



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

SECOND APPEAL NO. 181 OF 2018

APPELLANT :

(Ori. Plaintiff)
(on R.A.)

Smt. Basanti w/o Amrutlal Shahu,
Aged about 51 years, Occ. : Household,
R/o. Raje Raghuji Statute, Sakkardara
Chowk, Juni Shukrawari, Nagpur.

V E R S U S

RESPONDENTS : 1.

(Ori. Defendants)
(On R. A.)

Smt. Saraswatibai wd/o Lalji Shahu,
Aged about 53 years, Occ. : Business.

(Ori. Defendant)
(On R. A.)

2. Krushna s/o Lalji Shahu,
Aged about 32 years,
Occ. : Business,

(Ori. Defendant)
(On R. A.)

3. Balram s/o Lalji Shahu,
Aged about 28 years, Occ.: Business,

Nos.1 to 3 resident of Gandhi Chowk,
Sadar, Nagpur.

(Ori. Defendant)
(On R. A.)

4. Smt. Kiran S. Mahur,
Aged about 29 years, Occ.: household,
R/o. House No.12/7, 147/2, Menugonda,
Secunderabad – 17 (A.P.).

(Ori. Defendant)
(On R. A.)

5. Rajendra s/o Hiralal Shahu,
Aged about 39 years, Occ.: Business,
R/o. Gandhi Chowk,
Sadar, Nagpur.

(Ori. Defendant)
(On R. A.)

6. Smt. Laxmibai w/o Gayaprasad Gupta,
Aged about 48 years, Occ.: Household,
R/o. C/o. Shri G. P. Gupta PSI (N),
Police Pratilip Vibhag, Civil Court,
Sultanpur, District – Sultanpur (U.P.).

Shri P. V. Vaidya, Advocate for appellant.

Shri Yash Kullarwar, Advocate h/f Shri M. Anilkumar, Advocate for
respondent Nos.1 to 3.

Shri Shadam Khan, Advocate h/f Shri Masood Shareef, Advocate for
respondent No.5.

CORAM:- SANJAY A. DESHMUKH, J.

JUDGMENT RESERVED ON : 23/07/2024

JUDGMENT PRONOUNCED ON : 19/09/2024

JUDGMENT :

1. **Admit.** Heard finally with the consent of learned counsel appearing for the parties.

2. This appeal is preferred by the plaintiff against the Judgment and decree passed by the learned District Judge-4, Nagpur in Regular Civil Appeal No.160/2012, dated 18/09/2017. The said appeal was preferred by the defendants against the Judgment and decree dated 28/10/2004, passed by the learned 2nd Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No.96/1991.

PLAINTIFF'S CLAIM

3. The subject matter of this appeal are properties A(b) Plot Nos.49 and 50, situated at Navnath Co-operative Society, Somalwada, Nagpur, A(d) Plot No.3, P.H. No.38 in Shri Sanskriti Housing Cooperative Society, Besa, Nagpur and A(h) Municipal Shops Nos.11 and 12, situated at Fule Market, Nagpur of the Schedule A annexed with the plaint.

PLAINTIFF'S CASE:-

4. The plaintiff contended that Hiralal Shahu was her father, who died on 06/06/1988. Her mother defendant No.3 Saritajidevi died during the pendency of the suit on 16/05/1991. They had two sons and two daughters i.e. Basanti plaintiff, Lalji - defendant No.1, Rajendra - defendant No.2 and Smt.Laxmibai Gupta – defendant No.4.

5. During the pendency of the suit, defendant No.1 Lalji Shahu died. His legal representatives are his sons Krishnakant and Balram, respondent Nos.2 and 3 and daughter Smt.Kiran Mahur respondent No.4.

6. The plaintiff contended that all the disputed suit properties are Hindu Joint Family properties acquired with the funds of Hiralal Shahu, who was businessman. He died intestate. She demanded partition of her 1/4th share in all these properties, which was denied by the defendants. Therefore, suit was filed for partition.

DEFENCE :-

7. The defendants denied the claim of the plaintiff. They

contended that except the properties in Sr.Nos.A(a) and A(c), all the properties were purchased by them from income of the separate businesses of defendant No.1 – Lalji. In respect of disputed properties in Schedule A(b), A(d) and A(h), their contentions are as under :

- (i) The property in Schedule-A(b), Plot Nos.49 and 50 were purchased in the name of defendant No.2 Saritajidevi with the funds of defendant No.1. She gifted those plots to her son defendant No.2 Rajendra.
- (ii) The property at schedule-A(d) was purchased in the name of Saritadevi on 25.8.1984, with the funds of defendant No.1. She sold that property to the Krishna Kumar, the son of the defendant No.1 – Lalji by sale deed dated 06/03/1990.
- (iii) The property in Schedule-A(h) are shop Nos.11 and 12, which are the shops of defendant No.1, Lalji. Those shops are on lease owned by Municipal Council, Nagpur. He is only tenant of it.

8. The learned Trial Court held that the plaintiff and the defendants are entitled to 1/4th share in each property listed in Schedule-A(a), (b), (c), (d) and (h). However, in respect of

residential house (dwelling house) in schedule-A(a), the plaintiff's claim was refused, until Rajendra Shahu chooses to separate his share, after which the plaintiff will be entitled to 1/4th share in it as there is bar under Section 23 of the Hindu Succession Act, 1956 (For short, "H.S. Act"). The first appellate Court held that now that bar is removed by the amendment.

9. The learned First Appellate Court, while partly allowing the appeal, partly modified the Judgment and decree of the Trial Court and held that the plaintiff is entitled for partition of 1/4th share in house property in schedule-A(a), and in schedule-A(c) property, 1/10th share each. The defendant No.1 Lalji Shahu has his independent 1/2th share, as he is purchaser and owner of it. The first appellate Court held that properties at A(b) are not joint family properties. The plaintiff's claim was accordingly, rejected.

SUBSTANTIAL QUESTIONS OF LAW :-

10. The following substantial questions of laws have been formed by this Court :-

“(i) Whether the appreciation of evidence by the Appellate Court while modifying decree passed by the Trial Court is perverse ?

(ii) Whether the Appellate Court, while modifying the Judgment passed by the Trial Court granting

decree in favour of the original plaintiffs, came in close quarters with the reasons given by the Trial Court, specifically while differing with the findings given by the Trial Court ?”

11. The learned advocate for the plaintiff submitted that the Judgment and decree of the First Appellate Court is not legal and correct, as evidences were not reappreciated properly. The First Appellate Court gave incorrect reasons and findings. The First Appeal was erroneously allowed. He prayed to allow this appeal by granting decree for partition of suit properties as per Schedule A(b), A(d) and A(h) as the reasons of first appellate Court are not legal and correct because it did not give proper and correct reasons and came in close quarters with the reasons of the trial Court. He is relying upon following precedential law :-

i) ***Somakka (Dead) .vs. K.P. Basavraj***, 02222667, in which it was held that high Court did not consider the statement and other documentary evidence on record, in which it was held that, the judgment of High Court is liable to be set aside.

ii) ***Santoshkumar S/o Swamidas Agrawal ..vs.. Ashwin S/o Wardhaman Golechha***, reported in 2018 LawSuit(Bom) 683, in which, scope of Section 100 of the Code of Civil Procedure for deciding of second appeal with directions as to how to decide it are laid down.

iii) *Murthy and others ..vs.. C. Sardambal*, reported in **2021 DGLS 936**, in which the appellate Court has jurisdiction to reverse the finding of trial Court and first appellate Court if dealt with short cut method while giving reasons.

12. The learned advocate for the defendants submitted that there is no any illegality and perversity in the impugned Judgment and Decree of First Appellate Court. The evidences were properly reappreciated. The reasons and findings are correctly given.

13. The plaintiff had challenged the Judgment and decree of the First Appellate Court regarding properties as schedule-A(b), A(d) and A(h) in this appeal.

14. The plaintiff's evidence is that Hiralal Shahu came from Uttar Pradesh and he started selling "*Pohe*" and "*Phutane*" on footpath at Nagpur. After his death, his businesses were continued by the defendant Nos.1 and 2. From the income of those businesses of joint Hindu Family suit properties are purchased. Therefore, the suit properties are of Hindu joint family of plaintiff and defendants. She claimed her share.

15. The defendants' evidence is that during Constitutional Emergency in our country, Hiralal Shahu was not permitted to

conduct his business on the footpath and he subsequently stopped it. Thereafter, defendant No.1 Lalji in 1977 opened his shop for selling *Poha, Chana and Murmura* at Nagpur. Through his hard-work, he flourished his businesses. He got the shop Nos.11 and 12 on lease. Most of the properties were purchased by him in the name of his father, mother and brother, who were residing jointly. The disputed suit properties A(b) and A(d) were purchased by the defendant No.1 in the name of his mother Saritaji Devi. She transferred those properties to the son Rajendra and grandson Krishnakumar.

16. It is admitted fact that properties in schedule-A(b) i.e. Plot Nos.49 and 50 are situated at Navnath Co-operative Housing Society, Narendra Nagar, were purchased in the name of mother Saritajidevi by a sale deed Exh.77 dated 10/01/1990 after the death of Hiralalji, the father of plaintiff. The defendants evidence is that those were self-acquired properties of Saritajidevi. She gifted those properties by Gift Deed (Exh.56) to the defendant No.2 Rajendra Shahu, which she had purchased. As per Section 14(1) of the Hindu Succession Act, 1956 (for short "H.S. Act"), she was absolute owner of these properties and she had every right to dispose of it as per her choice. She had legally disposed of these properties to her son. The plaintiff has not adduced any evidence

to show that these two plots were purchased out of the funds of the businesses of deceased Hiralalji. The plaintiff failed to discharge her burden of proof in this regard. As there is no any corroborative evidence, the learned First Appellate Court rightly held in Para No.20 of the impugned Judgment that these properties belong to defendant No.2 Rajendra. The said reasons and findings are legal, correct. There is no any perversity in the impugned judgment and decree and hence, no interference is warranted in it in this regard.

17. The property at schedule-A(d) is Plot No.3 of which P.H. No. is 38 of Sanskriti Cooperative Housing Society at Gram Panchayat, Besa, Tah. & Dist. Nagpur was purchased in the name of Sitarajidevi vide Sale Deed Exh.55 dated 25/02/1988. The defendant's contended that it was purchased with consideration amount provided by the defendant No.1 to Saritajidevi from his own income of businesses.

18. The plot No.3, P.H. No.38 is sold by Saritajidevi to Krishnakumar Shahu, the son of defendant No.1 – Lalji through a Registered Sale Deed Exh.71 on 06/03/1996. Krishnakumar was not made party to the suit initially. He was arrayed as legal

representatives after the death of his father Lalji during pendency of suit. There is no any pleading in the plaint about him as to his claim regarding this plot. The learned First Appellate Court rightly held that no relief of partition could be granted to divest the said Krushnakumar Shahu from property Plot No.3 without giving him an opportunity to defend suit as contesting defendant in the suit.

19. The Saritajidevi was absolute owner of Plot No.3, P.H.No. 38 at Besa, Nagpur as per Section 14(l) of the H.S. Act. She can dispose of it as per her choice legally. There is no any corroborative evidence suggesting that there was nucleus i.e. income of the joint family and it was used to purchase the Plot No.3 in the name of Saritajidevi.

20. The plaintiff failed to discharge the burden of proof in this regard. The reasons and findings of the First Appellate Court are legal and correct in respect of plot No.3, P.H. No.38. There is no any perversity in the impugned Judgment and decree regarding Plot No.3 situated at Besa. The reasons are sufficient and acceptable. Therefore, the argument of learned advocate for the plaintiff is not acceptable in this regard.

21. In respect of suit properties at A(h) Shop Nos.11 and 12, situated at Phule Market and Cotton Market at Nagpur, the Lease Deeds dated 16/11/1981 and 25/01/1982 at Exhibits 54 and 55 are in the name of defendant No.1 Lalji. He was tenant of those shops. Those shops are got on lease having limited right to him in it. It's title lies with the Municipal Corporation, Nagpur. The plaintiff has not adduced any contrary evidence to show that these two shops were possessed and run by father Hiralal prior to his death to claim share in it. The plaintiff failed to discharge burden of proof that it is property of joint family and fund of joint family were used for it. The learned First Appellate Court rightly held in Para No.24 of the judgment that the Lease Deeds Exh.54 and 55 are in the name of defendant No.1 Lalji alone. There is no any illegality or perversity in the impugned judgment and decree in respect of these two shops. The reasons are sufficient and acceptable. Therefore, argument of learned advocate for the plaintiff is not acceptable in this regard.

22. The learned First Appellate Court properly reappreciated the entire matter before it particularly evidences of both sides in respect of these four properties in question in this appeal. The learned First Appellate Court also rightly held that the

plaintiff had failed to establish any legal right to claim partition in the properties in schedule-A(b), A(d) and A(h).

23. In respect of the substantial questions of law No.1 regarding reappreciation of evidence by the First Appellate Court as held above there is no any illegality and perversity in the impugned judgment. There is absolutely no any legal or factual reason and ground to interfere in the findings of the First appellate Court. The learned First Appellate Court correctly reappreciated the entire evidence. Hence, substantial question of law No.1 is answered in the negative.

24. In respect of substantial question of law No.2, this Court found that sufficient and acceptable reasons are given by the first appellate Court by considering matter before it as defined in the definition of 'proof' of the Indian Evidence Act, 1872. Thus, reasons and findings with respect to the reasons in the judgment of the trial Court are correct and it came in the close quarter with the reasons of the trial Court by holding in the para No.28 that, I differ with the finding of trial Court regarding properties open for partition. It is alleged that, the appellate Court had not given clear and convincing reasons for it. It is mistake of Court and for that

party defendant shall not suffer for the acts of Court as per principle that “*actus curiae neminem gravabit*” which means for mistake of Court party shall not suffer and it is no ground to set aside such judgment as held by the Hon’ble Supreme Court in the case of ***D. Purushotama Reddy and Anr. ..vs.. Sateesh***, reported in **AIR 2008 SC 3202**. Hence, substantial question of law No.2 is answered in negative.

25. In view of law laid down in precedential law of ***Santosh and others*** cited (Supra) by plaintiff there is no scope for interference in the findings of the first appellate Court as held above. Therefore, the argument of learned advocate for the plaintiff/appellant is not acceptable regarding these two substantial questions of laws. The precedential laws cited (Supra) by plaintiff are not helpful to the appellant as the facts are different as discussed above. Hence, those are not relied upon.

26. The appeal deserves to be dismissed. The appeal is **dismissed**. No costs.

27. In view of disposal of this appeal, the pending application(s), if any, shall stand disposed of.