

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO.640 OF 2018**  
**WITH**  
**CIVIL APPLICATION NO.1460 OF 2018**  
**IN**  
**SECOND APPEAL NO.640 OF 2018**

Gangadhar Alias Gangaram Shankar Shinde & Ors      ...Appellants/  
Applicants

**Versus**

Yamunabai Punja Sahane & Anr.      ...Respondents

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Mr. Sachin Gite for the Appellants/Applicants.

Mr. Nikhil M. Pujari for Respondent Nos. 1 & 2.  
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**CORAM : SHARMILA U. DESHMUKH, J.**

**DATE : FEBRUARY 2, 2024**

**P. C. :**

**1.** Being dissatisfied by the Judgment dated 7<sup>th</sup> March, 2017 passed by of Appellate Court in Civil Appeal No. 107 of 2014 allowing the Appeal and setting aside the judgment and Decree passed by the Trial Court in Special Civil Suit No. 443 of 2011, the original Defendants are before this Court. By the impugned Judgment dated 11<sup>th</sup> March, 2017 the Appellate Court has declared that the Appellants therein are entitled to ¼<sup>th</sup> share in the suit properties and for partition and separate possession.

For the sake of convenience, the parties are referred by their status before the Trial Court. Special Civil Suit No. 443 of 2011 was preferred by the Plaintiff who are the daughters of Defendant No. 1 against Defendant No. 1 father, Defendant No. 2 second wife of the Defendant No. 1, Defendant Nos. 3 and 4-subsequent purchasers of the suit property, Defendant Nos. 5 daughter of Defendant No. 2 and Defendant No. 6 brother of Defendant No. 1. The properties are described in paragraph No. 1a and 1b of the plaint as ancestral properties of the Defendant Nos. 1 and 6. The case of the Plaintiffs was that the property though being ancestral properties have been alienated by the Defendant No. 1 in favour of the Defendant Nos. 3 and 4 without any legal necessity. It was contended that they had demanded partition and the separate possession which was denied and by registered sale deed dated 3<sup>rd</sup> February, 2011 the Defendant No. 1 has sold the suit property. It was also contended that the Defendant No. 1 has performed the second marriage with the Defendant No. 2 during the subsistence of his first marriage and as such, the marriage itself is void.

**2.** The suit came to be resisted by the Defendants. It was denied that the suit properties are ancestral and joint family properties. It was further pleaded that there was legal necessity for the sale as the Defendant No. 1 has constructed a house and had also undergone surgery for which funds

were required and as such, the suit property came to be sold to the Defendant Nos. 3 and 4.

3. The parties went to trial. The Trial Court held that the suit properties are the ancestral properties of the Plaintiffs and Defendant No. 1. The Trial Court negated the issue that the alienation was for the legal necessity. The Trial Court however dismissed the suit by placing reliance on the decision in the case of *Vaishali Ganorkar & Anr vs. Satish Kesharao Ganorkar*, [AIR 2012 bombay 101] and held that the interest in the co-parcenary property cannot devolve upon the daughter except upon the death of Defendant No.1. The Trial Court dismissed the suit as against which the Plaintiffs preferred Civil Appeal. The Appellate Court in view of the enunciation of law by the Apex Court in the case of *Prakash Vs. Phulvati*, [2016(1) Mh.L.J.] held that Appellant being the daughters are the co-parceners in their own right having equal rights as that of the son and as such, allowed the Appeal and declared that the Appellant is entitled to  $\frac{1}{4}^{\text{th}}$  share in the suit property.

4. Heard Mr. Gite, learned counsel appearing for the Appellant.

5. Learned counsel for the Appellant submits that the suit properties came to be sold for legal necessity which is permissible. He points out that there is an admission of the Plaintiffs in the cross-examination as regards

the surgery which was undergone by the Defendant No. 1 and 2 and the suggestions regards the construction of the house which has been denied. He submits that considering the legal necessity and in the absence of any evidence to show that the Defendant No. 1 had another source of income, the sale must be held to be for legal necessity. As such, according to him the substantial question of law which arises is the perversity of the finding of the Trial Court as well as the Appellate Court on the aspect of legal necessity.

6. Considered the submissions and perused the Judgment of the Trial Court and the Appellate Court as well as the private paper book which has been tendered by learned counsel for the Appellant.

7. The issue as regards the property being ancestral property has been established and proved by the Plaintiffs and the same is not disputed by the learned counsel for the Appellant. The submission of learned counsel for the Appellant is that there was a legal necessity and as such, the ancestral property has been sold. It is settled that it is not permissible for co-parcener to sell the co-parcenary property without the consent of other co-parcenars except for legal necessity. The burden of proof is upon the alienating co-parcener to plead and establish the legal necessity. In the present case, the contention is that the Defendant No. 1 had constructed a house and also that he had undergone surgery. The Trial Court

considered that apart from the oral evidence there is no documentary evidence which has been produced by the Defendants to either show construction of the house property or the cost which was incurred in construction of the house property or as regards the loan which he had raised from the relatives. Pertinently, apart from the Defendant No. 1, there were no other witnesses examined in support of his contention as regards the repayment of the hand loan to the relatives. The Trial Court also considered that there are no medical records which are produced on record to show that the surgery was undergone and the funds were expended in the surgery.

8. The only reason why the Trial Court has dismissed the suit was the position of the law as regards the amendment in Section 6 of the Hindu Succession Act, and the judicial pronouncement at that stage. The Appellate Court on the basis of the enunciation of law by the Apex Court has rightly held that the Plaintiffs are the co-parceners and as such they are entitled to seek partition and separate possession of the property. The evidence on record does not demonstrate legal necessity for alienating the co-parcenary property. The submission of learned counsel for the Appellant would require this Court to re-appreciate the evidence which is come on record which has impermissible under Section 100 of CPC.

9. Having regard to the discussion above, there is no substantial

question of law in the Second Appeal. Second Appeal stands dismissed.

**10.** In view of dismissal of Second Appeal, nothing survives for consideration in the pending Applications, if any, therein and the same are disposed of as such.

(SHARMILA U. DESHMUKH, J. )