

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

SECOND APPEAL NO. 707 OF 2004

- 1) Zalaksing S/o Tikarambhau Bisen,
A/a 52 years, Occ. Agriculturist
- 2) Dameshwar Singh Alias Palaksing
s/o Tikarambhau Bisen, A/a 46 years,
Occ. Agriculturist
- 3) Indrajitsingh s/o Tikarambhau Bisen,
a/a 44 years occ. Agriculturist
- 4) Anandabai Wd/o Tikarambhau Bisen,
a/a 70 years Occ household work

All resident of Old Gondia, Civil Lines
Gondia Tah and Dist. - Gondia (Old
Bhandara)
- 5) Smt Chandrarekha w/o Indraraj Turkar,
a/a 54 years, Occ. household works,
r/o Tigaon Tahsil Amgaon, Dist - Gondia
- 6) Smt. Hirabai Makhansingh Pawar,
a/a 50 years, Occ. Household work,
r/o Tingipar, Tahsil Baihar, Dist.BNalaghat
- 7) Smt Gangadevi Wd/o Namajibhau
a/a 90 years Occ. Household work,
r/o Old Gondia, Civil Lines Gondia
Tah and Dist – Gondia (Old Bhandara)

.. Appellants

Versus

- 1) Pramodkumar s/o Prahladrai Agrawal
a/a 58 years, Occ. Business
r/o Near Prabhat Talkies, Gondia
Tah and Dist Gondia (Old Bhandara)
- 2) Ashokkumar s/o Pralahadrai Agrawal,
A/a 40 years, occ. Business
r/o Near Prabhat Talkies Gondia
Tah and Dist Gondia (Old Bhandara)

.. Respondents

Mr. J. T. Gilda, Senior Advocate assisted by Mr. V.R. Borkar, Advocate for appellants.

Mr. V. R. Mundra, Advocate for the respondents.

CORAM : MANISH PITALE, J.

RESERVED ON : 05/05/2022

PRONOUNCED ON : 03/08/2022

JUDGMENT

Heard Mr. J. T. Gilda, learned Senior Advocate for the appellants and Mr. Mundra, learned counsel for the respondents.

(2) The original defendants are before this Court in appeal, challenging concurrent judgments and decrees passed against them and in favour of the respondents i.e. original plaintiffs. The decree has been passed in favour of the respondents in a suit for partition filed by them as purchasers of property from one of the coparceners of the Hindu joint family of the appellants, as a consequence of which the property sold to the respondents has been put to the share of the alienating coparcener and allotted in their favour. The appellants have been restrained from executing an earlier

decree passed in favour of some of the appellants and against the respondents, whereby the said alienations had been set aside, as not being for legal necessity. Various issues were raised on behalf of the appellants while challenging the concurrent judgments and decrees. The appeal was admitted on 25/11/2008, on a substantial question of law and while finally hearing the appeal, this Court framed three more substantial questions of law. The learned counsel for the rival parties were heard at length on all the substantial questions of law. Before stating the substantial questions of law, it would be appropriate to first refer to the facts leading to filing of the present appeal.

(3) For the sake of convenience, the parties are being referred to as per their status in the trial Court, hence the appellants are referred to as defendants and the respondents as plaintiffs. The defendants are Hindus governed by the Mitakshara Law administered by the Banaras School. Tikaram was the father of defendant Nos.1 to 3, 5 and 6. The defendant No.4 was his wife and defendant No.7 was his mother. Namaji and Gangabai (defendant No.7) were the father and mother of the said Tikaram. Namaji died leaving behind extensive landed property. At the time of death of Namaji, Tikaram was minor

and hence the property was managed by his mother Gangabai(defendant No.7). When Tikaram became major, he appears to have fallen in bad habits, turning into an alcoholic and a gambler. Due to this Gangabai (defendant No.7) sought her share in the ancestral property and there was an oral partition in the year 1948. Tikaram started disposing of portions of ancestral property and hence at the intervention of relatives, a formal partition of ancestral property was affected by a registered partition deed dated 11/01/1957 between Zalaksingh (defendant No.1) and his father i.e. Tikaram. Since the said Zalaksingh was a minor, he was represented by his guardian Gangabai (defendant No.7).

(4) Property in Khasra No.189 consisting of 8.02 acres, which was part of ancestral property, was allegedly not included either in the share of Tikaram or Zalaksingh, but it was kept joint with a view to make provision for maintenance of dependent members of the family. At the time when the registered partition deed dated 11/01/1957 was executed, Dameshwarsingh (defendant No.2) was in the womb and he was born on 02/06/1957.

(5) On 27/01/1959, a registered Sale Deed was

executed of 3.20 acres of land from Khasra No.189. The said Sale Deed was executed by Tikaram in favour of the plaintiffs and since they were minor, they were represented by their father. Similarly, on 11/02/1959, Tikaram executed Sale Deed for 4.82 acres of land from Khasra No.189 in favour of the plaintiffs, who were represented by their father. On 16/06/1959, Tikaram died. Thereafter, on 26/08/1959, Indrarajsingh (defendant No.3) was born.

(6) On 16/04/1963, defendant Nos.1 to 4, filed Regular Civil Suit No.131 of 1963, before the Court of Civil Judge Junior Division, Gondia challenging the aforesaid Sale Deed dated 27/01/1959 executed by Tikaram in favour of the plaintiffs concerning 3.20 acres of land from Khasra No.189. Another suit was filed to challenge the Sale Deed dated 11/02/1959. The aforesaid suits were filed by the said defendants on the ground that Tikaram had fallen into bad habits and vices and that the said property was not sold for legal necessity or for benefit of estate. The plaintiffs herein, who were defendants in the said suit, resisted the prayers made in the suit and in the year 1969, the suit was dismissed.

(7) Aggrieved by the same, the defendant Nos.1 to 4

filed Civil Appeal No.22 of 1969, before the District Court at Bhandara. By judgment and order dated 10/03/1971, the appeal was allowed. The judgment and order passed by the Court below was set aside and a decree was passed declaring that said land from Khasra No.189 sold by Tikaram, was not sold for benefit of estate and the same was not binding on the plaintiffs therein. Accordingly, the defendants therein i.e. plaintiffs in the present case were directed to deliver vacant possession of the suit property. But, it was specifically recorded that the plaintiffs herein were at liberty to start appropriate proceedings for declaration that they had acquired the share of Tikaram, if there be any, in the said field and claim allotment of the same to his share by instituting appropriate proceeding for partition of the Hindu joint family property.

(8) Aggrieved by the said judgment and decree, passed by the appellate Court, the plaintiffs herein preferred Second Appeal No.448 of 1972. On 26/09/1984, this Court dismissed the aforesaid second appeal and confirmed the decree passed by the appellate Court. It is an admitted position that the said judgment and decree attained finality. Thereafter, on 18/04/1985, the plaintiffs filed Regular Civil

Suit No.120 of 1985, before the Court of Civil Judge Junior Division, Gondia, for declaration, partition and permanent injunction. It is this suit from which the present second appeal has arisen.

(9) The respondents in this appeal, being the original plaintiffs, arrayed the appellants herein as the defendants and claimed the aforesaid decree. The plaintiffs stated that the suit was being instituted in terms of the liberty granted by the appellate Court in its judgment and order dated 10/03/1971, in Civil Appeal No.22 of 1969. It was claimed that since the said judgment and decree was the subject matter of challenge before this Court and eventually the second appeal was dismissed on 26/09/1984, the present suit having been filed on 18/04/1985 was within limitation. In this suit, the plaintiffs arrayed not only the mother, widow and sons of the said Tikaram as defendants, but they also joined daughters of Tikaram as defendants in the said suit. In this suit, the plaintiffs referred to the two Sale Deeds dated 27/01/1959 and 11/02/1959, whereby the said Tikaram had sold 8.02 acres of land from Khasra No.189, in their favour. It was claimed that as per the information available with the plaintiffs and considering the revenue records, property admeasuring 101.71 acres in

different Khasra Numbers belonged to the Hindu undivided family of Tikaram. In the plaint, the plaintiffs gave details of the Khasra Numbers and the areas of the properties as per revenue records.

(10) It was further claimed that since there was enough property that came to the share of their vendor i.e. Tikaram, the suit be decreed by ascertaining the share of Tikaram and therefrom allot the specific lands in Khasra No.189, that were sold in favour of the plaintiffs. They also prayed for permanently restraining the defendants from executing decree passed in their favour in the aforesaid Regular Civil Suit No.131 of 1963.

(11) The defendants filed written statement claiming that the reliefs sought by the plaintiffs could not be granted as there was no joint family property with the defendants. It was claimed that the property in Khasra No.189, in the earlier partition was not allotted to Tikaram and it was to be utilized for maintenance of the dependent members of the family. The defendants claimed that the judgment and decree passed in the earlier suit i.e. R.C.S.No.131 of 1963, operated as constructive *res judicata*, because the plaintiffs, being defendants in the said earlier suit could have taken the pleas that were sought to be

raised in the aforesaid subsequent suit. It was denied that the family of the defendants was owning and possessing about 115 acres of land or the area of 101.71 acres specifically stated in the plaint. It was claimed that partition could not be sought for the property, which had been already partitioned and that the suit was barred by limitation.

(12) Upon issues being framed and the parties having led evidence in support of their respective stands, the said Court finally heard arguments in the aforesaid suit. On 22/04/1996, the Court of 2nd Joint Civil Judge Junior Division, Gondia, partly decreed the suit against defendant Nos.2 to 6 and it was directed that partition be made of the Hindu undivided family of deceased Tikaram. It was further directed that the land in Khasra No.189, be put to the share of the deceased Tikaram and it be allotted to the plaintiffs to satisfy their claim of 8.02 acres. On this basis, the plaintiffs were declared as owners of the said land in Khasra No.189 and the defendants were restrained from executing decree in Regular Civil Suit No.131 of 1963.

(13) Aggrieved by the aforesaid judgment and decree, the defendants filed Civil Appeal No.67 of 1996 before the District Court at Gondia. By the impugned judgment and order dated

17/07/2004, the 2nd Adhoc Additional District Judge, Gondia, dismissed the appeal and confirmed the decree passed in favour of the plaintiffs. Aggrieved by the said judgment and order of the appellate Court, the defendants filed the present appeal before this Court.

(14) On 25/11/2008, this Court admitted the appeal on one substantial question of law. This appeal came up for final hearing and at the stage of final hearing, on 05/05/2022, this Court framed three more substantial questions of law and heard the learned counsel for the rival parties extensively on all the four substantial questions of law.

(15) The four substantial questions of law framed in the present appeal are as follows: -

1) *Whether the Courts below were factually correct in holding that Tikaram was sole owner of 34.71 acres of land even after two partitions or was he owner of 6.85 acres of land alone as is contended?*

2) *Whether the suit as filed in the present form is maintainable by a stranger without putting in hotchpotch the entire joint family properties?*

3) *Whether both the Courts below were right in holding that the suit is not barred by the principle*

*of constructive res judicata as per explanation (IV)
to Section 11 of the C.P.C.?*

4) *Whether the suit filed by the respondents was
within limitation?*

(16) Mr. J. T. Gilda, learned Senior Counsel appearing for the appellants i.e. original defendants submitted that the substantial questions of law deserved to be answered in favour of the appellants and that the concurrent judgments and orders passed by the two Courts below deserved to be set aside. According to the learned Senior Counsel, the concurrent judgments and orders passed in favour of the respondents i.e. original plaintiffs were erroneous on various grounds. It was submitted that as per the settled position of law, when an alienee like the original plaintiffs herein files a suit for partition, the entire property has to be included in such a suit and partition cannot be sought for specific interest that the alienee claims to have acquired from a coparcener, who alienated such interest in the ancestral property. It was submitted that in the present case entire property was not included in the suit and therefore, the frame of the suit itself was defective. It was submitted that a partial partition could have been carried out only by agreement of parties, but the general rule for partition, in the suit as filed by the plaintiffs herein was that all the

joint family properties ought to have been included. As all the properties were not included, the suit was defective and yet the Courts below held in favour of the plaintiffs.

(17) It was further submitted that the present suit filed by the plaintiffs was hit by constructive *res judicata*, as manifested in explanation (IV) to Section 11 of the Code of Civil Procedure (CPC). It was submitted that in the earlier suit i.e. Civil Suit No.131 of 1963, filed by some of the defendants against the plaintiffs herein, which was decreed and Sale Deed executed by the said Tikaram in favour of the plaintiffs was set aside, the plaintiffs could have taken a defence or they could have filed a counter claim and attacked the claims of the defendants herein, on the grounds on which the subsequent suit was filed. It was when the alienation itself was challenged that the plaintiffs could have taken the stand that they took in the subsequent suit and therefore, the subsequent suit was barred by the principle of *res judicata* specified in Section 11(IV) of the C.P.C. For this proposition the learned Senior Counsel relied upon judgment of the Hon'ble Supreme Court in the case of ***Ramadhar Shrivastava vs. Bhagwandas*** (2005) 13 SCC 1.

(18) It was further submitted that the plaintiffs in a suit for general partition, as in the present case, could not have claimed allotment of a specific portion of the joint family property, because there is distinction between a coparcener filing for partition and an alienee like the plaintiffs herein filing for partition of joint family property. This is because, a coparcener has a right to alienate his undivided interests in coparcenary property, even without the consent of the coparceners. Therefore, it was contended that in such a situation when the plaintiffs filed the suit for partition, it could not be equated with a suit for partition filed by coparceners.

(19) In this backdrop, it was also submitted that the plaintiffs could not claim ascertainment of share of deceased Tikaram and specific allotment of the properties sold to them, to the share of deceased Tikaram. It was submitted that the plaintiffs were not entitled to claim equity because they were in possession of the said property from the year 1959, where they had constructed rice mills, for the reason that such alienees like the plaintiffs under Hindu Law are not entitled to claim equity as against the coparceners.

(20) According to the learned Senior Counsel for the

appellants, it was crucial that Tikaram had already died when the suit for partition was filed by the plaintiffs and the death of Tikaram had resulted in fluctuation and augmentation of the share of the other coparceners in the property. Therefore, it was submitted that the impugned judgments and orders were wrong in law.

(21) Reliance was placed on the judgment of the Nagpur High Court in the case of *Namdeo Govind and others vs. Mumtaj Begum Khwaja Hakimuddin 1962 NLJ 308* and judgment of this Court in the case of *Patilbua Pandu Landoe vs. Sadashiv Vithoba Kamble and others, 1976 Mh.L.J. 158*.

(22) It was further submitted by the learned Senior Counsel on behalf of the appellants that the suit was clearly barred by limitation, for the reason that even if the liberty granted by the appellate Court to the plaintiffs in the judgment and order dated 10/03/1971, while allowing Civil Appeal No.22 of 1969, was to be considered, the liberty was granted on 10/03/1971 and admittedly the suit was filed on 18/04/1985.

(23) It was submitted that the plaintiffs taking shelter of

Section 14 of the Limitation Act, was wholly misplaced, because the said provision was not at all applicable to the facts of the present case. Filing and pendency of Second Appeal No.448 of 1972, before this Court could not be said to be a situation where the plaintiffs were pursuing their remedy before a wrong forum, in order to seek benefit under Section 14 of the Limitation Act. Therefore, it was submitted that merely because second appeal was ultimately dismissed on 26/09/1984, it could not be said that the cause of action arose for the plaintiffs to file the suit on 26/09/1984. On this basis it was submitted that the suit ought to have been dismissed on the ground of limitation itself.

(24) It was further submitted that the erroneous approach adopted by the Courts below on the aforementioned grounds led to the finding that there was sufficient property available to the share of Tikaram, from which 8.02 acres of land could be carved out and further by applying the principle of equity, the said land in Khasra No.189, came to be wrongly allotted to the plaintiffs. On this basis, it was submitted that the impugned judgments and orders deserved to be set aside and the suit filed by the plaintiffs i.e. respondents herein

deserved to be dismissed.

(25) On the other hand, Mr. V. R. Mundra, learned counsel appearing for the respondent i.e. original plaintiffs submitted that the substantial questions of law need to be answered in favour of the respondents and the present appeal ought to be dismissed.

(26) It was submitted that there was absolutely no substance in the claim made on behalf of the appellants i.e. original defendants, that entire joint Hindu family property was not made subject matter of the suit filed by the plaintiffs. It was submitted that the plaintiffs were not members of the family of the defendants. They had purchased properties from Tikaram, who was a coparcener. In the plaint, the plaintiffs had stated in extensive detail as to the extent of properties of the family.

(27) Reliance was also placed and revenue records from the year 1917 to place on record the joint family properties pertaining to the Hindu undivided family of Tikaram. Even the daughters of Tikaram who had not filed the earlier suit bearing Regular Civil Suit No.131 of 1963, were made defendants in the suit. In other words,

the plaintiffs had taken sufficient care to add all members of the said Hindu undivided family of Tikaram as defendants and to include all the joint family properties to the best of their knowledge in the said suit. It was submitted that in such suits filed by strangers or alienees, it is often seen that even separate properties get included and it is only after material is placed on record by the defendants i.e. members of the joint Hindu family, that the extent of the property available for partition becomes clear.

(28) It was emphasized that in the present case, the defendants did not lead any evidence before the trial Court. Therefore, they could not be permitted to turn around and claim that the frame of the suit was defective, because all the joint family properties were not included. Much emphasis was placed on the presumptive value of revenue entries. In this regard, the learned counsel placed reliance on judgment of the Hon'ble Supreme Court in the case of *Shri Pratap Singh vs. Shiv Ram (2020) 4 SCALE 280*, as also judgment of this Court *dated 06/09/2021 passed in Writ Petition No.9653 of 2021 (Manik Ramrao Shelke vs. Balbhim Karbhari Salunkhe and others)*.

(29) The learned counsel further submitted that the plaintiffs had a right to file suit for partition under Section 44 of the Transfer of Property Act and Section 127 of the uncodified Hindu Law. There was no bar on the plaintiffs as alienees to file suit for partition, so as to ascertain the share of their alienor i.e. Tikaram and to seek allotment of specific properties from Khasra No.189, particularly when they had continued in possession of the said property since the year 1959, which they had developed by constructing rice mills over a period of time. It would be most inequitable and a travesty of justice, if the plaintiffs were to be non-suited on the ground that although they could claim partition for determination of share of Tikaram, they were disentitled from seeking allotment of the specific plots that were sold to them.

(30) On the question of *res judicata*, the learned counsel submitted that Section 11(IV) of the CPC did not apply to the facts of the present case, because no circumstances existed for invoking the concept of *res judicata*. It was submitted that the earlier suit bearing Regular Civil Suit No.131 of 1963, was filed by defendant Nos.1 to 4 and not by the other defendants against the plaintiffs herein. The said

suit was specifically for setting aside Sale Deed dated 27/01/1959, executed by Tikaram, in favour of the plaintiffs. In the said suit, the plaintiffs were defending the transaction that had taken place and they were entitled to do so. The suit in the first place was dismissed by the trial Court and thereafter, allowed by the first appellate Court. It was submitted that this was the precise reason why, when allowing the appeal and granting decree in the said matter, the first appellate Court had clarified that liberty was reserved for the plaintiffs to initiate appropriate proceeding for declaration that they had acquired the share of deceased Tikaram in the suit field located in Khasra No.189 and to claim allotment of the same to his share by instituting an appropriate proceeding for partition of the Hindu joint family property. There was no question of applicability of the concept of constructive *res judicata*, in the face of such liberty granted by this Court and in the facts and circumstances of the present case.

(31) It was further submitted that the suit could not be said to be barred by limitation, for the reason that the judgment and decree passed by the first appellate Court on 10/03/1971, merged into the judgment and decree dated 26/09/1984, passed by this Court

while dismissing Second Appeal No.448 of 1972. It was further submitted that therefore, the suit being filed on 18/04/1985, was clearly within limitation. The learned counsel submitted that reference to Section 14 of the Limitation Act in the plaint was being sharply criticized on behalf of the defendants i.e. the appellants herein, but it is a matter of common knowledge that pleadings in Mofussil Courts ought to be construed liberally and that reference to a wrong provision of law ought not to inure to the benefit of the defendants.

(32) In this context it was submitted that Section 15 of the Limitation Act could be applied, for the reason that during the pendency of Second Appeal No.448 of 1972, before this Court, there was an interim order and in any case the decree dated 10/03/1971, passed by the first appellate Court could not have been acted upon. Therefore, it was submitted that the suit could not be said to be barred by limitation. On the basis of such contentions, the learned counsel appearing for the plaintiffs submitted that the Courts below correctly found that a large share to the extent of about 34.74 acres did come to the share of Tikaram and that in the facts and circumstances of the present case, 8.02 acres from Khasra No.189 could be allotted to the

share of Tikaram and then to the plaintiffs as the purchasers of the said land from Tikaram. It was submitted that the Courts below had taken a proper and reasonable view in the facts and circumstances of the present case by applying the correct position of law and that the substantial questions of law deserved to be answered in favour of the plaintiffs i.e. respondents herein.

(33) In support of the aforesaid contentions, the learned counsel for the original plaintiffs i.e. respondents herein relied upon judgments of this Court in the case of *Sakharchand Satidas vs. Narayan AIR 1951 Bombay 10*, *Vasudeo Dagdulal and others vs. Kankoochand Hirachand Visashrimali and others, AIR (88) 1951 Bombay 226*, *Gurulingappa Shivappa Masali vs. Sabu Ramappa Kore, AIR 1931 Bombay 218*, *Ramkrishna Bajirao Gotmare vs. Kahaiyalal Tribhuwanlal Shah, AIR 1990 Bombay 361*, *Laxminarayan Deo Vs. Narayan Fula Marathe 1995 (1) BomCR 539* and judgments of Hon'ble Supreme Court in the case of *Gurupad Khandappa Magdum vs. Hirabai Khandappa Magdum AIR 1978 SC 1239* and *Union of India vs. West Coast Paper Mills Ltd. 2004 (2) SCALE 285*.

(34) Having heard the learned counsel for the parties on

the said substantial questions of law and upon perusal of the record, this Court is of the opinion that the objections pertaining to *res judicata* and limitation i.e. substantial questions of law Nos.3 and 4 can be considered first.

(35) It has been strenuously submitted on behalf of the appellants that explanation (IV) to Section 11 of the C.P.C. pertaining to the aspect of constructive *res judicata* applies and that therefore, the subsequent suit, from which the present appeal arises, stood barred by the concept of constructive *res judicata*. The said explanation (IV) elaborates the concept of *res judicata* spelt out in Section 11 and therefore, the issues in the earlier suit and the subsequent suit ought to be directly and substantially the same, between the same parties or between the parties under whom they claimed.

(36) In the facts of the present case, although the respondents i.e. original plaintiffs sought relief in respect of lands located in Khasra No.189, with which the earlier suit was also concerned, the controversy raised in the earlier suit filed by four of the appellants before this Court, was on a different issue.

(37) The earlier suit was an attack on the aforementioned Sale Deed about part of land in Khasra No.189, on the ground that the said Tikaram, as 'Karta' of the joint family was not justified in selling the said land to the respondents herein, as there was neither legal necessity nor benefit of estate. The respondents herein as defendants in the earlier suit were contesting the aforesaid challenge raised on behalf of some of the appellants who were plaintiffs in the said suit and they were defending the Sale Deed on the ground that it was indeed executed for legal necessity or benefit of estate. The suit was dismissed by the trial Court, but on appeal, it was decreed, which attained finality. The remedy available to the respondents in such a situation was to file the suit for general partition to ascertain the share of their alienor i.e. Tikaram and therefore, they filed the subsequent suit for partition, wherein they arrayed, not only those appellants who were plaintiffs in the earlier suit, but also daughters of Tikaram and his mother. The respondents placed on record details of the properties belonging to the joint family by referring to revenue records from the year 1917 onwards.

(38) The remedy of filing the subsequent suit for general

partition, in such circumstances is always recognized by law. It cannot be said that such a remedy could or ought to have been availed by the respondents in the earlier suit and that filing of the subsequent suit was barred by the concept of constructive *res judicata*. The specific transaction executed in favour of the respondents stood set aside in the earlier suit, but the said proceeding could never shut out the respondents as the alienees to seek partition of the joint family property for allotment of land from the share of their alienor, as long as they satisfied the requirements of such a suit for general partition.

(39) Thus, it cannot be said that the subsequent suit filed by the respondents was barred by the concept of constructive *res judicata* under Section 11(IV) of the C.P.C. The substantial question of law is accordingly answered in favour of the respondents and against the appellants.

(40) As regards the question of limitation, much emphasis has been placed on behalf of the appellants on the fact that liberty to file such a suit for partition was granted to the respondents on 10/03/1971, while the suit was admittedly filed on 18/04/1985, much beyond the period of limitation. It was submitted that the

respondents could not take shelter of Section 14 of the Limitation Act, 1963, for the reason that the same was wholly inapplicable, because filing and pursuing appeal before this Court against the decree passed by the District Court could not be said to be a proceeding being pursued *bonafide* in a Court without jurisdiction. Much emphasis was placed on the fact that in the plaint itself, it was specifically pleaded that the respondents i.e. original plaintiffs were taking shelter of Section 14 of the Limitation Act, to claim that the suit was filed within the period of limitation.

(41) In this context, there is substance in the contention raised on behalf of the respondents that merely because reference was made to Section 14 of the Limitation Act in the plaint, it cannot be a ground to non-suit them on the ground of limitation. It was submitted that mere reference to a wrong provision ought not to be held against the respondents, when filing and pendency of second appeal before this Court and its ultimate disposal on 26/09/1984, was an admitted position on facts. In this context, reference to Section 15 of the Limitation Act on the part of the respondents appears to be appropriate. The said provision pertains to exclusion of time in certain

cases where the institution of a suit has been stayed by an injunction or order, the time period in such cases when the interim order operates has to be excluded.

(42) In this context the learned counsel for the respondents is justified in relying upon the judgement of this Court in the case *Laxminarayan Deo Vs. Narayan Fula Marathe (supra)*, wherein it was held that pleadings in Mofussil Courts are loosely drafted and as such liberal construction should be given to such pleadings, thereby indicating that mere reference to section 14 of the Limitation Act in the plaint ought not to be held against the respondents. In the present case, there is no dispute about the fact that the respondents filed Second Appeal No.448 of 1972, to challenge the judgment and decree of the appellate Court dated 10/03/1971, wherein liberty was granted to file suit for partition and that there was an interim order operating during pendency of the appeal. It was when the second appeal was dismissed on 26/09/1984, that the respondents took steps to file the suit, in terms of the liberty granted by the appellate Court, as confirmed by this Court.

(43) The respondents in this context, have referred to

judgment of this Court in the case of *Ramkrishna Gotmare* (supra), wherein this Court has held that as per Section 15 of the Limitation Act, limitation commences from the date of the appellate decree. It has been laid down that when the appellate decree supersedes the original decree on the basis of doctrine of merger, only the superseded decree is enforceable and that therefore, limitation commences from the date of the appellate decree. In this regard the Respondents are also justified in relying upon judgement of the Supreme Court in the case *Union of India Vs. West Coast Paper Mills Ltd* (supra). In the present case, although liberty was reserved to the respondents to file suit for partition despite the decree being granted in favour of some of the appellants who had filed the earlier suit, the same was made subject matter of challenge in Second Appeal No.448 of 1972 by the respondents, which was ultimately dismissed on 26/09/1984. As per the doctrine of merger, the decree of this Court became operational and thereupon, the respondents filed the suit for partition on 18/04/1985. Therefore, it cannot be said that the suit filed by the respondents was barred by limitation.

(44) The first and the second substantial questions of law

can be considered together for the reason that the extent of property held by Tikaram, after two partitions in the year 1948 and 1957, would also concern the question as to whether the suit filed by the respondents could be said to be maintainable, as the appellants specifically raised the objection that all the properties belonging to the joint family were not made subject matter of the said suit. At this stage it would be appropriate to note that as per the law laid down by the Supreme Court in the case of *Arshnoor Singh Vs. Harpal Kaur and Ors.* (2020) 14 SCC 436, after the two partitions in the years 1948 and 1957, the ancestral property in the hands of Tikaram would remain coparcenary property for his descendants upto three degrees.

(45) A perusal of the plaint in the suit filed by the respondents for partition would show that they arrayed as defendants, not only the plaintiffs in the earlier suit i.e. the sons and widow of Tikaram, but also the daughters and mother of the Tikaram. In the plaint at paragraph 8, the respondents gave details of the properties belonging to the joint family of Tikaram, stating the Gat Numbers, as well as the area of such property totaling 101.71 acres of land. It was stated that these details were obtained by the respondents from

revenue records and that therefore, the properties belonging to the joint family were placed on record. Being strangers to the family, the respondents had made efforts to identify the properties of the joint family by referring to revenue records from the year 1917 onwards and all the details as per their knowledge and information were placed on record before the trial Court. In the written statement, the appellants simply denied that the joint family had 101.71 acres of land as described in the plaint and it was further claimed that the respondents could not claim partition of property that was already partitioned. But there were no specific pleadings on the part of the appellants as regards the properties of the joint family.

(46) It is even more significant that the appellants did not lead any evidence in support of their stand. In the absence of any evidence led on their behalf, it could not lie in their mouth to state that the suit was defective and not maintainable, because the entire joint family properties were not made subject matter of the said suit. They could also not make a bald denial by merely stating that the lands stated in the plaint, totaling 101.71 acres, did not belong to the joint family. In this context, the learned counsel for the respondents is

justified in contending that revenue records have presumptive value and that it was for the appellants, as the defendants, to have led evidence to rebut such presumption.

(47) Reliance placed in this context on the judgment of the Supreme Court in the case of *Shri Pratap Singh* (supra) and that of this Court in the case of *Manik Ramrao Shelke* (supra) is justified, wherein it has been held that the presumption of truth attached to revenue records can be rebutted only on the basis of evidence of impeccable integrity and reliability. It has been further held that oral evidence can be adduced to contradict the revenue record, but that in itself will not be sufficient to hold that the statutory presumption is rebutted. In the present case, as noted above, the appellants did not lead any evidence and therefore, presumption as regards correctness of the revenue record relied upon by the respondents went unrebutted and the same ought to accrue to the benefit of the respondents. In this backdrop, this Court is inclined to accept the contentions raised on behalf of the respondents that the appellants cannot be permitted to claim that the frame of the suit was defective, because all properties of the joint family of Tikaram were not included.

(48) As regards the extent of property available to the share of Tikaram is concerned, once the aforesaid position is accepted as regards the extent of property available in the hands of the joint family of Tikaram, the share ascertained on that basis by the trial Court and confirmed by the appellate Court does not require any interference. There is no perversity in the findings given in that regard by the two Courts below and therefore, the same cannot give rise to a substantial question of law warranting interference in the decrees passed by the two Courts below.

(49) In this regard, it also cannot be said that since the suit was filed by the respondents after the death of Tikaram, specific share in the property could not be granted to the respondents as the alienees, by invoking the principle of equity. In this context, the learned counsel for the respondents has relied upon a judgment of division bench of this Court in the case of *Vasudeo Dagadulal* (supra), wherein it was held that a purchaser could certainly enforce his rights by a suit for general partition and further, that a specific property from the share of the alienor could be assigned to the alienees, provided it could be done without injustice to other coparceners. It was held that

if there are equities between the coparceners or liabilities attaching to the alienor's share, which would render it inequitable or impracticable to allot specific property, the alienee would be entitled to recover an equivalent value of property from the property of the alienor. Thus, the concept of equity can be invoked, provided no injustice is done to the other coparceners.

(50) In this context, the learned counsel appearing for the respondents is also justified in relying upon the judgment of the Hon'ble Supreme Court in the case of *Gurupad Magdum* (supra), wherein it has been laid down that to ascertain the share of a deceased coparcener, it is necessary to assume that partition had taken place between the deceased and his coparceners immediately before his death. Applying the said principle to the present case, it would be clear that the Courts below ascertained the share of Tikaram and then directed specific property to be allotted to the respondents as the alienees.

(51) In this context, the learned counsel for the appellants has placed much emphasis on judgment of the Nagpur High Court in the case of *Namdeo Govind* (supra) wherein it is laid down

that when the coparcener is dead before the suit for general partition is filed, the question of allotting any particular item of joint family property to him cannot be considered and the alienee cannot ask for adjustment of equities by claiming specific property. In this context, it would be relevant to note that the said judgment of the Nagpur High Court, at best, can be of persuasive value for this Court and it would not be binding. The reason being that the successor High Court of the Nagpur High Court is the High Court of Madhya Pradesh at Jabalpur and not the Bombay High Court. This aspect has been clarified by judgement of the Madhya Pradesh High Court in the case of *Late Ishan Vs. Jogesh 2013(2) MPLJ 460*. A full bench judgment of this Court in the case of *Prabodh K. Mehta Vs. Charuben K. Mehta 2018(2) MhLJ 898*, has expressed reservation about the claim that judgments of the Nagpur High Court can be said to be binding on this Court.

(52) In any case, as noted above, a division bench of this Court in the case of *Vasudeo Dagadulal* (supra) has held that specific property may be claimed by the alienees in such a situation, without doing injustice to other coparceners. This Court is bound by the said position of law as laid down by this Court and not persuaded to follow

the dictum laid down in the judgment of the Single Judge of Nagpur High Court in the case of *Namdeo Govind* (supra).

(53) This Court finds that by granting decree in favour of the respondents in respect of the specific property, in the facts of the present case and the material available on record, it cannot be said that any injustice has been done to the other coparceners. In fact, when it is found that no injustice has been done to the other coparceners, the concept of equity can certainly be invoked in favour of the respondents, particularly for the reason that they have continued in possession of the specific property since the year 1959 when the two Sale Deeds were executed and further that they developed the property, constructing rice mills and other such structures on the said land. Therefore, the contentions raised in this regard on behalf of the appellants cannot be accepted.

(54) As regards reliance placed on behalf of the appellants on the division bench judgment in the case of *Patilbua Landoe* (supra), suffice it to say that in the said case it was held in the backdrop of partial partition that since the other coparceners were not consenting to such partial partition, a stranger filing a suit could not

claim relief. In the present case, the respondents filed the suit for general partition on the basis of the liberty granted in the earlier suit to determine the share of the alienor i.e. Tikaram and upon determination of the extent of share of Tikaram, the trial Court in the present case held in favour of the respondents. Therefore, the said judgment of this Court also cannot assist the appellants to succeed in the appeal.

(55) In view of the above, the substantial questions of law are all answered against the appellants and in favour of the respondents, thereby indicating that no interference is warranted in the concurrent judgments and decrees passed by the two Courts below.

(56) Accordingly, the appeal is dismissed. Pending application(s) stand disposed of. There shall be no order as to costs.

[MANISH PITALE J.]

KOLHE