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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 840 OF 2019

1. Namdeo Shivram Redij,
Age : 65 Years, Occu. : Agri. & Business,
2. Sugam Namdeo Redij,
Age : 38 Years, Occu. : Service,
3. Kishor Namdeo Redij,
Age : 36 Years, Occu. : Business,
4. Santosh Namdeo Redij,
Age : 34 Years, Occu. : Business,

All R/o. : Amir House, Room No.19,
N. M. Joshi Marg, Maharashtra
High School Maidan, Mumbai – 13.

... Appellants

Versus

1. Vishwanath Shivram Redij,
Since deceased through his
Legal Representatives :
 - A. Sudha Vishwanath Redij (Abated)
Age : 71 Years, Occu. : Household,
 - B. Ashok Vishwanath Redij,
Age : 51 Years, Occ. : Agri. & Business,
 - C. Anil Vishwanath Redij,
Age : 41 Years,
 - D. Mahesh Vishwanath Redij,
Age : 32 Years, Occu. : Service,
Nos. A to D R/o. : 933 A,
Panchakhata Chawl, Opp. Khatav
Mill, B.J. Marg, Mumbai – 27.

- E. Mangala Ramakant Bashte,
Age : 46 Years, Occu. : Household,
R/o. : Saikripa Second Floor,
Jacob Circle, Mumbai – 11.
- F. Anita Pradip Gandhi,
Age : 38 Years, Occu. : Household,
R/o. : Bajarwadi Pachal,
Taluka : Rajapur, District : Ratnagiri.
2. Ashok Vishwanath Redij,
Age : 42 Years, Occu. : Agri. & Business,
3. Mahesh Vishwanath Redij,
Age : 27 Years, Occu. : Apprentice,
R/o. : Panchakhata Chawl, Opp. Khatav
Mill, B.J.P. Marg, (Bidi Shop)
Mumbai – 27.
4. Anil Vishwanath Redij,
Age : 37 Years, Occu. : Business,
R/o. : Panchakhata Chawl,
B.J.P. Marg, Mumbai – 27.
5. Leela Shankar Redij,
Age : 67 Years, Occu. : Household,
6. Vilas Shankar Redij,
Age : 48 Years, Occu. : Service,
7. Bhalchandra Shankar Redij,
Age : 44 Years, Occu. : Business,
Nos. 4 to 7, R/o. : Kashmiri Building,
Room No. 19, Majas Road, Jogeshwari,
Mumbai – 400 060.
8. Vijaya Subhash Pathare,
Age : 40 Years, Occu. : Household,
R/o. : C/o. Suibhash General Stores,
Near Vitthal Mandir, Malkapur,
Taluka : Shahuwadi, District : Kolhapur.

9. Shalini Eknath Redij (Abated),
Age : 55 Years, Occu. : Household,
10. Sanjay Eknath Redij,
Age : 32 Years, Occu. : Business,
11. Sunil Eknath Redij,
Age : 29 Years, Occu. : Business,
12. Kalpana Eknath Redij,
Age : 36 Years, Occu. : Household – Service,
Nos. 9 to 12 R/o. : 7A, United H.S.C.
Bhamasha Apartment Ramnagar,
Chincholi Bandar Road, Malad (West),
Mumbai – 400 064.
13. Suresh Shivram Redij,
Age : 63 Years, Occu. : Business,
14. Anand Suresh Redij,
Age : 22 Years, Occu. : Agri. & Business,
Both R/o. : 225 D, Rangari Building,
Room No. 12, Maharashtra High School
Maidan, N.M. Joshi Marg, Mumbai – 13. ... Respondents

Mr.Atul Damle – Senior Advocate i/b. Mr.S.S.Kanetkar, Advocates for Appellants.

Mr.Sanjiv Sawant a/w Mr.Abhishek Matkar a/w Mr.Malhar Bageshwar i/b. Mr.Abhishek Deshmukh, Advocates for Respondent No.1(B) to 1(F).

CORAM : S. M. MODAK, J.

RESERVED ON : 18th NOVEMBER, 2022

PRONOUNCED ON : 13th JANUARY, 2023

JUDGMENT :-

1. Heard learned Senior Advocate Shri.Atul Damle instructed by learned Advocate Shri.S.S.Kanetkar for the Appellants and learned

Advocate Shri.Sanjiv Sawant a/w learned Advocate Shri.Abhishek Matkar for Respondent Nos. 1(B) to 1(F).

2. The substantial questions of law raised in this Appeal are ;

Whether the Appellants have discharged the burden of proving the suit properties as joint family properties and ; whether for not giving evidence by these Appellants, debars them from challenging the case put up by the Plaintiffs.

3. There are concurrent findings that suit properties are joint family properties and shares have been declared by the Courts below. So additionally, this Court has to see ; whether those concurrent findings can be upset by this Court.

4. According to learned Senior Advocate Shri.Damale, even though the Appellants have not given evidence, it will not relieve the Plaintiffs from discharging their burden. Whereas, according to learned Advocate Shri.Sawant, the scope of Second Appeal is limited when there are concurrent findings. He relied upon the following judgments :-

(i) *C. Coddanarayana Reddy (Dead) by LRS. & Ors. V/s. C. Jayarama Reddy (Dead) by LRS. & Ors. [Civil Appeal No. 2165 of 2009 : 14th February, 2020 : Supreme Court of India]*

(ii) *Kirpa Ram (Deceased) Through Legal Representatives and Ors. V/s. Surendra Deo Gaur & Ors. [Civil Appeal No. 8971 of 2010 : 16th November, 2020 : Supreme Court of India]*

I have perused them very minutely.

5. In case of ***Kirpa Ram***, the High Court dismissed the Second Appeal without framing the substantial questions of law. (Para No.14). The Hon'ble Supreme Court has discussed the scope of Section 100 of the Code of Civil Procedure, 1908 (“CPC”). The relevant observations are as follows :-

“Therefore, if the substantial question of law framed by the appellants are found to be arising in the case only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.” (Para No.23).

Whereas, in case of ***C. Coddanarayana Reddy***, the Hon'ble Supreme Court observed that :-

“29. The learned High Court has not satisfied the tests laid down in the aforesaid judgements. Both the Courts, the trial Court and the learned First Appellate Court, have examined the School Leaving Certificate and returned a finding that the date of birth does not stand proved from such certificate. May be the High Court could have taken a different view acting as a trial court but once, two courts have returned a finding which is not based upon any misreading of material documents, nor is recorded against any provision of law, and neither can it be said that any

judge acting judicially and reasonably could not have reached such a finding, then, the High Court cannot be said to have erred. Resultantly, no substantial question of law arose for consideration before the High Court.”

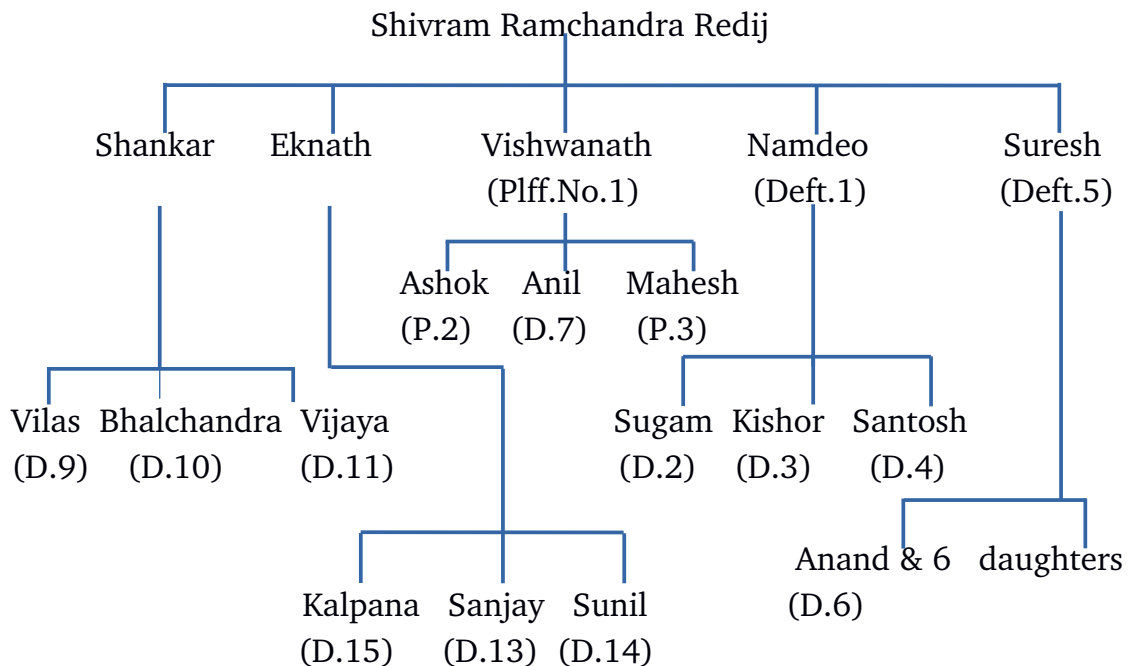
6. So, the law is settled. It is not always mandatory to formulate the substantial question of law. They are necessary to be formulated only when the Court is satisfied. Otherwise, this Court is entitled to dismiss the Appeal at pre-admission stage. If the judgment of the First Appellate Court is to be reversed, then it is better to formulate the substantial questions of law first. But, if the judgment of the First Appellate Court is to be confirmed on the background of concurrent findings, the Appeal can be dismissed without formulating the substantial questions of law. According to him, it is not a case of wrong appreciation of evidence or appreciation without considering a particular piece of evidence and hence, this Appeal needs to be dismissed at pre-admission stage, even without formulating substantial question of law. With this, the findings recorded by the First Appellate Court need to be looked into.

The background needs to be stated

7. The common ancestor is one Shivram Ramchandra Redij. He was carrying on the business of selling pan and other allied products. He used to carry on the business at village Pachal, Taluka : Rajapur, District : Ratnagiri and in Mumbai. He owned properties at native place and tenanted properties in Mumbai. Two of his sons by name Eknath and Shankar were separated in the year 1964. There was a deed of partition executed on 23rd June, 1964 at Exhibit-69-old Exhibit-102. Though it was

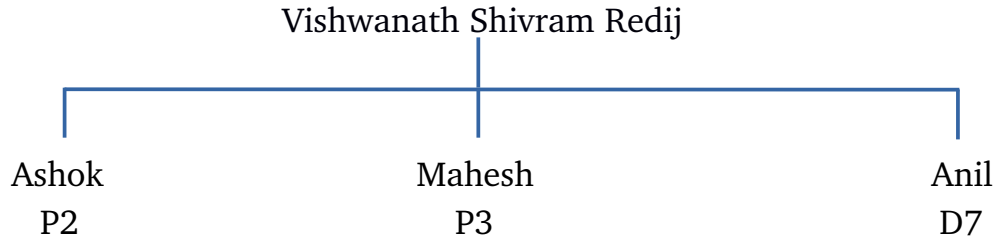
tendered in evidence by the Plaintiffs and though it was commented upon by both the Courts below, its copy is not filed along with the compilation. Even after the matter was closed initially, after rehearing the matter on this aspect, none of them have produced it.

8. So, the Plaintiffs case was continuing the business by other three sons of common ancestor Shivram after 1964. The family tree is reproduced :-



9. After the mutual understanding of the year 1964, the joint family property was managed under the leadership of Namdeo – Defendant No.1. The properties at village – Pachal are described in Schedule – ‘A’. Whereas, the shops and residential premises both situated at various places in Mumbai are described in Schedules – ‘B’ and ‘C’ respectively. The Plaintiffs No. 2, 3 and Defendant No.7 are the sons of the Plaintiff

No.1 – Vishwanath. It is as follows :-



10. Dispute arose in between Vishwanath, his sons on one hand with heirs of Namdeo (D1 and his sons D2, D3, D4) and Santosh – D4 (and his sons D5 and D6) on the other hand on account of Schedule – ‘B’ and ‘C’ properties. That is how the partition suit was filed. Copies of written statements filed by three sets of Defendants are made available. They are as follows :-

(a) two brothers Namdev – Defendant No.1 (and their sons Defendant Nos. 2 to 4) and Suresh – Defendant No.5

and

(b) heirs of deceased separated brother Shankar (Defendant No.8 – 10)

(c) heirs of deceased separated brother Eknath (Defendant Nos.12 to 15).

Written statement

Contentions raised by Defendant Nos. 1 to 5 are as follows

Partition is admitted, but it is denied that the properties described in Schedule ‘B’ and ‘C’ are joint family properties. All properties are tenanted properties and are taken on rent by respective members in their individual capacity.

Contentions raised by Defendant Nos. 8 – 10 in their written statement
are as follows

There was division of business of Mumbai effected in the year 1964. These Defendants claimed 1/5th share in the ancestral property at village Pachal.

Contentions raised by Defendants No.12 to 15 in their written statement

The partition of 1964 was denied. All five sons of Shivram are having 1/5th share each in properties at Pachal and Mumbai. When alleged partition took place, common ancestor Shivram was alive.

Evidence

11. On the set of above pleadings, Plaintiffs examined in all 7 witnesses. Predominantly, they are on the point of Shop Act license of various shops situated in Mumbai. Whereas, Defendants have not entered into witness box. Defendants No.1 to 6 only examined one witness from the bank. It is on the point of advancing of loan for starting business / furniture of Ashirwad Medical Stores i.e. B – 4.

Judgment

12. The trial Court decreed the suit and declared the shares in 3 scheduled properties as below :-

Schedule 'A' properties at village Pachal

<i>Plaintiff & Defendant No.7</i>	<i>1/5th share together</i>
<i>Defendants No.1 to 4</i>	<i>1/5th share together</i>
<i>Defendants No.5 & 6</i>	<i>1/5th share together</i>
<i>Defendants No.8 to 11</i>	<i>together 1/5th share</i>
<i>Defendants No.12 to 15</i>	<i>together 1/5th share</i>

Schedule 'B' and 'C' properties in Mumbai

<i>Plaintiffs & Defendant No.7</i>	<i>together 1/3rd share</i>
<i>Defendants No.1 to 4</i>	<i>together 1/3rd share</i>
<i>Defendants No.5 & 6</i>	<i>together 1/3rd share</i>

The following are the only exclusions

- (a) *Properties at Sr.Nos.3, 8 and 13 from Schedule 'B' are excluded as they are not in existence*
- (b) *Defendants No.8 to 15 are excluded from Schedule 'B' and 'C' properties.*

Reasonings

13. Schedule 'B' and 'C' properties were held as joint family properties with few exceptions. Defendants No.1 to 5 could not prove that they are their self acquired properties. (Para No.17). Trial Court also dealt with the objection of Defendants No.12 to 15 about deed of partition. It turned down all objections about deed of partition. Trial Court read its content. That is why Defendants No.8 to 15 were excluded from shares in Schedule 'B' and 'C' properties. It gave following reasonings :-

- (a) *It was in respect of partition of business*
- (b) *Document is more than 30 years old*
- (c) *Legal heirs of Shankar – Defendants No.8 to 11 have admitted it.*
- (d) *Defendants No.12 to 15 have never challenged that document earlier.*

14. Learned Senior Counsel Shri.Damale invited my attention to the observations in para No.16 of the judgment. It is reproduced below :-

“No doubt the evidence of P.W.2 to 7 and the counter-foils or certificates produced by them on record do not lead to the conclusion that those shops are ancestral or joint but those documents are also not legally helpful to the defendants No.1 to 5 to prove that the shops at B-4 to B-13 are their self-acquired properties. There is no explanation on record by the side of defendants No.1 to 5 as to from which income these shops have been started. It is an admitted position that till 1964-65 the parties to the suit and their ancestors were joint having number of properties and therefore it can easily be held that the properties at schedule ‘B’ are from joint nucleus”.

The trial Court observed that on the basis of counterfoils, shops cannot be said to be joint properties. According to learned Senior Advocate Shri.Damale, the trial Court ought not to have held that these properties are joint family properties just because there is no explanation from the side of Defendants No.1 to 5.

Law on the point of joint family properties

15. There is always a presumption that there exists joint Hindu family.

But, this presumption does not extend to joint Hindu family possessing joint property. So, this has to be proved by adducing evidence. This law is well settled. This was reiterated in case of ***Appasaheb Peerappa Chamdgade V/s. Devendra Peerappa Chamdgade and Others [(2007) 1 Supreme Court Cases 521]*** relied upon by Respondents.

First Appeal

16. Defendants No.1 to 6 preferred First Appeal. It was dismissed on 1st June 2019. It is challenged by Defendants No.1 to 4 only. The First Appellate Court gave following reasonings :-

- (a) *except bank witness, Defendants No.1 to 5 have neither examined any witness nor entered into witness box.*
- (b) *party to suit does not lead any evidence, then adverse inference can be drawn – [AIR 1999 SC 1441 : Vidhyadhar V/s. Mankikrao and another].*
- (c) *Plaintiffs have examined seven witnesses (discussed in Para Nos.11 and 12).*
- (d) *1964 partition pertains to business.*

17. According to learned Senior Advocate Shri.Damale, the First Appellate Court committed same mistake which was committed by the trial Court. Now, the question before this Court is ; whether findings are erroneous and were arrived at by neglecting particular piece of evidence or by overlooking the provisions of law. There is no dispute about Schedule 'A' properties and according to learned Senior Advocate Shri.Damale, let the law will take its own course.

Consideration

18. It is important to note that Schedule 'B' and 'C' properties are tenanted properties. And whether they can be said to be tenanted properties of the family or belongs to person who is tenant. Learned Advocate Shri.Sawant relied upon the judgment in case of ***Dalip Kumar V/s. Om Prakash & Ors [RFA No.73 of 2010 : 13th August, 2015 : Delhi High Court]*** to buttress his submission that even tenanted properties can be partitioned. In fact, this issue was never raised nor dealt with by the Courts below. There was an issue about partition of tenanted commercial premises. It was held that *"tenancy right is a valuable asset and there is no bar to partition it"*. (Para No.13). It was further held that *"if there is interse division amongst the tenants for convenience of use of tenanted property, it will not amount to subletting, assigning, parting with possession of tenanted premises"*. (Para No.17).

19. On one hand, there is an objection that the Plaintiffs have not adduced any evidence to show nature of tenanted properties 'as joint family properties'. Whereas, on the other hand, there is also an objection that "neither of the defendants have entered into witness box to prove their contention. It is the cardinal principle of Indian Evidence Act, 1872 (1 of 1872) that *"a party has to prove case pleaded by him and in case of failure, an adverse inference can be drawn"*. It is also true that a party can remain silent and can only rely upon the weaknesses of his rival side.

20. When we apply these principles and when we read both the Courts judgments, we may find that these principles were not referred. What I

find is that both the Courts below have not explained “*the effect of evidence adduced before it and effect of not giving evidence*”, happily. That is to say ; what is the cumulative effect of evidence of six witnesses and documents produced by them and deed of partition on one hand and effect of not giving evidence at all by the defendants. Both the Courts below could have discussed the evidence. In a better way, it could have been dealt with by both the Courts below because entire oral and documentary evidence was very much available before them.

21. As said above, Schedule ‘B’ and ‘C’ properties are tenanted properties. So, what can be the evidence? So to say rent receipt, rent agreement, licenses, any correspondence etc. There cannot be evidence of ownership. From pleadings by way of written statements, it is clear that there was no dispute about nature of properties as tenanted properties. Dispute was ; whether individual member holds it individually or on behalf of joint family. Evidence of Plaintiff No.1 – Vishwanath is made available. It seems that he was not cross-examined by Defendants No.1 to 5, but on behalf of Defendants No.12 to 15 only. So, whatever is said by him went unchallenged. Furthermore, deed of partition was also proved during evidence. Father Shivram was not party to it. Both the Courts below got an opportunity to read its content and that is how, there are findings recorded as mentioned above.

22. It was made clear by both the Courts below that there was partition of business and Shankar and Eknath got separated and rest of 3

brothers i.e. Vishwanath (P.1), Namdeo (Def.1) and Suresh (D.5) continued remaining business.

23. The evidence discussed above is sufficient to infer that Schedule 'B' and 'C' properties were joint family properties of above 3 brothers and certain properties were acquired from the joint income. It was obligatory for Defendants No.1 to 5 to enter into witness box. So, I do not find that the conclusion drawn by both the Courts are erroneous. They are not arrived at by wrongly considering a piece of evidence or by wrongly interpreting the provisions of law. When the Executing Court will order partition of tenanted properties by appointing Court Commissioner, they can be partitioned in an usual manner. Either of the party does not get right to oppose the partition just because they are tenanted properties. The trial Court has already directed to give priority to the person in possession while allotting the share and even, the provisions of Order XXVI Rule 14(1) of CPC, empowers to allot share to the parties and even award sums to be paid for the purpose of equalizing the value of shares (*principle of owelty*).

24. The principles of the Indian Evidence Act, 1872 (1 of 1872) have to be considered in set of facts. If you do not challenge the evidence and if you do not give evidence, an adverse inference has to be drawn. On the basis of evidence, the Plaintiffs have certainly discharged their burden to prove nature of tenanted properties as held by joint family property. Both the Courts below have not committed any mistake. Both the judgments are not happily worded. Still, there is no fault in the conclusion. This is said on minute perusal of evidence. So, I do not find any reason to

interfere in the concurrent findings. Hence, the Appeal is dismissed at an admission stage as no substantial question of law is involved. Parties to bear their own costs.

(S. M. MODAK, J.)