

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

SECOND APPEAL NO. 990 OF 2022
WITH SA/989/2022 WITH CA/17417/2022 IN SA/989/2022

Bharat Deorao Pawar,
Age : 57 years, Occ: Agriculture,
R/o. Khatkheda, Tq. Kannad,
Dist. Aurangabad.

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

Versus

1. Shantabai Ashok Pawar,
Age : 56 yrs, Occ: Household,
R/o. Tajnapur, Tq. Khultabad,
Dist. Aurangabad.
2. Savita Rahul Patil,
Age : 43 yrs, Occ: Household,
R/o. R-27/242, N-9, Pratapgadh
Nagar, CIDCO, Aurangabad.
3. Dipali Abhijeet Bhosale,
Age : 36 yrs, Occ: Household,
R/o. Satpur Colony, Nashik
Through her power of Attorney
Holder Respondent No. 1
Shantabai Ashok Pawar,
Age : 56 yrs, Occ: Household,
R/o. Tajnapur, Tq. Khultabad,
Dist. Aurangabad.

**...Respondents
(Orig. Defendants)**

Mr. M. S. Kulkarni, Advocate for the Appellants.
Mr. A. R. Syed, Advocate for Respondent No. 1.
Mr. M. H. Shaikh, for Respondent No. 2.

CORAM : R.M. JOSHI, J.

**RESERVED ON : APRIL 18, 2023
PRONOUNCED ON : APRIL 25, 2023**

COMMON JUDGMENT

1. These appeals are filed under Section 100 of

the Code of Civil Procedure against judgments and decree passed in R.C.S. No. 57/2015 dated 22.04.2019 and judgment in R.C.A. No. 155/2019 dated 21.10.2022 as well as judgment in R.C.S. No. 215/2012 dated 24.04.2019 which was confirmed in R.C.A. No. 153/2016 by judgment dated 21.10.2022. For the convenience, parties are referred by their names.

2. Bharat filed suit being R.C.S. No. 215/2012 seeking injunction against Savita, Dipali and Shantabai restraining them from interfering into his possession over the suit property being Gut No. 61 admeasuring 2H 82R. Bharat is brother-in-law of Shantabai and paternal uncle of Dipali and Savita. It is the case of the Bharat that the suit property is ancestral property of himself and his real brother deceased Ashok, who died on 18.05.1998. Shantabai is wife of Ashok and Savita and Dipali are their daughters. It is claimed by Bharat that after death of Ashok, suit property was mutated in the name of Bharat and Shantabai to the extent of their half share. It is further claimed that the entire property was in possession of the Bharat. According to him, since the Shantabai was in need of money for

maintaining her daughters and also for their marriage, she sold her share in the suit property i.e., 1H 41R land to Bharat and possession was also given at the same time. Bharat on the basis of sale deed claims that he is in possession of entire property as owner. As Shantabai and others threatened him to obstruct his possession, suit came to be filed by Bharat.

3. Shantabai filed written statement and accepted the relationship between them and also about effecting mutation entry bearing no. 1036 after death of Ashok. It is claimed that she was jointly cultivating the suit land with Bharat. It is specifically averred that till January, 2012, she was staying with Bharat and the expenses of marriage and maintenance of daughters was borne by her father. It is alleged that on the pretext of partition of the suit property, she was taken to the Sub-Registrar's office and her signature was obtained on the document. As she had trust and confident in Bharat, without knowing the contents of the same, she signed it.

4. Dipali and Savita filed suit bearing R.C.S. No. 57/2015 seeking partition of the suit property and

declaration that sale deed dated 28.06.1999 is not binding on them. It is alleged that after death of their father Ashok, Bharat in collusion with Talathi got the land entered in his name and in the name of Shantabai, their mother. It is alleged that sale deed executed by Shantabai on 28.06.1999 is illegal and bogus and the same is executed without their consent and against their interest and hence, the same is not binding on them.

5. Bharat filed written statement and raised objection about the limitation for maintainability of the suit. It is also contended that since the declaration is not sought about the sale deed being illegal, the Plaintiffs are not entitled to seek any share. It is specifically claimed that after the death of Ashok, Shantabai started staying separately with her daughters and that the suit property was mutated in name of Bharat and Shantabai equally. It is further claimed by Bharat that for the purpose of maintenance and marriage of Dipali and Savita, Shantabai was in need of money and by executing the sale deed in question, her share in the suit property was sold to

him and since then he is exclusive owner thereof. Defendant No. 2 – Shantabai filed written statement with the allegation that Bharat has obtained sale deed by playing fraud upon her and that she was taken to the Sub-Registrar's office under the pretext of execution of the partition deed.

6. Learned Trial Court by passing common judgment dismissed R.C.S. No. 215/2012 and decreed R.C.S. No. 57/2015 and held that Bharat is entitled for half share in the suit property whereas Shantabai, Dipali and Savita are entitled to receive 1/6 share each from half share receivable by deceased Ashok. This judgment was taken exception by filing R.C.A. No. 153/2019 and 155/2019. The First Appellate Court by passing judgment dated 21.10.2022 dismissed both Appeals with costs and confirmed the judgment and decree passed by the Trial Court in R.C.S. No. 215/2012, however, R.C.S. No. 57/2015 is modified extent of their share by treating Plaintiffs and Defendants as co-parceners.

7. Learned Counsel for Bharat submitted that Trial Court as well as First Appellate Court committed error in dismissing the suit filed by Bharat and

decreeing the suit of Savita and Dipali and the said judgment is wrongly confirmed by the First Appellate Court. It is submitted that both the Courts below have committed serious error in not considering the fact that there is no declaration sought by the Shantabai or her daughters to the extent that the sale deed executed by her in favour of Plaintiff in respect of half portion of the suit property is illegal and bad in law. According to him, even if the trial Court as well as First Appellate Court has recorded the finding, there is no decree passed to the effect that the sale deed executed in favour of Bharat is illegal and not binding on the shares of Savita and Dipali and therefore, question of giving share to the Plaintiffs and Shantabai does not arise. He further argued that in fact, the First Appellate Court has not agreed to the findings recorded by the Trial Court with regard to the effect that sale deed executed without legal necessity but has finally maintained the judgment of the trial Court. Without prejudice to these submissions, it is stated that in any event at least share of Shantabai in suit land ought to have been given to the share of Bharat on the basis of sale deed in question. In support of his

submissions, he placed reliance on the judgment of Hon'ble Apex Court in the case of Bachhaj Nahar Vs. Nilima Mandal and Ors, MANU/SC/8199/2008.

8. At the outset, learned Counsels for Shantabai, Dipali and Savita fairly conceded the legal position that Bharat and Ashok were entitled to the equal share in suit property and that Plaintiffs and Shantabai are entitled to claim share of deceased Ashok. They don't dispute about the fact that Appellate Court has erred in determining share of parties a fresh and that shows decided by Trial Court are correct. They further argued that there is no error committed by either Court in passing judgment and decrees. According to them, findings recorded by the Courts below are sufficient to indicate that issue about the binding effect of the sale deed on the Plaintiff is clearly decided. According to them, no separate declaration was required to be sought by them and filing of the suit for partition is sufficient. It is argued that Shantabai specifically averred in the written statement that the sale deed was obtained from her by playing fraud under the pretext of executing partition and

share of Shantabai is rightly excluded by both Court from allotment of it to Bharat. To support their contentions, reliance is placed on following judgments: Commissioner of Income Tax Vs. Seth Govindram, (1965) 3 SCR 488, Shreya Vidyarthi Vs. Ashok Vidyarthi Ors, (2015) 16 SCC 46, Badami (deceased) by her LR Vs. Bhali, (2012) 11 SCC 574, S.P. Chengalvarya Naidu (Dead) by Lrs Vs. Jagannath (dead) by Lrs and Others, (1994) 1 SCC 1, Chandrabhan (deceased) through Lrs and Others Vs. Saraswati and Others, 2022 SCC OnLine SC 1273, Hero Vinoth (Minor) Vs. Seshammal, (2006) 5 SCC 545 & Jayendra Sahadeo Abnave Vs. Sunita Vilas Mahadik and Ors, MANU/MH/2911/2022.

9. There is no dispute about the fact that the suit property is an ancestral property of Bharat and his brother deceased Ashok and that it was not partitioned previously. It is for the purpose of record, the names of Bharat and Shantabai, wife of deceased Ashok were mutated in the revenue record. Undisputedly, Savita and Dipali were minors at the relevant time. Shantabai not being co-parcenor was not "Karta" of the family and hence, even for the legal

necessity, she could not have sold joint family coparcenary property. Perusal of the evidence on record shows that though Bharat has claimed that the land was sold by the Shantabai to him for the necessity of maintenance of the daughters and for their marriage, in the cross-examination it was admitted by him that the daughters of Ashok were maintained by father of Shantabai. Thus, even otherwise, his case that the sale was effected for any legal necessity is not proved.

10. As regard the share of minor daughters of Shantabai. Section 8 of the Hindu Minority and Guardianship Act (for short '**Guardianship Act**') would apply, which reads thus:

8. Powers of natural guardian.—

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

(a) mortgage or charge, or transfer by

sale, gift, exchange or otherwise, any part of the immovable property of the minor; or (b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or by any person claiming under him.

*(4) ******

*(5) ******

*(6) ******

This provision prohibits sale of the property of the minor without permission of the competent Court, by natural guardian. Undisputedly, no permission is obtained from competent Court to sell the share of minors in the suit property. Shantabai, being natural guardian of minor, was not authorized to sell the shares of minor daughters in suit property. The sale effected by her is voidable at the instance of minor. Thus, on both counts the sale deed executed by Shantabai to the extent of share of minor daughters is not binding on them. In this regard, finding is

recorded by the Trial Court and it is also held in no uncertain terms that the sale deed is illegal and not binding on the share of the Savita and Dipali.

11. Now question arises as to whether for want of declaration of operative part of agreement that it is not binding on daughters of Shantabai, sale deed would bind on them. The candid answer to this has to be in negative. Daughters of Shantabai filed suit for partition of suit property and claimed their share with specific averments that sale deed by Shantabai does not bind them. These pleadings are sufficient to show they have exercised option to treat the said sale deed as void. Undoubtedly, having regard to provision of Section 8(3) of the Guardianship Act, it is voidable at their instance. Filing of suit for partition shows that substantial prayer is made in the suit. Once suit for partition is decreed with observation that sale deed does not bind them, it is immaterial whether any specific declaration is given to that effect in the operative part of the judgment. This Court, therefore, finds no reason to accept submissions made by Counsel for Bharat in this regard. Considering material

difference in facts, judgment in case of Bcchaj Nahar (supra) has no application to case in hand.

12. As far as validity of the sale deed to the extent of share of Shantabai, there is no dispute about the fact that the Shantabai was also having share in property received by her deceased husband. She claims that the sale deed was obtained from her by playing fraud and under the pretext of executing the partition deed. It is settled law that one who alleges fraud must plead and prove the same. However, Shantabai has not entered into the witness box to substantiate the said case. An adverse inference therefore, needs to be drawn against her that since there is no substance in her contention about the fraud being played upon her by Bharat, she avoided cross-examination.

13. In spite of this, both Courts below have relied upon the facts at the time of mutation of names of Bharat and Shantabai in revenue record and held that since beginning the conduct of Bharat was doubtful. The challenge to sale deed is not based on his prior conduct but on specific allegation that under pretext of registration of document of partition sale deed is

obtained. This allegation cannot be proved by anyone else than Shantabai. Since, she failed to examine herself and state this fact on oath, there is absolutely no evidence on record to hold that sale deed (Exh. 69) is obtained under pretext of execution of partition deed and Bharat played fraud upon her. In such circumstances, though the sale deed is not binding on daughters of Shantabai however, there is no reason or justification to hold that the said sale deed dated 28.06.1999 is also not binding on Shantabai to the extent of her share in the suit property.

14. In the circumstances, following substantial question of law arises in this appeal i.e., "Whether both Courts have committed error in considering pleadings and evidence on record to hold that sale deed is not binding to share of Shantabai", which deserves to be answered in affirmative, in view of discussion made herein above. Finding recorded by trial Court as well as First Appellate Court to this extent is without proper appreciation of pleadings of parties, evidence on record and law related on the issue and hence, the same deserves interference.

15. In the result, sale deed (Exh. 69) is held to be binding on Shantabai to the extent of her share and the said share must be given to Bharat. As far as R.C.S. No. 215/2012 is concerned, for want of any perversity being shown in the impugned judgment, no interference is called therein. Hence, order:

O R D E R

- 1) R.C.A. No. 153 of 2019 is dismissed.
- 2) R.C.A. No. 155 of 2019 is partly allowed.
- 3) Decree in R.C.S. No. 57 of 2015 is modified in following terms:
 - (i) Bharat to receive 2/3rd share in suit property.
 - (ii) Plaintiff Dipali and Savita to get 1/6th share each from share of deceased Ashok in suit property.
 - (iii) Rest of the decree to remain unchanged.
- 4) Pending civil application, if any, stands disposed of.

(R.M. JOSHI, J.)