed parameters of law and the observations and the conclusions drawn by them are perverse and arbitrary and give rise to substantial questions as indicated in the appeal memos.

4. The learned advocate would further submit that without there being any cogent and convincing reason, even the rate of interest awarded by the trial court has been unnecessarily reduced by the lower appellate court. Therefore, even to that extent, at least, the judgment and order of the lower appellate court deserves to be reversed.

5. Learned advocate Mrs. Dube for the respondent Prakash vehemently submitted that this being a second appeal, when the courts below have concurrently held the appellant to be not entitled to the discretionary relief

of seeking specific performance, this court cannot reverse the findings of facts which are based on correct appreciation of the facts, circumstances and evidence.

6. The learned advocate would further submit that since the respondent No. 1 Prakash had already agreed to sell the suit property to the respondent No. 2 Balbhim by an agreement of sale which was first in point of time, even otherwise, the suit of the appellant for specific performance could not have been decreed.

7. She would further point out that even an independent suit (Regular Civil Suit No. 251/2003) for general partition was filed by all the heirs of the common ancestor Trimbak which included even the suit property in the present matter. The appellant Rukhminibai is the wife of one Maruti who was one of the sons of Trimbak whereas respondent No. 1 Prakash is the son of one Nivrutti who was also a son of Trimbak. One of the daughters of Trimbak by name Nilawati and the sister of respondent No. 1 Prakash by name Mangal filed that suit for partition which was dismissed. However, in appeal, bearing Regular Civil Appeal No. 326/2006 by the judgment and order passed on the same date on which the appeals in the present matters were decided. The lower appellate court allowed the appeal, quashed and set aside the judgment and order passed by the trial court and decreed the suit directing partition and separate possession of the shares. Even the sale-deed executed by the respondent No. 1 Prakash in favour of respondent No. 2 Balbhim has been held to be not binding on the other sharers. In Second Appeal No. 206/2013 respondent No. 2 Balbhim is challenging the judgment and order passed by the lower appellate court decreeing the suit for partition and holding that the sale-deed in his favour was not binding on the other sharers except respondent No. 1 Prakash.

8. For these peculiar reasons, the learned advocate for the respondent Prakash vehemently submitted that in view of such complexity of matter

and the dispute, independent of the reasoning assigned by the courts below, the propriety demands that the discretion may not be exercised in granting specific performance to the present appellant.

9. In view of such peculiar state of affairs, therefore, I have heard even the Second Appeal No. 206/2013 along with the first two appeals, for admission.

10. As can be appreciated, it was a suit for partition with a declaration that the sale-deed and the agreement of sale executed by respondent No. 1 Prakash in respect of the one of the suit properties in favour of Changdeo who was his paternal uncle and who was the defendant No. 2 in that suit and respondent No. 4 (against which the appeal stood abated in view of his death) and, the agreement of sale in favour of the respondent No. 2 Balbhim who was defendant No. 3 in that suit, was not binding on the other sharers. Though the trial court recorded a finding that all the suit properties were the ancestral and joint family properties it refused to direct partition by upholding the contention of respondent No. 1 Prakash of there being an antecedent partition of the year 1987.

11. The lower appellate court upheld the finding of the trial court to the extent of holding the suit properties to be the ancestral and joint family properties but refused to concur with the finding of trial court that there was an antecedent partition and one of the plaintiffs namely Nilawati who was one of the daughters of Trimbak had relinquished her share. The lower appellate court also held that the plea of respondent No. 1 Prakash and respondent No. 2 Balbhim about the former having sold agreed to sell couple of suit properties being Karta to meet legal necessity was not duly proved. It, therefore, allowed the appeal and by reversing the judgment and order of the trial court decreed the suit by working out the shares of each individuals.

12. The learned advocate Mr. Sangit for the respondent No.2 Balbhim

who is appellant in Second Appeal No. 206/2013 would submit that the lower appellate court has without sufficient and cogent reasons refuted the strong evidence regarding previous partition which was evidenced by recording mutation in the revenue record and also illegally refused to notice that plaintiff No.1 Nilawati had relinquished her share. Since there are inconsistent findings of the courts below, the Second Appeal No. 206/2013 deserves to be admitted.

13. The learned advocate Mr. Hon for the appellant Rukhaminibai who is the respondent in Second Appeal No. 206/2013 would submit that there are no cogent and sufficient reasons to cause any interference in the judgment and order of the lower appellate court. It has given sound reasons to discard the defence of previous partition and relinquishment. The finding to the extent that all the properties are the ancestral and joint family properties is a concurrent finding of facts. Once it was demonstrated that there was no previous partition and even the alleged relinquishment was not evidenced by any written and registered document, it was obvious for the lower appellate court to have decreed the suit for partition. No substantial question of law arises even in this appeal.

14. It is a matter of record that both the courts below have concurred to the extent of holding that respondent No. 1 Prakash had agreed to sell the suit property to appellant Rukhaminibai by accepting earnest money to the tune of Rs. 75,000/-. They have concurrently held that though she had succeeded in establishing such agreement of sale and her readiness and willingness, they have also concurred in refusing to decree the claim for specific performance by noticing variety of facts and circumstances.

15. The lower appellate court has specifically mentioned that respondent No. 1 Prakash had already executed a similar agreement of sale in respect of the self-same property in favour of respondent No. 2 Balbhim and even the latter was seeking specific performance and whose suit was subsequently

decreed and the decree was confirmed by the time appellant Rukhaminibai's appeal was heard. It also noted that apart from such claim that was being put forth by respondent No. 2 Balbhim, even the suit properties were the ancestral and joint family properties in respect of which a separate suit for general partition was filed by Nilawati and Mangal which is the subject matter in Second Appeal No. 206/2013. It was concluded that since the suit property was a subject matter of dispute in that suit, it was not proper to grant specific performance.

16. True it is that as far as the first ground for refusal of specific performance is concerned, since respondent No. 2 Balbhim as well as the present appellant Rukhaminibai were claiming specific performance and both the suits were being tried by the same court and were being decided on the same date, such claim by respondent No. 2 Balbhim for specific performance could not have been the sole ground to justify refusal of specific performance albeit he was found entitled to, and indeed it was not the sole reason.

17. As is mentioned earlier, independently also there was one more reason to refuse specific performance in as much as the suit property was a subject matter of a pending dispute wherein number of sharers were demanding partition. Once having noticed that there was a cloud on the right of the respondent No. 1 Prakash to alienate the suit property, it was indeed a just and plausible ground to refuse specific performance.

18. Interestingly, though I am disposing of the other Second Appeal No. 206/2013 filed by Balbhim, it is important to note that even the alienation by respondent No. 1 Prakash in favour of respondent No. 2 Balbhim has been held to be not binding on the other sharers including the present appellant Rukhaminibai.

19. If such is the peculiar state of affairs, the conclusion of the two courts below in refusing to exercise the discretion in granting specific performance,

by no stretch of imagination, can be said to be either perverse or arbitrary much less giving rise to any substantial question of law.

20. So far as the challenge to the extent of the finding recorded by the lower appellate court holding the appellant Rukhaminibai not entitled to claim interest on the refund at the rate of 18 % per annum, as has been rightly pointed out by it, there was no agreement between the parties to award any interest at a specific rate in case there was an occasion to refund the earnest money. In the absence of such agreement and in view of the provisions of Interest Act, and in the absence of material showing the nationalised banks awarding interest at the rate of 18% per annum, the direction to refund the earnest money at such exorbitant rate was indeed arbitrary and has been correctly brought down by the lower appellate court to 6% per annum. Consequently, even no substantial question of law arises even on account of such reduction of rate of interest on the amount to be refunded.

21. So far as the Second Appeal No. 206/2013 is concerned, there is a concurrent finding of fact by the courts below holding all the suit properties to be the ancestral and joint family properties.

22. The trial court in spite of having recorded such finding refused to decree the suit on two grounds, firstly, by holding that there was an antecedent partition of the year 1987 and that one of the plaintiffs namely Nilawati had relinquished her share. To repeat, both these grounds were found by the lower appellate court not to have been duly established.

23. So far as the claim of the respondent No. 1 Prakash and respondent No. 2 Balbhim regarding there being an antecedent partition the lower appellate court has discussed the testimony of their witness Pandurang Kisan Pachankar. It has been specifically pointed out that during his cross-examination he gave clinching admissions holding that the plaintiffs in that suit were having shares in all the suit properties. It has also been pointed

out that the witness further admitted that all these suit properties were the self acquired properties of Trimbak who was the common ancestor and even the names of Nilawati and Mangal, the plaintiffs, were recorded as owners in the revenue record of the suit properties. It then referred to the revenue record to demonstrate that name of Nilawati and even her mother Bhagirathi was recorded in the revenue record of the suit properties.

24. The lower appellate court has then discussed the testimony of one Sandipan who stated about mutation entries having taken place pursuant to a partition in the year 1987 between Maruti, Changdeo and Prakash. The lower appellate court has specifically pointed out that this witness Sandipan was serving in revenue department and at the material time was posted as Awwal Karkun at Jamkhed in the year 1987. He further admitted that a sharer cannot relinquish his rights orally but by way of registered instrument. Admittedly, the other sharers apart from Changdeo, Maruti, Prakash were not the parties to the alleged partition of the year 1987. It has, therefore, been held and correctly so, by the lower appellate court that even if the three sharers had with some understanding separated their shares, since the other sharers were not parties to that arrangement it could not have been accepted as a full and complete partition. Even it has correctly held that in the absence of any registered instrument even the claim that Nilawati having relinquished her share was not legally sustainable. It has then pointed out that the trial court has clearly ignored all such material facts and circumstances and the law and had readily accepted that there was some antecedent partition.

25. The observation and the conclusion of the trial court, therefore, was clearly perverse, arbitrary and capricious and has been rightly interfered with and reversed by lower appellate court while discarding the theory of antecedent partition and relinquishment. The logical and legal corollary, it was imperative for the lower Court to have quashed and set aside the judgment and order of the trial court and to decree the suit.

26. As far as the claim of the respondent No. 2 Balbhim who is the appellant in Second Appeal No. 206/2013 is concerned, there was absolutely no evidence before the trial court or the lower appellate court to demonstrate that respondent No. 1 Prakash had agreed to sell him one of the suit properties for any legal necessity. Even assuming for the sake of arguments that he was the Karta of the family, so long as there was no evidence to demonstrate that he had any legal necessity to alienate one of the suit properties, the burden to prove which fact was on the purchaser respondent No. 2 Balbhim, no fault can be found with the observation and the conclusion of the lower appellate court in holding that the alienation made by respondent No 1 Prakash in favour of Balbhim was not binding on the other sharers. No substantial question of law, therefore, arises for determination in the Second Appeal No. 206/2013 also.

27. All three second appeals are dismissed.

28. Pending civil applications are disposed of.

(MANGESH S. PATIL, J.)

29 After pronouncement of judgment the learned advocate Mr. Sonkawade h/f Mr. Hon learned Senior Advocate in Second Appeals No. 832/2012 and 833/2012 submits that since the interim relief was in operation till date the same may be continued for a reasonable time to enable the appellants to challenge the judgment and order.

Since the interim relief has been in operation till date, it stands extended for a period of four weeks from today.

(MANGESH S. PATIL, J.)

mkd/-