

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

SECOND APPEAL NO.531 OF 1991

Dadarao s/o. Bhimrao Patil
(deceased) his legal representatives :

- 1] Manabai w/o Dadarao Patil
Died. Appellant nos.2 to 8 are
L.Rs. already on record.
- 2] Yashodabai w/o Gururaj Patil
- 3] Kantabai w/o Ram Gadhave
(died) her L.Rs.
- 3A. Dayanand s/o Ram Gadhave
Age 48 years, Occu. Agri.,
R/o. Gadviewadi, Tq. Ausa,
Dist. Latur.
- 3B. Meenabai Vishwanath Kode
Age 40 years, Occu. Household,
R/o. Trikoli, Tq. Omerga,
Dist. Osmanabad.
- 3C. Shobhabai Rajendra Birajdar
Age 35 years, Occu. Household,
R/o. Dautpur, Tq. Ausa,
Dist. Latur.
- 3D. Vanita Mahaling Aaralkar
Age 30 years, Occu. Household,
R/o. Kond, Tq. Ausa,
Dist. Latur.
- 4] Dhondabai w/o. Balvant Mule
Died through her LR's

- 4A. Nilkant s/o. Balvant Mule
Age- 50 years, Occu-Agri.
R/o. Alori, Ta-Ausa,
Dist. Latur.
- 4B. Umadevi w/o. Dattatray Dane
Age-45 years, Occu-Household
R/o. Davatpur, Ta-Ausa
Dist-Latur
- 4C. Sridevi w/o Ramesh Birajdar
Age-41 years, Occu-Household
R/o. Mirgaali, Ta.Nilanga
Dist. Latur.
- 5] Gundappa s/o. Dadarao Patil
- 6] Sharanappa s/o. Dadarao Patil
- 7] Vilas s/o. Dadarao Patil
- 8] Nilawatibai w/o Madhukar Dkhande

..APPELLANTS

VERSUS

Dayanand s/o. Subrao Birajdar

..RESPONDENT
[Original Plaintiffs]

...

Mr.V.C.Solshe, Advocate for the appellants.

Mrs.Charuta S. Deshmukh, Advocate for the respondent.

...

CORAM : ARUN R. PEDNEKER, J.

Reserved on : 27.07.2023

Pronounced on : 25.10.2023

JUDGMENT :

1] By order dated 21st April, 1994, the present Second Appeal is admitted, is as under :

“Heard Shri. Solshe counsel for the appellants & Shri Deshmukh counsel for the resp.

Admit. Ground Nos.B. G, H. L raise substantial questions of law.”

2] The present Second Appeal is admitted on the following substantial questions of law :

B (1) The lower Appellate Court erred in law in not giving the benefit and protection of Section 41 of the Transfer of Property Act to the Defendant purchaser of the suit property even as an alternative came.

G (2) The lower Appellate Court should have seen that the circumstances brought out by the Defendant in the form of documentary evidence on record clearly go to show that the Defendant has not only complied with the conditions of Section 41 of the Transfer of

Property Act so as to be entitled to its benefit, but has also gone beyond section 41 to prove himself to be bona fide purchaser for value without notice.

H-(3) The lower Appellate Court should further have seen that the circumstances pointed out in the above grounds clearly go to show that the compromise decree exhibit 27 was a fraudulent document as alleged by the Defendant and it was not intended to be acted upon and in fact not acted upon.

L-(4) Whether, in the facts and circumstances of the present case, it can be held that the compromise decree of partition in Regular Civil Suit No. 74 of 1967 can be said to be a real one and was acted upon as alleged by the Plaintiff.

Brief facts giving rise to the above substantial questions of law are summarized as under :

3] The plaintiff filed suit for recovery of possession of suit land against the defendant – purchaser of the suit property. In the said suit, it is contended by the plaintiff

that the plaintiff, his brother and father were members of a Hindu Joint Family. They had land Survey Nos.71E, 31 and 126 at village Killari as joint family property. Father of the plaintiff had bad vices and in order to satisfy his lusts he was alienating the joint family property. Hence, the plaintiff had instituted a Civil Suit No.74 of 1967 for partition and separate possession against his father and Minor brother, Vivekanand Birajdar. In that suit the plaintiff's father compromised with the plaintiff and plaintiff has received half share from western side in the lands whereas his brother Vivekanand Birajdar received remaining half share from eastern side in the lands. The plaintiff's father was given net amount in lieu of his share in the land. Since the date of compromise till the 1975-76, the plaintiff and his brother Vivekanand Birajdar are in possession of their respective shares of land as owners. Moreover names of the plaintiff and his brother are mutated in revenue record.

4] The plaintiff's further contended that he lives out of village Killari for service. Defendant took

disadvantage of absence of the plaintiff from village Killari and took illegal possession on 2 Acres 2 Gunthas land of plaintiff in the year 1975-76 and since he is taking benefit of the land and has deprived the plaintiff from fruits of the land. The plaintiff claimed mesne profit.

5] The defendant filed his written statement at Exhibit 13 and challenged the entire contentions of the plaintiff. The defendant challenged ownership as well as possession of the plaintiff on suit survey no.126 including suit land. The defendant contended that the plaintiff is neither owner of suit land nor he is in possession of the suit. Compromise and decree on the basis of the compromise in Regular Civil Suit No.74 of 1967 is collusive and obtained conclusively by the plaintiff to defraud the defendant. The defendant was not party in that suit hence decree passed in the suit is not binding on the defendant.

6] The defendant contended that he has purchased the suit land for Rs.8,000/- from father of the plaintiff. The defendant made enquiry about ownership of suit land prior

to purchase. He found plaintiff's father Sugriv Birajdar was owner and possessor of the suit land, hence, he has purchased it from Sugriv Birajdar. The plaintiff has got executed a registered sale deed of suit land from father of the plaintiff. Since the date of sale deed till date the defendant is in possession of the suit land as owner. The defendant had published a notice in daily news paper 'Sanchar' about contract of purchase of suit land from Sugriv Birajdar. The plaintiff had not raised any objection to the contract. He is bona fide purchaser of suit land for value without notice. The plaintiff's father has sold the suit land to the defendant for legal necessity. The defendant has expended Rs.12,000/- for suit land by installing pipeline through suit land for irrigation.

7] The trial Court formulated the following issues along with findings on it :

Sr.No.	Issues	Findings
1.	Does plaintiff prove his title on suit property on the basis of decree in Regular Civil Suit No.74 of 1967 ?	No.
1A.	Does Defendant prove that decree passed in Regular Civil Suit No. 74	Yes

	of 1967 is obtained fraudulently by the plaintiff ?	
2.	Does Defendant prove his title on suit land	Yes
3.	Whether Decree in Regular Civil Suit No.74 of 1967 is binding on the Defendant.	No
4.	Whether Defendant is a bona fide purchaser for value without notice	Yes
5.	Is Plaintiff entitled to possession of the suit land.	No
6.	What order ?	As per final order
7.	Is Plaintiff entitled to recover any amount towards past mesne profit?	No
8.	What are future mesne profits if any	Nil

8] The trial Court on consideration of the material dismissed the suit filed by the plaintiff. The trial Court held that the plaintiff is not able to prove his title on the suit property on the basis of decree in Regular Civil Suit No.74 of 1967 and defendant proved that decree passed in Regular Civil Suit No.74 of 1967 is obtained fraudulently by the plaintiff. The trial Court further held that the defendant has proved his title over the suit property. The trial Court also held that the defendant had no knowledge about the partition and compromise decree between the plaintiff and his father. In normal course a purchaser of agricultural land

will see revenue record such as mutation register and record of right in order to ascertain if a particular vendor is real owner of the land. The purchaser will also see the registers maintained by Government under provisions of Indian Registration Act. In the present case, revenue record as well as registers maintained by Government under the Indian Registration Act do not disclose that the plaintiff has title on the suit land. It means that the defendant has no notice about prior decree of partition of the plaintiff in respect of the suit land. Moreover, the plaintiff has published a notice in daily news paper sanchar at Exh.39. The plaintiff has not raised any objection to contract of purchaser of suit land. In ordinary course, the defendant has adopted all means to ascertain previous contract in respect of the suit land. The defendant has purchased suit land for Rs.8,000/- from father of the plaintiff. From this it is clear that the defendant is *bona fide* purchaser of suit land for value without notice of previous partition decree. Therefore, the suit filed by the plaintiff is dismissed by order dated 7th December, 1983.

9] The plaintiff, thereafter, filed Regular Civil Appeal before the Appellate Court. The Appellate Court formulated the points for determination along with its findings on it :

Sr.No.	Points	Findings
1.	Does the Respondent prove that he has acquired a perfect title over the suit land ?	No
2.	What order ?	Appeal is allowed.

10] The appellate court on consideration of material held that the compromise was of the year 1967 and compromise decree was passed on 5th September, 1967. On 2nd June, 1975 the suit land is purchased by the respondent-defendant. Thus, the Appellate Court held that the father of the appellant was not competent to sell the suit land. The Appellate Court held that under the Hindu law, the partition is complete once the shares are demarcated. The Appellate Court also held that merely because family continued to stay together and utilized the land, it cannot be said that

the compromise decree was not acted upon. The revenue entries continued to be in the name of the father of the respondent even till the year 1975. But this alone circumstance is not sufficient to draw irresistible conclusion that the compromise decree was not acted upon and that it has no force in law.

11] Admittedly, the shares of plaintiff, his father and real brother Vivek are determined in compromise decree and the suit land was allotted to the share of the plaintiff. The Appellate Court held that decree is not collusive one. It was further held that father of the appellant was not entitled to sell the property. As regards the contention of the appellant that he is *bona fide* purchase of the land, the Appellate Court held that the plea of bona fide purchaser for valuable consideration without notice is also not available to the defendant for the simple reason that the vendor himself i.e. Sugreev has no title after partition to dispose of the suit land in favour of the respondent and the respondent has not sent a notice to the sons of the Sugreev

particularly when at least the plaintiff was major on that day. The defendant and Sugreev reside in the same village and therefore it will not be proper to say that he was not knowing the family of Sugreev and there was no signature obtained from the plaintiff on the instrument of transfer and thus any transfer without title becomes ineffective in the eyes of law and defendant cannot get any title over the suit land only because Sugreev executed a sale deed of the suit land in his favour and his possession over the suit land therefore becomes illegal. The Appellate Court thus decreed the suit.

12] It is the contention of the appellant – defendant that the compromise decree arrived at between the parties is fraudulent. The learned counsel for the appellant – defendant for this purpose has submitted that the father of the respondent was given cash amount in lieu of his share in the joint family property. The appellant – defendant had brought on record evidence that the plaintiff and his family were dealing with the properties as joint family property,

which can be seen from the following evidence :

A] That the respondent – plaintiff, his father and brother had jointly executed two sale deeds i.e. Exhibit 30 and 31 dated 23.11.1970 in respect of land survey No.71C in which it is stated that the property is ancestral property and further that the father is exclusive owner and that in the two sale deeds, there is no whisper of the said compromise decree passed in RCS no.74/1967.

B] The mutation entry No.1204 i.e. Exhibit 42 is sanctioned after the death of respondent / plaintiff's father in 1977 recording properties in the name of legal heirs i.e. respondent / plaintiff, his brother, mother and daughter and the brother of respondent is shown as Karta of the family.

C] Even after the said compromise decree revenue entries are not changed and remained in the name of father of respondent till his death and mutation entry No.1204 at Exh.42 was sanctioned on 21.11.1978 showing respondent, his brother, mother and sister as legal heirs.

D] The respondent in his cross examination had stated that his mother had waived her share, which is without pleading and in fact had not even led any evidence to show that mother had waived her share during the said compromise decree in RCS No.74/67 nor it is mentioned in the said compromise decree.

13] Based upon the above four facts, the learned counsel for the appellant-defendant submitted that the Appellate Court erred in holding that the said compromise decree is not a collusive one to deceive the subsequent purchaser. The learned counsel for the appellant – defendant submits that the said compromise decree was not acted upon till filing of the present suit for 12 years nor there is whisper of it even in the sale deeds executed in 1970 by the plaintiff, his father and brother in respect of other lands i.e. at Exh.30 and 31, in which it is stated that the father is exclusive owner and it is their ancestral property moreover the revenue entries were also not carried out as per the said compromise decree and thus decree

obtained was collusive to deceive the purchaser.

14] The learned counsel for the appellant submits that without any plea, plaintiff has stated in his evidence that in view of the said compromise, the plaintiff and his brother had paid Rs.10,000/- in lieu of his share. In the year 1967, when the suit was compromised, the plaintiff was 17 years and that he was taking education from 1966 to 1972 at Solapur, hence it is highly impossible for the plaintiff and his brother to pay Rs.10,000/- which is a huge amount in the year 1967. That the mother and daughter are not party to the said compromise decree of 1967 and for the first time the respondent in his examination in chief had stated that his mother had waived her share but had not led any evidence to that effect nor it is stated in the said compromise decree.

15] The learned counsel for the appellant thus contended that the compromise decree passed in Regular Civil Suit No.74 of 1967 is not valid in the eyes of law for the reason that mother and daughter are not made party to

the suit. The respondent plaintiff is shown guardian of his minor brother in the said compromise decree, which is against the law as only father and after him, mother is guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956 and Section 12 of the said Act bars to appoint guardian for minor's undivided interest in joint family property. Thus, the decree, which is obtained, is *void ab initio* and need not be challenged.

16] *Per contra*, the learned counsel for the respondent – plaintiff submits that the respondent continued to be in possession of the suit property. That the joint family property was partitioned under the decree of the Court and the respondent and his brother have been in lawful possession of their respective share of the joint family property. Though the names of the respondent and his brother were not entered in revenue record of the properties allotted to their respective share, it does not lead to conclusion that the compromise decree was not acted upon and that it has no force in law. The learned counsel for

the respondent – plaintiff submits that partition, according to Hindu law, is numerical division of the property. It is nothing but the shares of coparceners in the joint family property and actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise and in the present case under the compromise decree, the partition is complete. The learned counsel for the respondent – plaintiff has relied upon the judgment in the case of **Kalyani [Dead] by L.Rs. V. Narayanan and others** reported in **AIR 1980 SC 1173**.

17] The learned counsel for the respondent – plaintiff further submits that the appellant is stranger to the decree of compromise and he has no right to challenge the decree on the ground of fraud and / or collusion.

18] Having considered the rival submissions, it is to be noticed that under the Hindu Law, the Hon'ble Supreme Court in the case of **Kalyani [Dead] by L.Rs. V. Narayanan and others** reported in **AIR 1980 SC 1173** at para 10, 12

and 18 has held as under :

10. The next stage in the unfolding of the case is whether Ext. P-1 is effective as a partition. Partition is a word of technical import in Hindu Law. Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact on devolution of share of such member. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property [see Appovier v. Rama Subba Aiyar, (1886) 11 Moo Ind App 76 (PC) quoted with approval in Smt. Krishnabai Ganpatrao v. Appasaheb Tuljaramarao (1979) 4 SCC 60 at p.68 : (AIR 1979 SC 1880). A disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in

right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right (see Girja Bai v. Sadashiv) 43 Ind App 151 : (AIR 1916 PC 104). A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense.

12. Mr.Krishnamoorthy Iyer urged that even though undoubtedly a Hindu father joint with his sons and governed by Mitakshara law has the power to partition the joint family property, this power enables him to partition the property by metes and bounds but he has no power merely to disrupt the joint family status unaccompanied by division of property by metes and bounds. The limited question that needs answer in this case is whether a Hindu father joint with his sons governed by Mitakashara law has the power to disrupt the joint family status being a first step in the stage of dividing the property by metes and bounds. The wider question whether a coparcener of a coparcenary governed by Mitakshara law brings about a disruption of joint family status by definite and unequivocal indication of his intention to separate himself from the family would constitute disruption of status qua the non-separating members need not be examined. A Hindu father joint with his sons and governed by Mitakashara law in contradistinction to other manager of a Hindu undivided family or an ordinary coparcener enjoys the larger power to impose a partition on his sons with himself as

well as amongst his sons inter se without their consent and this larger power to divide the property by metes and bounds and to allocate the shares to each of his sons and to himself would certainly comprehend within its sweep the initial step. viz., to disrupt the joint family status which must either precede or be simultaneously taken with partition of property by metes and bounds. This view taken in Kandasami v. Doraisami Ayyar, (1880) ILR 2 Mad 317 does not appear to have been departed from. Further, the text from Mayne's book extracted in the preceding paragraph shows that the weight of authority is against the proposition canvassed for by Mr. Iyer. It does, therefore, appear that a Hindu father governed by Mitakshara law has power to partition the joint family property belonging to the joint family consisting of himself and his sons and that this power comprehends the power to disrupt joint family status.

18. One thing is crystal clear that Ext. P-1 is not a deed of partition in the sense it does not purport to divide the property amongst various coparceners by metes and bounds. However, in Hindu law qua joint family property the word 'partition' is understood in a special sense. If severance of joint status is brought about by a deed, a writing or an unequivocal declaration of intention to bring about such disruption, qua the joint family, it constitutes partition. (see *Raghavamma v. Chenchamma*. AIR 1964 SC 136). To constitute a partition all that is necessary is a definite and unequivocal

indication of intention by a member of a joint family to separate himself from the family. What form such intimation, indication or representation of such interest should take would depend upon the circumstances of each case. A further requirement is that this unequivocal indication of intention to separate must be to the knowledge of the persons affected by such declaration. A review of the decisions shows that this intention to separate may be manifested in diverse ways. It may be by notice or by filing a suit. Undoubtedly, indication or intimation must be to members of the joint family likely to be affected by such a declaration.

19] Thus, in the instant case, the partition had taken place and the suit was filed for partition. In terms of decree of partition, partition was effected and that father of the plaintiff had no authority to sell the property of the plaintiff once partition had taken place and shares in land were allotted to the plaintiff and his brother. If there was improper allocation of shares under the partition, it was available to the members of the joint family to challenge the same on the ground of fraud and misrepresentation etc. However, stranger to a partition between joint family members cannot challenge partition between the family

members. Once the intention of the joint family to separate themselves is made, under the Hindu law, the partition is effected and the karta of the family cannot sell the property on behalf of all members of the joint property thereafter. In the instant case, suit for partition was filed and compromised and the shares of the coparceners were determined and the plaintiff received the suit land while his brother received the land from eastern side and thus the demarcation is complete and the father in lieu of the land received monetary compensation. The land which was sold to the appellant by the father of the plaintiff, was received by the plaintiff under the partition.

20] In the Mulla's Hindu Law, 22nd Edition, Article 321, partition is described as under :

V. PARTITION HOW EFFECTED

321. What is partition. - According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, or that a particular member, has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property; in other

*words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary." Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before, however, whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint and immediately the shares are defined, and henceforth, the parties hold the property as tenants-in-common." The family may still continue to possess property jointly despite the separation, unless partition takes place by metes and bounds. In *Kalyani v. Narayanan*, the Supreme Court reviewed the case law on the subject and reiterated the principle that:*

...a disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right although not immediately followed by a de facto actual division of the subject-matter. This may at any time be claimed by virtue of the separate right. From the time of such disruption, each member holds his aliquot share as tenant-in-common irrespective of whether there is actual division of the properties by metes and bounds. Such would be the position, unless there is proof or reunion as understood in law. It is established law that actual physical division or partition by metes and bounds is not an essential ingredient for the purpose of effecting severance of status. That is really a

formality in the process of partition." When there is a severance of the joint family from a particular date, but the properties are not partitioned, the members of the family become tenants in common and would be liable to account for the incomings received by them till the time that a final partition takes place and the properties are in the respective possession of such members. Such coparceners are tenants in the common but cannot be characterized as trustees.

Placing reliance on the decision of the Supreme Court in Kalyani v. Narayan, the Orissa High Court held that a suit for partition could not be dismissed on the ground of prior partition, the suit was decreed." A prior partition has, however, to be proved. When a plea of partition is raised, it has to be substantiated, as under law, there is a presumption as to jointness. Even separate possession by co-sharers may not, by itself, lead to a presumption of partition. When there was a prior partition, but the parties continued in a joint state, despite the same, since there was no proof of reunion, a partition could not be decreed. Where, a partition is either proved or admitted in the sense that all property was partitioned and divided, and the same was affirmed by the High Court, the presumption would be that there was a complete partition. In such circumstances, a person claiming that some property had been excluded while the prior partition took place has to prove the same. Where, at a partition between a Hindu, his two sons, and his two wives, one-fifth was allotted to each of the sons and three-fifths to the father and his wives, it was held that the father and his wives became tenants-in-

common, but though they had not divided their shares by metes and bounds inter se, there could be no reunion between them, and the father therefore had no right to sell the properties of the wives and any such alienation by him was not binding on them.

21] Thus, under the Hindu Law, the partition is complete. Once shares are agreed between the coparceners or otherwise, after the shares are so defined, the parties may divide the property by metes and bounds or they may continue to live together and enjoy the property in common as before, however, whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint and immediately the shares are defined, and thereafter the parties hold the property as tenants in common. In the instant case, the partition has taken place by virtue of the compromise decree and the father of the plaintiff had no right to sell the suit property after partition is effected.

22] The partition has taken place in the year 1967 and the sale of the suit land is in the year 1975. It cannot be

presumed that the partition made 8 years prior to sale of the suit land, is merely for cheating the appellants – defendants.

23] In view of the same, the above question of law Nos.H-3 and L-4 raised at para 2 is answered against the appellant – defendant herein. I am of the view that compromise decree is not fraudulent document as alleged by the defendant. I am of the view that the partition is effected through compromise decree and that intention of the parties are clear to separate themselves from the joint status and thus the compromise decree cannot be termed as fraudulent document and compromise is acted upon once decree is passed. The partition is effected, although there is no subsequent mutation entry or that parties continued to live together would not make any difference to the partition between the joint family property. Hence the father of the plaintiff was not entitled to sell the suit property to the defendant. The partition is also not fraudulent to cheat the purchaser.

24] Coming to the next questions of law Nos.1 and 2 as regards benefits of Section 41 of the Transfer of Property Act. Section 41 of the Transfer of Property Act reads as under :

41. Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be violable on the ground that the transferor was not authorised to make it:

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

25] The learned counsel for the appellants has relied upon the judgment in the case of **Bhagwan Dayal [since deceased] V. Mst. Reoti Devi [deceased]** reported in **AIR 1962 SC 287** and submits that the appellant has purchased the property on *bona fide* belief that the appellant's father is a karta of the property and he is entitled to sell the property and as such he has purchased

the property for valuable consideration and that the sale deed ought to have protected.

26] The Hon'ble Supreme Court in the case of **Suraj Rattan thirani and others v. Azamabad Tea co. Ltd. & others** reported in **AIR 1965 SC 295** has held at para 16 as under:

16. In order that S. 41 of the Transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether Ismail had the power to make a transfer of the full 16 as. interet. Now, the facts however were that except the property being entered in the revenue records in Ismail's name, and that the management of the property was left by the co-sharers with Ismail, there is not an iota of evidence to establish that Ismail was put forward by them as the ostensible owner of the property. It is manifest that the conduct of co-sharers in permitting one of them to manage the common property does not by itself raise any estoppel precluding them from asserting their rights. The learned Judges have also pointed out that even the least enquiry by the mortgagee would have disclosed, that Ismail was not the full owner and this finding was not seriously challenged before us. In this view it is unnecessary for us to consider the submissions

made to us by Mr. Desai that S. 41 was inapplicable to cases of sales in court auctions for the reason that what the court is capable of selling and what is sold in execution of a decree is only the right, title and interest of the judgment-debtor and nothing more. We, therefore, hold that the learned Judges of the High Court rightly held that S. 41 of the Transfer of Property Act afforded no defence to the respondents.

27] The plaintiff's father, after the partition, is not the co-owner of the suit property and that he has no consent of the plaintiff to sell the property. Thus, the benefit of Section 41 of the Transfer of Property Act is not available to the appellants in this case. The question of law raised in para 2 at B-1 and G-2 is answered against the appellant – defendant.

28] The learned counsel for the appellants during the course of argument also raised question of law as regards compliance of the Order 41 Rule 31 of the CPC and contends that the appellate Court had failed to formulate all the necessary points and render findings thereon. The

learned counsel for the appellants relied upon the judgment in the case of **K. Karuppuraj Vs. M. Ganesan** reported in [2021] 10 SCC 777 wherein it has been held at para nos.8 to 11 as under :

8. In B.V. Nagesh, this Court has observed and held that without framing points for determination and considering both facts and law; without proper discussion and assigning the reasons, the first appellate court cannot dispose of the first appeal under Section 96 CPC and that too without raising the points for determination as provided under Order 41 Rule 31 CPC. In paras 3 and 4. it is observed and held as under: (SCC pp. 530-31)

“3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

*(a) the points for determination;
(b) the decision thereon;
(c) the reasons for the decision; and
(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right

of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, SCC p. 188, para 15 and Madhukar v. Sangrams, SCC p. 758, para 5.)"

9. In Emmsons International Ltd. while considering the scope and ambit of exercise of powers under Section 96 CPC by the appellate court and after considering the decisions of this Court in Madhukar v. Sangrams; H.K.N. Swami v. Irshad Basith' and Jagannath v. Arulappa, it is held that sitting as a court of first appeal, it is the duty of the appellate court to deal with all the issues and the evidence led by the parties before recording its findings.

10. In H.Siddiqui, it is observed and held in para 21 as under: (SCC p. 247)

"21. The said provisions provide

guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide Sukhpal Singh v. Kalyan Singh : Girijanandini Devi v. Bijendra Narain Choudhary : G. Amalorpavam v. R.C.Diocese of Madurai :

Shiv Kumar Sharma v. Santosh Kumari and Gannmani Anasuya v. Parvatini Amarendra Chowdhary)"

11. Applying the law laid down by this Court in the aforesaid decisions, if the impugned judgment and order passed by the High Court is considered, in that case, there is a total non-compliance of the provisions of Order 41 Rule 31 CPC. The High Court has failed to exercise the jurisdiction vested in it as a first appellate court; the High Court has not at all re-appreciated the entire evidence on record, and not even considered the reasoning given by the learned trial court, in particular, on findings recorded by the learned trial court on the issue of willingness. Therefore, as such, the impugned judgment and order passed by the High Court is unsustainable and in normal circumstances we would have accepted the request of the learned Senior Counsel appearing on behalf of the respondent to remand the matter to the High Court for fresh consideration of appeal. However, even on other points also, the impugned judgment and order passed by the High Court is not sustainable. We refrain from remanding the matter to the High Court and we decide the appeal on merits.

In the above cited case of **K. Karuppuraj** [supra], the Hon'ble Supreme Court has held that the appellate Court has to re-appreciate the entire evidence and also consider the reasoning given by the trial Court.

29] The Hon'ble Supreme Court in the case of **G.Amalorpavam and others Vs. R.C.Diocese of Madurai and others** reported in [2006] 3 SCC 224 at para 9 has observed as under :

9. The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the

controversy between the parties and there is proper appraisal of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 CPC.

Thus, the Hon'ble Supreme Court has held that the non compliance of the provisions of the Order 41 Rule 31 of CPC may not vitiate the judgment if there is substantial compliance with it and second Appellate Court is in a position to ascertain the findings of the lower Appellate Court. Although it is desirable that the appellate authority should comply with all the requirements of Order 41 Rule 31 of CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said

requirements and that justice has not thereby suffered, that would be sufficient.

30] Coming to the facts of this case, the Appellate Court has considered the evidence on record and considered the relevant points which have arisen for adjudication. The appellate court has not merely recorded as general expression of concurrence or rejection. The appellate court has proceeded on the basis of two admitted fact that there is decree of compromise decree in the year 1967 and that there is a sale deed executed by the father of the plaintiff of the suit land in the year 1975. The appellate Court on the basis of two admitted facts proceeded as to examine the law as regards the partition and has held that the partition is complete. Once compromise decree is passed, it is not available to the third person to challenge the decree of compromise between the parties. The partition having taken place between the parties or once expression is expressed by any of one of the coparceners of the joint family to separate and there is demarcation of the property by the consent

decree. Once the appellate Court has rendered findings that the partition has taken place and the same was effected between the parties, it logically follows that the father of the plaintiff cannot sell the property, which is received by the plaintiff in his share.

31] Thus, the findings recorded by the Appellate Court is correct. There is substantial compliance of Section 41 Rule 31 of Civil Procedure Code in the matter. In view of the same, substantial question of law raised is answered against the appellants and the present Second Appeal is dismissed.

[ARUN R. PEDNEKER]
JUDGE

1] The learned counsel for the appellants seeks continuance of the interim relief granted by this Court at the time of admission of the matter. The learned counsel appearing for the respondents has not objected to the same.

2] In view of the same, the interim relief granted by this Court would stand continued for a period of Ten [10] weeks from today.

[ARUN R. PEDNEKER]
JUDGE

DDC