



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

SECOND APPEAL NO. 52 OF 2019

1. Shri Balakdas S/o. Lahanu Wanjari,
Aged about 56 years, Occu.: Agriculturist,
R/o. Dahargaon, Tahsil and District
Bhandara.

2. Shri Budha S/o. Lahanu Wanjari,
Aged about 66 years, Occu.: Agriculturist,
R/o. Gandhi Ward, Bazar, Parashiv, Post
Dahegaon, Tahsil and District Bhandara.

2. Lahanu S/o. Donu Wanjari
(Dead), Aged about 81 years,
R/o. Dahargaon, Tah. and
District - Bhandara.
(Corrected the name of appellant no. 2
as per Hon'ble Court's order dated
11/07/2019. After correction, the name
of appellant no. 2 is deleted
as per said order.)

... Appellants
(Original defendants)

.. Versus ..

1. Shri Sudhakar S/o. Lahanu Wanjari,
Aged about 61 years, Occu.: Labour,
R/o. Kharbi, Tahsil Tumsar, District
Bhandara.

2. Shri Tarachand S/o. Lahanu Wanjari,
Aged about 51 years, Occu.: Service,
R/o. C/o. Narendra Bhuzade, M.S.E.B.
Colony, Rajgopalchari Ward, Bhandara,
Tahsil and District Bhandara.

3. Sadashiv S/o. Hansaram Wanjari (dead)

Through legal heirs

3(a) Smt. Renuka Wd/o. Sadashiv Wanjari,

Aged about 66 years, Occu.: Household,

3(b) Shri Keshav S/o. Sadashiv Wanjari,

Aged about 41 years, Occu.: Agriculturist,

Nos. 3(a) & 3(b) both R/o. Dhargaon, Tahsil and District Bhandara.

4. Smt. Laxmibai Wd/o. Lahanu Wanjari (dead),

Through legal heirs

4(a) Smt. Kamlabai W/o. Shankar Vairagade,

Aged about 91 years, Occu.: Agriculturist,

R/o. Dabha (Jamni) Tahsil and District Bhandara.

4(b) Smt. Vimal W/o. Maroti Khadsinge,

Aged 66 years, Occu.: Agriculturist,

R/o. Manegaon Bazar, Tahsil and District Bhandara.

Corrected address of respondent no. 4b**4(b) Smt. Vimal W/o. Maroti Khadsinge,**

Aged about 66 years, Occu.:

Agriculturist, R/o. C/o. Anusaya W/o.

Sheshrao Deshmukh, (Furniturewala)

Kesalwada, Tah. Lakhani,

District Bhandara.

(Amendment carried out as per order dated 27/07/2018)

5. Shri Budha S/o. Lahanu Wanjari,

Aged about 68 years, Occ. Nil,

R/o. Ashirwad Mangal Karyalaya,

Bhandara, Tah. and Dist. Bhandara.

(Added the respondent no. 5

as per Hon'ble Court's order

dated 11/07/2019)

5. Shri Budha S/o. Lahanu Wanjari,
 Aged about 66 years, Occu.: Agriculturist,
 R/o. Dahegaon,
 Tahsil and District Bhandara.
**(Amendment carried out
 as per Hon'ble Court's order
 dated 07/09/2021)**

5. Shri Budha S/o. Lahanu Wanjari,
 Aged about 66 years,
 Occupation - Agriculturist,
 R/o. Dhargaon Post, Tahsil and
 District – Bhandara.
**(Amended as per Hon'ble Court's
 order dated 16/06/2022)**

**...Respondents
 (Original plaintiffs)**

 Shri P.S.Sahare, Advocate for appellants.
 Shri A.Z.Jibhkate, Advocate for respondent nos. 1, 2, 4(b) & 5.

CORAM : SMT. M.S. JAWALKAR, J.
DATE : 09/10/2023

ORAL JUDGMENT

Heard both the parties at length.

2. This Court while issuing the notice has framed the following substantial question of law vide order dated 19/12/2022:-

“Whether the District Judge – 1, Bhandara erred in granting partition of house No. 339 when it was not claimed by the plaintiff?”

3. The present Second Appeal is filed by the appellants being aggrieved by the judgement and order dated 07/07/2016 passed by learned District Judge-1, Bhandara in Reg.C.A. No. 93/2010, whereby the judgment and decree dated 26/03/2009 passed by learned 4th Joint Civil Judge, Junior Division, Bhandara in R.C.S. No. 88/2005 was confirmed.

4. The brief facts of the case can be summarized as under:-

The plaintiff nos. 1 & 2 and defendant nos. 2 & 4 are brothers and defendant nos. 5(a) & 5(b) are sisters (legal heirs of defendant no. 5). The defendant no. 1 is the father of plaintiffs and defendant nos. 2, 4 & 5. The defendant no. 3(a) and 3(b) are legal heirs of deceased brother of the plaintiffs. It is the contention of the plaintiffs that, defendant nos. 3(a) and 3(b) are not having any share in the suit property, however, they are in possession of House no. 151 at Dhargaon. Defendant no. 1 has received (1) field survey no. 34/1, area 0.22 H.R., (2) field survey no. 109, area 0.38 H.R., (3) field survey no. 110, area 45 decimal out of 90 decimal and (4) House no. 151 at Dhargaon. Out of income from said fields, he had purchased field at Koknagad bearing survey no. 218, area 1.17 H.R., so also he constructed

House no. 339 at Dhargaon. Since 2002, defendant no. 2 was looking after the property belonging to defendant no. 1, however, he had not maintained accounts of profit and loss. In April, 2005, it is learnt by the plaintiffs that defendant no. 1 has sold out the House no. 339 on 01/12/2004 to defendant no. 2. It was also learnt by the plaintiffs that defendant no. 2 also mutated his name in the fields survey nos. 34/1, 109 and 110, therefore, the plaintiffs had issued notice to the respondents on 05/04/2005 for partition of the entire property. But, there was no response to the said notice, therefore, the plaintiffs had filed a suit against the defendants.

5. In the suit, defendant no. 1 filed his written statement at Exh. 14 and defendant nos. 2 & 4 filed their written statement at Exh. 15. As per their contentions, survey No. 217, area 1.17 H.R. of Mouza Koknagad was purchased by defendant no. 1 out of his own income. Even House no. 339 was constructed by defendant no. 1 out of his own income. It is also contention of the defendants that the suit properties are partitioned between his four sons 20 years ago. Defendant no. 1 sold out one property to defendant no. 2 on 01/12/2004 for legal necessities.

6. The learned Trial Court recorded the finding that the suit property was ancestral property. However, the plaintiffs failed to establish that House no. 339 was sold by defendant no. 1 illegally. It is also held that defendant no. 1 failed to establish that field survey no. 217 and House no. 339 were his self acquired property. The learned Trial Court further held that defendant no. 1 failed to prove that the property was partitioned 20 years back before filing of the suit. Accordingly, the learned Trial Court decreed the suit and granted partition except suit House no. 339, and awarded 1/7th share to the plaintiffs and defendant nos. 1, 2, 4, 5(a) and 5(b) in (1) field survey no. 34/1, area 0.22 H.R. at Mouza Dhargaon, (2) field survey no. 109, area 0.38 H.R. at Mouza Dhargaon, (3) field survey no. 110, area 45 decimal at Mouza Dhargaon, (4) field survey no. 217, area 2.55 H.R. at Mouza Koknagad and House no. 151 at Mouza Dhargaon.

7. Being aggrieved by the said judgment, defendant nos. 1, 2 & 4 filed R.C.A. No. 93/2010 before learned lower Appellate Court. It is contended that the suit property is ancestral one. However, some properties were purchased by defendant no.

1 out of his own income. Even defendant no. 1 had constructed a house property out of his own income. He had purchased Survey No. 217, area 1.17 H.R. at Mouza Koknagad out of his own income and house property bearing no. 339 constructed by him out of his own income. The house property was purchased by defendant no. 2 from defendant no. 1 legally and for valuable consideration. It is contended that defendant no. 1 and his wife (i.e. defendant no. 5) were residing with plaintiff no. 2 at Dhargaon till 2002. In the year 2002, plaintiff no. 2 shifted to Sakoli for his service. Till that time, defendant no. 1 with the help of plaintiff no. 2 was looking after administration of landed property. After the year 2002, defendant no. 2 took over management of landed property and did not give accounts of profit and loss to the plaintiffs.

8. The learned lower Appellate Court recorded the finding that the property was joint family property. The learned Appellate Court further recorded the finding that the sale of house property no. 339 effected by defendant no. 1 in favour of defendant no. 2 is illegal and void. It is also held that defendant no. 1 failed to establish that Survey No. 217 and House Property

No. 339 are self acquired property of defendant no. 1. He also failed to established that there was any partition 20 years ago. There is concurrent finding with regard to the nature of property as ancestral one.

9. It was the contention of the defendants that the property was sold out to his son as there was legal necessity in order to repay the outstanding dues of loan. The learned Appellate Court rightly appreciated this fact that there was transaction between father and son with whom father resided during his last days, and for that reason also, the transaction appears to be sham and bogus. There is nothing on record to show that the valuable consideration passed on to defendant no. 1. The defendants failed to established that there was any independent source of income. As such, out of the joint family income, the said properties were purchased. It is further contention of the appellants that out of five sons of defendant no. 1, deceased Sadashiv Hansaram was out of consideration from getting any share in the partition because he was given in adoption during his childhood to Hansaram. Therefore, his tie with family of defendant no. 1 is severed and extinguished long.

Accordingly, the First Appeal came to be dismissed by the learned lower Appellate Court and the suit was decreed. The decree passed by learned Trial Court was modified, and held that the plaintiff nos. 1 and 2, and defendant nos. 2, 4, 5(A) and 5(B) each has got $1/6^{\text{th}}$ undivided share in the suit property viz. field survey no. 34/1, area 0.22 H.R. situated at Dhargaon, field survey no. 109, area 0.38 H.R. at village Dhargaon, field admeasuring 45 decimals from field survey no. 110, total area 90 decimals at Dhargaon, house presently numbered as 151 at Dhargaon, field survey no. 218, area 1.17 H.R. at Koknagarh, Tahsil and District Bhandara, and constructed house No. 339 at Nehru Ward at Dhargaon. The sale deed dated 01/12/2004 of house property bearing no. 339 was held as void and not binding on the plaintiffs.

10. The learned counsel for the appellants relied on the following citations:-

- 1) *Ravinder Kumar Sharma V/s. State of Assam and ors. [AIR 1999 SC 3571]***
- 2) *Ranganayakamma and anr. V/s. K.S.Prakash (D) by L.Rs. and ors. [Judgment of the Hon'ble Supreme Court in Civil Appeal No. 3635/2008 (arising out of SLP (C) No. 4055/2006) D/d. on 16/05/2008]***

3) *Abdul Rahim and ors. V/s. Sk. Abdul Zabar and ors. [(2009) 6 SCC 160]*

4) *Krishnakumari and ors. V/s. Ponnusamy [Judgment of Madras High Court in A.S. No. 407/2008 D/d. on 18/03/2015]*

11. The learned counsel for the appellants placed reliance on ***Ravinder Kumar Sharma*** (supra). The reliance is misplaced. The said citation is in respect of Order 41, Rule 22 of C.P.C. wherein the Hon'ble Apex Court laid down that the respondent can question adverse finding without filing cross-objection.

12. The learned counsel further placed reliance on ***Ranganayakamma and anr.*** (supra). However, the facts involved in the matter are not identical. Considering the facts involved in the said matter, the Hon'ble Apex Court concluded that the properties of joint families and the self acquired properties could not be put into hotchpotch of joint family properties whereas in the present matter, both the Courts below concurrently held that the property was ancestral one and being a Karta, he (defendant no. 1) was using his power to purchase property out of income from ancestral property.

13. The learned counsel further placed reliance on ***Abdul Rahim and ors.*** (supra) in support of his contention that, the suit was barred by limitation as the declaration for sale deed to be null and void. It has to be filed within three years from the date of knowledge. However, this issue was never raised on substantial question of law as the suit was not filed within the limitation and in fact, the appellant himself restricted his claim only to the claim of house property. No defence raised about limitation in the learned Trial Court nor before the learned lower Appellate Court. Moreover, it is mixed question of law & fact.

14. Though the learned counsel for the appellants relied on ***Krishnakumari and ors.*** (supra), he has not placed on record a complete copy of the judgment nor argued on the same. As the learned counsel for the appellants has not filed a complete copy of the judgment, I decline to consider the same for the determination of the present appeal.

15. In view of the substantial question of law framed vide order dated 19/12/2022, the appellants' contention is that there was no partition claimed by the plaintiffs for House no. 339, still the learned District Judge-1, Bhandara granted the

same. However, from the copy of plaint, it appears that the suit was filed for the property including the house property bearing No. 339 and field Survey No. 218, area 1.17 H.R. as these properties are purchased out of the income of ancestral property. As such, no inference can be drawn that there was no partition claimed in respect of House property No. 339. There is no other substantial questions of law framed by this Court. So far as the partition as alleged effected 20 years back, is not proved by the defendants and both the Courts below concurrently recorded the finding in this regard, there is no substance in the present Second Appeal and it is liable to be dismissed. Accordingly, the substantial question of law is answered in negative and the judgment and order dated 07/07/2016 passed by learned lower Appellate Court (i.e. District Judge-1, Bhandara) in RCA No. 93/2010 is just and legal. As such, I proceed to pass the following order:-

ORDER

- 1) The Second Appeal stands dismissed.
- 2) The judgment and order dated 07/07/2016 passed by learned lower Appellate Court (i.e. District Judge-1, Bhandara) in RCA No. 93/2010 is hereby confirmed.

- 3) Decree be drawn accordingly.
- 4) Pending applications, if any, stand disposed of accordingly.

[SMT. M.S. JAWALKAR, J.]

B.T.Khapekar