IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 721 OF 2017
WITH
CIVIL APPLICATION NO. 1424 OF 2017

Dipak Kishor Kanugo,
through his constituted Attorney
Sanjay Kanugo ... Appellant.

Versus

Smt. Vimal Vishnu Purandare (since deceased),
through her LRs. and Ors. ... Respondents.

WITH
SECOND APPEAL NO. 163 OF 2018

Sadashiv Balchandra Purandare (since deceased)
through LRs. Rajiv Sadashiv Purandare and Ors. ... Appellants.

Versus

Smt. Vimal Vishnu Purandare (since deceased),
through her LRs. and Ors. ... Respondents.

WITH
INTERIM APPLICATION NO. 6627 OF 2024

Madhukar Bhalchandra Purandare ... Applicant.

Versus

Smt.Vimal Vishnu Purandare (since deceased) ... Respondent.

Ms.Sheetal Shah i/by Mehta & Girdharlal, for Appellants in SA/163/2018 and for Respondent Nos.6 to 14 in SA/721/2017.
Mr. Pramod Patil, Mr. Shyam S. Solanke, Ms. Kunjan Jogdand, Ms.Sakshi Thombre, for the Appellants in SA/721/2017.
Mr. Kishore Malpathak, Mr. Satyajeet Joshi, Mr. Nachiket Tarade and Mr. Chinmay Joshi, for Respondent Nos.2 to 5 in SA/721/2017.

Coram : Sharmila U. Deshmukh, J.
Date : April 3, 2024.

P. C.:

1. Being dissatisfied by the common judgment dated 28th February, 2017 passed by the Appellate Court in three appeals which were filed by the subsequent transferees as well as the original defendant–coparceners, these two appeals are preferred by the defendant Nos.11 and by the alienating coparceners. As the Appeals arise out of common judgment, with consent of parties, the appeals were heard together and decided by this common order. For the sake of convenience, the parties are referred to by their status before the trial Court.

2. The genealogy which is not disputed is that Chintamani Purandare was the propositus having two sons Moreshwar and Bhalchandra. The defendants in Second Appeal No.163 of 2018 are from the branch of Bhalchandra, whereas the defendants in Second Appeal No.721 of 2017 are the transferees from the defendant no.1 who is the son of Bhalchandra.

3. The Plaintiffs are from the branch of Moreshwar Chintamani Purandare. Special Civil Suit No.23 of 1998 was filed seeking declaration that the suit properties are the joint family properties with the further declaration that the registered sale-deed dated 17th February, 1989 executed by the defendant no.1 in favour of defendant no.11 in respect of Gat No.28 be declared null and void and not binding on the share of the plaintiffs, registered sale-deed dated 30th October, 1992 executed by the defendant nos.1 to 10 in favour of the defendant nos.12 and 13 in respect of the CTS NO 7541 admeasuring 132.94 square meters and the construction thereon being Municipal House No.57/D be declared null and void and not binding upon the plaintiffs. Further declaration sought was that the plaintiffs have half share in the suit property and for partition and separate possession.

4. The case of the Plaintiffs was that the suit properties are joint family properties being looked after by Bhalchandra and were acquired from the joint family income. Some of the joint family properties are situated at Mumbai, Girgaon and Kalbadevi and that Chintamani and Bhalchandra enjoyed and maintained the properties. At the time of death of Moreshwar i.e. the brother of Bhalchandra his son Vishnu was three years old. Chintamani died in the year 1986 and the joint family properties situated at Kelva was mutated in the joint names of Bhalchandra and Vishnu. Bhalchandra being the elder son and *Karta* his name was mutated in the revenue record as the *Karta* of the Hindu Undivided Family (HUF). Bhalchandra acquired agricultural land out of the joint family property income which is clear from the correspondence which had entered into between the parties. Even if some of the properties shows the name of Bhalchandra in the revenue records and in the name of Vishnu in respect of the some of the properties they were the joint family properties and were enjoyed as joint family properties and there was no partition effected between Vishnu and Bhalchandra. By way of registered sale-deed dated 27th March, 1957 partition was effected by the branch of Bhalchandra inter se with respect of the suit properties without any right.

5. It was further contended that the defendant Nos.1 to 10 sold Gat No.28 to the defendant No.11 on 17th February, 1989 without any legal necessity as also the property at Girgaon on which building bearing Municipal House No.57/D was sold to the defendant Nos.12 and 13 on 30th October, 1992. Legal notice dated 2nd April, 1989 was issued to the defendants seeking share in the suit properties alongwith separate possession. As partition was demanded and refused, the suit came to be filed.

6. The suit came to be resisted by the defendant Nos.1/1 to 1/3 and 1/5 and defendant Nos.3 to 6. It was contended that the suit is not tenable, barred by limitation and suffers from non-joinder of necessary parties. It was contended that the properties which were in the name of Chintamani were the joint family properties and properties standing in the name of Bhalchandra was the self acquired property purchased out of his income with which the plaintiffs and Vishnu had no concern or interest. Plaintiffs and the late Vishnu had knowledge of the registered partition deed executed in the year 1957 by Bhalchandra, which was not challenged and as such, the principle of waiver and estoppel was applicable.

7. In the year 1989 and 1992, the defendant No.1 – Sadashiv had sold the properties to the defendant Nos.11, 12 and 13 which was to the knowledge of the plaintiffs and despite thereof at that time suit was not filed for a declaration that the sale-deeds are null and void. It was contended that at the time of demise of Chintamani only the property at Kelva described in Schedule-A at Sr.No.4 was the joint family property of the parties and there was no income derived therefrom. In the year 1947, partition has been effected in respect of the joint family property between Bhalchandra and Vishnu reflected in Mutation Entry No.8335. The properties described in Schedule-D of Mauje Girgaon were the self acquired properties of Bhalchandra. It was contended that Bhalchandra was an educated person and well-known Astrologist and out of his income, different properties were purchased during the lifetime of Chintamani however, the purchase price was paid out of the income of Bhalchandra and from the year 1930 onwards separate properties were purchased from Bhalchandra's self income. It was contended that Vishnu resided separately in Mumbai and was in service and infact the ancestral properties had been partitioned on 1947 between Bhalchandra and Vishnu which were in their separate possession.

8. The defendant No.11 filed his independent written statement contending that after exercising due diligence the property was purchased by the defendant No.11. It was further contended that the property i.e. Gat No.28 was purchased for valuable consideration by a registered deed of conveyance dated 17th February, 1989 and the suit filed in the year 1998 was barred by the limitation.

9. The parties went to trial. The Trial Court after consideration of the evidence on record decreed the suit by Judgment dated 31st December, 2002 holding that the properties were the ancestral properties and the sale-deeds dated 17th February, 1989 and 30th October, 1992 are null and void and not binding on the plaintiffs. There was further declaration that the plaintiffs have half share in the ancestral properties.

10. As against this, three appeals came to be filed as indicated above. The Appellate Court passed a common judgment in the Appeals. The Appellate Court re-appreciated the evidence which has come on record. The Appellate Court framed and answered the following points for consideration, which read as under:

	"POINTS	***FINDINGS***
1.	*Whether plaintiffs prove that the suit property as mentioned in schedule A,B,C and D are ancestral joint family property ?*	*In the affirmative.*
2.	*Whether the Sale Deeds dated 17/02/1989 and 30/10/1992 of suit property mentioned in Schedule C and D are binding on the plaintiffs ?*	*In the negative.*
3.	*Whether the registered partition Deed dated 27/03/1957 is binding on the plaintiffs ?*	*In the negative.*
4	*Whether the claim of the plaintiffs is hit by the principle of Estoppel and Waiver ?*	*In the negative.*
5.	*Whether the suit is within limitation?*	*In the affirmative.*
6.	*Whether the plaintiffs prove that they have half share in the suit property?*	*In the affirmative.*
7.	*Whether the plaintiffs are entitled to claim partition of the suit property and possession of their share?*	*In the affirmative.*
8.	*Whether the Judgment and Decree*	*In the negative.*

passed in Special C.S.No.23/1998 requires interference and is liable to be set aside?

9. What order? As per final order."

11. Heard Ms. Sheetal Shah, learned counsel for the Appellants in Second Appeal No.163 of 2018, Mr. Pramod Patil, learned counsel for the Appellants in Second Appeal No.721 of 2017 and Mr. Kishore Malpathak, learned counsel for the Respondent Nos.2 to 5 in Second Appeal No.721 of 2017.

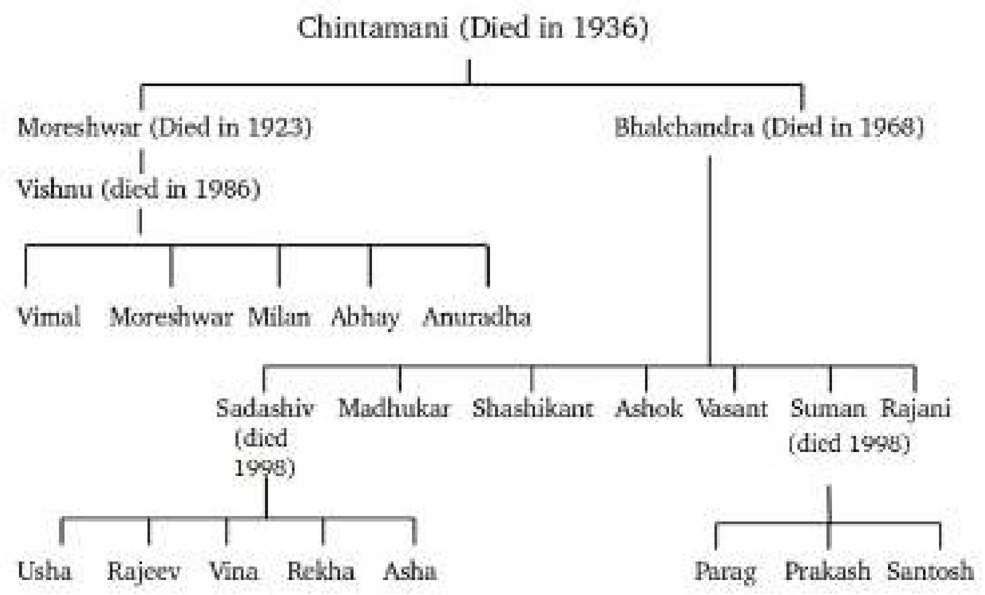
12. Mr. Patil, Learned counsel appearing for the Appellants in Second Appeal No.721 of 2017 has taken this Court in detail through the findings of the Trial Court and the Appellate Court. He would submit that the sale deed was executed in his favour in the year 1989 and he was bonafide purchaser for value without notice. He would submit that there was registered partition deed executed between between Bhalchandra and his sons and the defendant no.11 has purchased the share of Sadashiv which was allotted to him in the partition on 27th March, 1957. He would contend that at the time when the partition of 1957 was effected, Vishnu who is the predecessor of the plaintiffs was major and there was no challenge to the said partition deed. He submits that the Plaintiffs issued notice in the year 1989 and the suit for cancellation of sale deed ought to have been filed under Article 59 of the Limitation Act, within a period of three years and thus suit is barred by limitation. Pointing out to the findings of the Appellate Court he submits that the findings on the issue of limitation suffers from perversity as the knowledge was acquired in the year 1989. He would further submit that as there was partition in the year 1957 at the time when Vishnu was alive and the exclusion of the branch of the plaintiffs from the joint family property was known in the year 1957 and that the period of 12 years under Section 110 of the Limitation Act, 1963 is required to be computed from the year 1957.

13. Ms. Shah would supplement the submissions of Mr. Patil. She contends that there is neither a challenge to the partition deed of the year 1957 nor the sale-deeds by which the properties were purchased by Bhalchandra. She would further submit that the properties were the self acquired properties of Bhalchandra and documents on record would indicate that Bhalchandra was an educated person and was a well known respected Astrologist. She would submit that as such there was sufficient income from his profession of Astrology and Priest from which he purchased the properties. She would further submit that the fact that there was partition between Bhalchandra and Vishnu is evident as after the partition there was certain properties which were sold by the plaintiffs as well as by the defendants. She would further submit that the documentary evidence has not been properly appreciated inasmuch as the mutation entries and the sale-deeds when read together would indicate that the properties were the self acquired properties of Bhalchandra. She submits that as there is perversity in the findings substantial question of law would arise.

14. Mr. Malpathak, learned counsel appearing for the Respondents would contend that there are concurrent findings of fact based on the evidence and it is impermissible for this Court under Section 100 to re-appreciate the evidence. He would further submit that the unless there is evidence to show intention to sever and actual severance of the status of the joint family and the joint family properties the presumption is that properties belonging to joint family are joint family properties. He would further submit that the documentary evidence on record shows the joint family nucleus from which the properties were purchased and the Defendant Nos 1 to 10 have failed to discharge their burden. In support, he relies upon the decision of the Apex Court in the case of ***Ramdas vs. Sitabai and Ors.*** reported in ***(2009) 7 SCC 444*** and would contend that as the defendant No.11 is a purchaser of an undivided share of a coparcener property the remedy to file suit for partition.

15. Considered the submissions and perused the record.

16. The genealogy for easy understanding of the relationship of the parties is reproduced hereunder:



17. The Plaintiffs are from the branch of Vishnu and the Defendants are from the branch of Bhalchandra. Moreshwar died in the year 1923. Special Civil Suit No.23 of 1998 was filed seeking partition and separate possession of the properties which are described in Schedule A to D of the plaint on the ground that the properties are joint family properties of the joint family of Bhalchandra and Moreshwar which have not been partitioned. The suit properties as described in

Schedule A to D of the plaint and reproduced by the Appellate Court in the judgment are landed agricultural properties at Mahim, Zanzroli, Kelva road, Village Kelve and Maikhop, Tal: Palghar and House properties at Village Kelve.

18. It is settled that if a joint family possessed property which was admittedly joint, the presumption would be that the property continued to be joint and the burden would lie upon the member who asserts partition to prove that there was a partition. In the present case it is claimed by Bhalchandra that the properties in the name of Chintamani were the joint family properties and came to be mutated in the name of Bhalchandra and Vishnu and the properties standing in sole name of Bhalchandra was his self acquired properties. The initial burden lay upon the plaintiffs to prove that there was sufficient nucleus present for the purpose of purchasing the properties which are claimed to be ancestral properties. Once the initial burden is discharged by the plaintiffs then the onus shifts upon the defendants to prove that the properties were his self acquired properties.

19. There are concurrent findings of the Courts holding that the suit properties are ancestral joint family properties. It is settled that under Section 100 of CPC, it is impermissible to re-appreciate the evidence and come to a different findings. However as the contention is that there is perversity in findings, this Court has examined the evidence.

20. On the aspect of the nature of the suit properties, the Appellate Court has considered the evidence of the DW-1 giving details of the properties purchased by Bhalchandra indicating that the self acquired properties were purchased during the period from 1930 to 1941 and that except nine agricultural lands all other properties were claimed as self acquired properties. There is specific admission given by DW-1 Rajiv that there is no documentary evidence produced to show that late Bhalchandra had sufficient income from his profession as Astrology and Priest. The Plaintiffs have produced documentary evidence i.e. communication dated 24th October, 1949 written by Bhalchandra to Vishnu mentioning about maintenance of cattle, communication by Vishnu to Mamlatdar in 1953 mentioning that the property is jointly cultivated by Vishnu and Bhalchandra and Bhalchandra was looking after the lands and based on the evidence, the Appellate Court has held that the properties were being jointly cultivated and there was income from the joint family property. The Appellate Court also considered the 7/12 extracts in respect of all 39 properties situated at Tal. Jawhar admeasuring 107 acres which were sold to tenants after 1957 and thus held that there was income from these lands. The Appellate Court therefore rightly held that there was sufficient joint family nucleus existing for purchase of properties by Bhalchandra.

21. One of the contentions of learned Counsel for Appellants was that the properties were purchased in the year 1930 to 1940 and it was difficult to produce records as to the source of income of Bhalchandra. Although such contention is not acceptable, it needs to be noted that there is documentary evidence in form of communication produced by the Plaintiffs of the year 1949. Considering that the burden lay upon the defendants to show that the properties were the self acquired properties of Bhalchandra, even if not documentary atleast there should have been oral evidence as to the income of Bhalchandra to link the same with the consideration in the sale-deeds to demonstrate that the income of Bhalchandra was sufficient to purchase the properties or some explanation of time lapse for non-production of documentary evidence as to the income of Bhalchandra. At least before this Court it has been admitted by Ms.Shah that there is no such deposition on record. The burden was upon defendants to prove that the properties were self-acquired properties, and upon appreciation of evidence there are concurrent findings, as the properties being ancestral joint family properties, in the absence of any perversity demonstrated, this Court cannot interfere with the concurrent findings.

22. As regards the issue of partition between Bhalchandra and Vishnu, there is documentary evidence on record which shows the correspondence between Vishnu and Bhalchandra, wherein Bhalchandra had requested Vishnu to look after the agricultural land. These documents are up to the year 1949 which demonstrate that atleast till 1949 there was no partition between the parties. The properties which are claimed to be the self acquired properties are stated to have been acquired during the period from 1930 to 1940. If that would have been so, there was no necessity for Bhalchandra to address any communication to the Vishnu requesting him to look after the agricultural lands. The Appellate Court has considered the Mutation Entry No.839 which shows that after the demise of Chintamani i.e. the father, an application was filed by Bhalchandra to record the name of Bhalchandra and Vishnu in respect of certain properties. It is well settled that unless it is demonstrated that there is an unequivocal intention to separate the mere mutation in name of certain coparceners would not establish partition. The fact that subsequently there was correspondence between Bhalchandra and Vishnu whereby Bhalchandra called upon Vishnu to look after the agricultural lands would indicate that despite some of the properties being mutated in the names of Bhalchandra and Vishnu, the properties were being cultivated as joint family properties. The Appellate Court has therefore rightly accepted that there was no partition and the properties were the joint family properties.

23. The other issue raised was that there was no challenge to the partition deed of the year 1957 or the sale deeds in name of Bhalchandra. As far as the sale deeds of certain properties executed in name of Bhalchandra as the Plaintiffs has proved sufficient joint family nucleus even though the properties were purchased in name of Bhalchandra, the same constituted joint family properties and it was not necessary to challenge the sale deeds. In so far as the partition deed of the year 1957 is concerned, there is specific issue framed by the Courts as to whether the partition deed of 1957 is binding upon the Plaintiffs and upon appreciation of evidence it has been held that the partition deed is illegal.

24. The question of law which was raised by the learned counsel for the Defendant No.11 was that the suit was barred by limitation. In that context, if the provisions of the Limitation Act are considered, under Section 110 of the Limitation Act, the period is 12 years when the exclusion becomes known to the plaintiffs for the purpose of enforcing a right to the share therein. In the present case, the notice has been issued by the Plaintiffs on 2nd April, 1989 seeking partition of the properties and thereafter the suit has been filed in the year 1998 in which is within the prescribed period of limitation of 12 years.

25. The submission of the learned counsel appearing for the Appellants is that by the suit the plaintiffs seek to cancel and to set aside an instrument which according to him ought to have been filed within period of three years from 2nd April, 1989. The substantive relief sought was of partition and separate possession. By way of consequential relief the sale-deeds which have been executed by the defendant nos.1 to 10 in favour of the defendant nos.11, 12 to 13 are sought to be declared as not binding on the share of the plaintiffs. There is no relief of cancellation of the sale-deed which has been sought and indeed it cannot be so as the plaintiffs are not the executants of the sale-deeds. Even if it is held that the notice was sent on 2nd April, 1989, the Appellate Court on perusal of the notice which is at Exhibit 245 has held that the plaintiffs had no knowledge on 2nd April, 1989 about the alienation by the defendant nos.1 to 10.

26. It is only when the notice was issued on 14th May, 1997, the contents indicate an objection raised to the sale of these two lands and thereafter, the suit has been filed in the year 1998. In the present case, considering that the question of limitation is a mixed question of fact and law the Trial Court and the Appellate Court upon appreciation of the evidence has come to a finding that the suit is not barred by limitation, this Court will not interfere with the findings.

27. Unless it is shown that the findings of the Appellate Court are based on no evidence or a wrong inference has been drawn on proven facts by applying law erroneously, it is not permissible for this Court under Section 100 of the CPC to re-appreciate the evidence on record and to come a different finding based on the evidence. It is trite that even if the findings are erroneous findings of fact, the same cannot be interfered under Section 100 of CPC. Thus no substantial question of law arises in the present Appeals. Both Second Appeals stand dismissed.

28. In view of the disposal of Second Appeals, Civil/Interim Application(s) taken out in these Appeals, if any, does not survive and same is disposed of.

[Sharmila U. Deshmukh, J.]