

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.675 OF 2014.
WITH
CIVIL APPLICATION NO.1449 OF 2011.
WITH
INTERIM APPLICATION NO.6776 OF 2024.

Smt. Kumudini Ganesh Datar and Ors. ...Appellants-Applicants.

Versus

Bhagirathi Mahadev Golambade and Ors. ...Respondents.

*Mr. G. S. Godbole, Senior Advocate i/b Mr. S. S. Kanetkar for Applicants in
IA and for appellants in SA.*

*Mr. Harshad Sathe a/w. Mr. Arya Sapre i/b. Mr. Harshad Bhadbhade for
Respondent Nos.5A to 5C.*

Mr. Dilip Bodake for Respondent No.8.

Coram : Sharmila U. Deshmukh, J.

Date : May 2, 2024.

P. C. :

1. Heard.
2. The present Appeal is at the instance of the original Defendant Nos 7 and 9, who are the purchasers of undivided joint family property, being dissatisfied with the concurrent findings decreeing the suit for partition and determining the shares of the members of the joint family. For the sake of convenience the parties

are referred to by their status before the Trial Court.

3. RCS No 34 of 1984 was initially instituted by Bhagirathi and her daughter Shubhangi and subsequently Shubhangi was transposed as defendant No.12. It was case of the plaintiff that the propositus Narayan Govind Golambade was in occupation of the suit properties as tenant (khotnisbat) and after his death the plaintiff and defendant Nos.1 to 6 and 12 are his legal heirs. Defendant No.9 on the basis of fabricated Power of Attorney and by playing fraud upon Defendant Nos 2 and 3 got executed sale deed in the name of defendant Nos. 7 to 9 pursuant to which their names were recorded in the record of Rights. After the death of Narayan name of his son Suresh was recorded as head of the joint family in the suit properties. Mahadev who was another son of Narayan and husband of the plaintiff and father of Defendant No.12 was missing since last 17 years and should be legally treated as dead. It was contended that the plaintiff and defendant No.12 have got 1/8th share each in the suit premises and that the sale deeds executed by defendant Nos.2 and 3 in favour of defendant Nos. 7 to 9 are not binding on the plaintiff and are valid only *qua* defendant Nos.2 and 3.

4. The Suit was resisted by defendant No.1 by filing his written statement dated 12th September 1984. Defendant Nos.1 to 3, 7 and 11 filed pursis through their advocate and adopted the written

statement of Defendant No.9. Defendant No.9 thereafter filed his additional written statement dated 13th March 1999. The case of defendant No.9 was that the suit properties at Sr. No.5, 7, 11 and 13 of the plaint were purchased by him from Defendant Nos.2 and 3 by paying valuable consideration and since the execution of the sale deed he is in possession of the properties. As far as properties at Serial No.1, 2, 3, 14 and 15 the same were purchased by Defendant No.7 by paying valuable consideration and upon execution of valid sale deed and are in possession of Defendant No.7. If partition is effected then the properties alienated in favour of defendant No.7 and 9 should be allotted to the share of defendant Nos.2 and 3.

5. Defendant No.1 along with defendant Nos. 2, 3, 7 and 11 had filed pursis adopting the written statement of Defendant No 9 and has thereafter filed pursis cancelling the *vakalatnama* of the earlier advocate and Power of Attorney given to Shrikant Mahadeo Khot as also the pursis by which the written statement was adopted and filed her written statement seeking partition of the suit property and her share to be handed over. Similar stand was adopted by defendant Nos.2 and 3.

6. Trial Court framed about 14 issues and held that the suit properties were joint family properties and determined the shares of the joint family members and declared that the sale deed dated 12th

October 1981, 10th January 1983 and 14th October 1983 are valid to the extent of share of defendant Nos.2 and 3 only and void *qua* the extent of share of plaintiff, defendant No.12, defendant 4 to 6 and cancelled the same *qua* them.

7. As against this, Regular Civil Appeal No.98/2003 was instituted by defendant Nos.7 and 9. The Appellate Court re-appreciated the evidence on record and confirmed the findings of the Trial Court dismissing the appeal.

8. Heard *Mr. G. S. Godbole, learned Senior Advocate for appellants, Mr. Harshad Sathe for Respondent Nos.5A to 5C and Mr. Dilip Bodake for Respondent No.8.*

9. Mr. Godbole, would submit that as sale deeds dated 12th October 1981, 10th January 1983 and 14th October, 1983 were held to be valid *qua* the share of defendant Nos. 2 and 3, upon partition, the alienated properties should be allotted to defendant Nos.2 and 3 and the Appellate Court committed an error in failing to pass such an equitable decree by directing partition by metes and bounds. He has taken this Court through the findings of the Appellate court as well as the operative part of the order of the Trial Court upholding the validity of the sale deed *qua* share of defendant Nos. 2 and 3 and would submit that once the sale deed have been held to be validly executed by defendant Nos.2 and 3, the shares to be allotted to

defendant Nos.2 and 3 should be confined to the properties forming part of their sale deeds. He would further submit that it is clear from the judgment of the Trial Court and the Appellate Court that defendant No.1 as well as the transposed defendant No. 12 had adopted the written statement filed by defendant No.9. He submits that by a procedure unknown to law defendant No.1 had cancelled the *Vakalatnama* of her advocate as well as the Power of Attorney and also the pursis by which she has adopted written statement of defendant No.9. He submits that thereafter separate written statement of defendant No.1 was taken on record. He submits that as far as defendant No.12 is concerned in her written statement below Exhibit 98 she had adopted the written statement of defendant No.9 and thereafter during the deposition had changed her stand and sought partition. He submits that defendant No.1 and defendant No.12 having adopted the written statement of defendant no.9 supported the case of defendant No.9 and thus cannot seek share in the properties which are alienated by defendant Nos. 2 and 3 in favour of defendant No. 9.

10. *Per contra*, Mr. Sathe, learned counsel appearing for respondent No.5A to 5C would submit that even if it is accepted that the written statement of defendant No.9 was adopted by defendant Nos.1 and 12, perusal of the written statement of defendant No.9 would

indicate that it was the specific contention of defendant No.9 that defendant Nos.2 and 3 had 1/2 share in the suit properties and it is this contention which has been adopted by defendant Nos.1 and 12. Pointing out to the genealogy at paragraph 14 he submits that defendant Nos.2 and 3 had half share whereas plaintiffs and legal heirs of Suresh had 1/4th share each in the suit property and despite supporting the case of defendant No.9, it cannot be accepted that the Defendant Nos 1 and 12 should not seek their share in the alienated properties.

11. I have given thoughtful consideration to the submissions and have perused the record.

12. The finding of the properties being joint family properties has not been disputed by the Appellants. Similarly, there is no dispute that the Defendant Nos 2 and 3 have alienated undivided joint family properties in favour of the Defendant Nos 7 and 9. It is nobody's case that the suit properties which are admittedly ancestral properties were partitioned and thus what was purchased by defendant Nos.7 and 9 is the undivided share of defendant Nos.2 and 3 in the ancestral properties. It is well settled that a purchaser of an undivided share in the ancestral property is not entitled to any specific share in the properties as without a partition having taken place between the members of coparcenary no coparcener can claim any defined share

in the coparcenary property.

13. The purchaser from alienating coparcener runs the risk of being allotted the property which would be allotted to his vendor i.e. alienating coparcener upon partition being effected. In the present case, defendant Nos.7 and 9 by purchasing undivided share in coparcenary property from the alienating coparceners i.e. defendant Nos.2 and 3 would thus be entitled to the property which would be allotted to the share of defendant Nos.2 and 3 upon partition being effected at the time of final decree proceedings. The Trial Court as well as the Appellate Court have rightly held that the sale deeds executed are valid only to the extent of share of defendant Nos.2 and 3 as they had right to alienate their undivided share in the coparcenary property. However the property which would fall to the share of the purchaser can be determined only after partition takes place by metes and bounds.

14. The submission of Mr. Godbole, learned Senior Advocate is that the Trial Court and the Appellate Court while directing partition should have passed an equitable decree allotting the subject matter of the sale deeds to the share of defendant Nos.2 and 3 is contrary to the settled position of Hindu law and is thus liable to be rejected as no coparcener can before partition claim any specific property as his own. In view of the settled position in law, the Appellate Court could not

have passed a decree allotting the alienated property to the share of the alienating coparcener.

15. The contention that defendant No.1 and transposed defendant No.12 having adopted written statement of defendant No.9 and thereby supporting the defendant No.9 cannot claim any share in the alienated property is also liable to be rejected. As held hereinabove, the purchaser of undivided share in coparcenary is only entitled to the property which would fall to the share of his vendor. The adoption of the written statement by the Defendant No 1 and 12 would at the most be construed as supporting the sale deed executed in favour of the Defendant Nos 7 and 9 but cannot be construed as waiver of their right in the alienated property and confining their share only to the other properties of the coparcenary. As rightly pointed out by Mr. Sathe, the contention of defendant No.9 in written statement is that defendant Nos.2 and 3 have half share in the suit property which contention has been supported. That being so, Mr. Sathe is right in contending that as per the accepted genealogy the other half share falls to the share of the plaintiff and defendant Nos.12 as well as the legal heirs of deceased Suresh i.e. defendant No.1, 4,5 and 6.

16. The Appellate Court has drawn the right inference from proven facts by applying the law correctly and no substantial question of law

arises. Appeal stands dismissed.

17. By way of Interim Application filed under Order 41 Rule 27 of the CPC, the appellant-applicant sought to place on record the sale deeds executed by the members of the joint family to demonstrate that all other properties had been sold. Mr. Godbole would submit that, after having alienated their share in the property, execution proceedings will now be adopted by them for the purpose of seeking their share in the subject matter of two sale deeds and seeks liberty to raise all contentions before the executing Court. As final decree proceedings are pending, it will be open for the Appellant to raise all such contentions before the executing Court. Interim Application is disposed of with liberty as prayed.

18. In view of dismissal of Appeal, Civil Application does not survive for consideration and is accordingly disposed of.

19. At this stage, request is made for continuing the interim relief that possession will not be handed over for further period of 6 weeks. As interim arrangement is continued since long, the same is continued for a period of 6 weeks from the date of uploading of this order.

[Sharmila U. Deshmukh, J.]