



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

**SECOND APPEAL NO.83/2011**

1. Ramesh s/o Ramchandra Wanode  
Aged about 50 years, Occ: Business  
& Agriculturist,
2. Shantaram s/o Ramchandra Wanode  
Aged about 46 years, Occ: Business  
& Agriculturist,
3. Suresh s/o Ramchandra Wanode,  
Aged about 44 years, Occ: Business  
& Agriculturist
4. Smt. Sakhubai wd/o Ramchandra Wanode,  
Aged about 75 years, Occ: Household,

All R/o: Plot No.49-A, Manewada Road,  
Nagpur.

**.....APPELLANTS**

**...V E R S U S...**

1. Smt. Deokabai wd/o Wamanrao Borkar,  
Aged about 60 years, occ: Household,  
R/o: New Gumgaon (Gotali),  
Tahsil and District: Nagpur.
2. Laxman s/o Sahadev Dandare,  
Aged about 50 years, Occ: Cultivator,
3. Bhaskar s/o Sahadev Dandare,  
Aged about 43 years, Occ: Cultivator,
4. Keshav s/o Sahadev Dandare,  
Aged about 36 years, Occ: cultivator.

Nos.2 to 4 R/o Selu, Dist.: Wardha.

**...RESPONDENTS**

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Mr. J. M. Gandhi, Advocate for appellants.  
Mr. D. T. Shinde, Advocate for respondents.  
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**CORAM:- ANIL L. PANSARE, J.**  
**DATED :- 09.05.2024**

**JUDGMENT**

Heard Mr. J. M. Gadhi, learned counsel for the appellants and Mr. D. T. Shinde, learned counsel for the respondents.

2. The appeal has been admitted on the following substantial questions of law:

*“1] Whether the learned First Appellate Court has committed error of law and fact in reversing the finding given by learned Trial Court in paragraph Nos. 11 to 14 of its judgment holding the document i.e. 'Kabulaitnama' dated 9.02.1967 to be genuine and proved to have been executed by late Sadashiv Wanode?*

*ii] Whether the learned First Appellate Court has committed error of law and fact in reversing the finding given by Trial learned Trial Court in paragraph No.15 of its Judgment holding that the suit was bad for non-joinder of necessary parties?”*

3. Having heard both sides and considering the peculiar facts of the case, the second substantial question of law is taken up first.

4. The suit property is part of a self acquired property of one Sadashiv Jagobaji Wanode. He purchased an agricultural field bearing old survey No.39/1, new gat No.19/1 at Mouja Dongargaon admeasuring 18.38 Acres, Tahsil and District Nagpur. He died in the year 1967 leaving behind him, his wife namely, Laxmibai, two sons namely, Govindrao and Ramchand and two daughters namely, Anubai and Deokabai.

5. Deokabai is plaintiff No.1. The legal heirs of Anubai are plaintiff Nos.2 to 4 (they will be hereinafter collectively referred to as "Anubai"). The defendant Nos.1 to 3 are children of Ramchandra and defendant No.4 is his wife (The defendants will be hereinafter collectively referred to as "Ramchandra").

6. Govindrao and/or his legal representatives was/were not made party to the suit. Laxmibai expired in August, 1990 and, therefore, was not party to the suit.

7. The entire controversy revolves around the document dated 09.02.1967 styled as "*Kabulaitnama*" (Exh.-35). Sadashiv is the author of the document. The document is written in favour of his wife Laxmibai. Sadashiv has stated that he has purchased the

field property admeasuring 18  $\frac{1}{2}$  Acres and, therefore, is partitioning the same by giving 6 Acres to Laxmibai for her lifetime and is given to her for lifetime, with a rider that she will have no authority to sell her share. It is then mentioned that after her death, the property will devolve upon two brothers equally i.e. 3 Acres each to Ramchandra and Govindrao. So far as remaining land is concerned, 6 Acres is given to Ramchandra and 6  $\frac{1}{2}$  Acres is given to Govindrao.

8. The plaintiffs i.e. Anubai and Deokabai contended that Sadashiv and Laxmibai died intestate and thus claimed share in terms of Section 8 of the Hindu Succession Act, 1956 (Hereinafter referred to as the, "Act of 1956"). The defendant i.e. Ramchandra relied upon Exh.-35 to contend that it was a Will executed by Sadashiv and filed counter claim, seeking declaration of ownership over the suit property on the ground that the remaining property i.e. 50% share has been sold by Govindrao with consent of all. The Trial Court found merit in the said contention.

9. The Trial Court dismissed the suit for non joinder of the necessary party, having found Govindrao to be necessary party to suit. It, however, allowed the counter claim filed by Ramchandra.

10. The First Appellate Court held that the document, “*Kabulaitnama*”, Exh.-35 was not a Will. It further found that the document having been not registered, cannot be treated as a document of partition. The First Appellate Court, on the basis of evidence led, came to the conclusion that Govindrao had sold his part of share in the property with consent of the plaintiffs and defendants and, therefore, his presence in the suit was not necessary. Accordingly, the First Appellate Court decreed the suit and dismissed the counter claim.

11. Having given thoughtful consideration to the entire episode, in my considered view in absence of Govindrao neither the suit nor the counter claim was maintainable.

12. There is no dispute that Sadashiv was absolute owner of the land admeasuring 18 ½ Acres. If the document Exh.-35 i.e. *Kabulaitnama* is to be accepted as a Will or a document supporting theory of partition, 6 Acres land was given to Laxmibai for her maintenance, without authority to sell the same. Sub Section (1) of Section 14 of the Act of 1956, provides that the property possessed by a female Hindu, whether acquired before or after the

commencement of the Act of 1956, shall be held by her as full owner thereof and not as a limited owner.

13. So far as Sub Section (2) is concerned, the Apex Court, in *V. Tulasamma and Ors. Vs. Sesha Reddy (Dead) by LRs., (1977)* *3 SCC 99*, while considering the scope of Section 14(1) and (2), held that:

*“..sub-section (2) must be confined to cases where property is acquired by a Hindu female for the first time as a grant, without any pre-existing right under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. That this is the legislative intendment is also made clear by the circumstances that the Hindu Succession Bill referred to acquisition of property by a Hindu female under gift or will only and it was only subsequently, in the Act, that other modes of acquisition were added. Where, however, property is acquired by a Hindu female at a partition or in lieu of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope of sub-section (2), but within the scope of sub-section (1).”*

14. Thus, the Apex Court has held that where property is acquired by a Hindu female at a partition or in lieu of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the exception of sub-section (2), but within the scope of sub-section (1). In the present case, Exh.-

35 is in the nature of a Will-cum-Partition and, therefore, the said document, if given effect to, Laxibai would be treated an absolute owner of 6 Acres. Upon her death, it will devolve upon her heirs in terms of Section 15 of the Act of 1956.

15. Section 15 provides that the property of a female Hindu dying intestate shall devolve firstly upon sons and daughters (including children of any predeceased son or daughter) and the husband. In the present case, the husband of Laxmibai predeceased her and, therefore, upon her death, 6 Acres land will devolve upon Ramchandra, Govindrao, Anubai and Deokabai. Ramchandra predeceased Laxmibai and, thereore, his share i.e. 1/4th share will devolve upon his heirs. Govindrao will be entitled for 1/4th share in the property left behind by Laxmibai and hence was a party necessary to the suit seeking partition as also counter claim.

16. If the document Exh.-35 is to be discarded, the succession to the property left behind by Sadashiv will be governed by Section 8 of the Act of 1956. The property shall then devolve firstly upon Class-I heirs which includes Laxmibai, Ramchandra, Govindrao, Anubai and Deokabai. Laxmibai will be thus entitled

to 1/5th share and upon her death, the property that fell into her share will devolve upon two sons and two daughters, meaning thereby, Govindrao will be entitled to receive 1/4th of 1/5th share of Laxmibai. Thus, in the second eventuality as well, Govinderao was a party necessary to the suit and counter claim.

17. Both the Courts below failed to consider this vital aspect. They have, on the basis of the claims and counter claim made by the parties, indulged into giving weightage to that part of evidence by which Govindrao has sold his part of share. As such, the Trial Court found Exh.-35 to be genuine but dismissed the suit on the ground of non joinder of Govindrao. While examining counter claim, the Trial Court gave weightage to the recitals in the Will/Partition, Exh.-35 to hold that Govindrao and Ramchandra will be entitled to half shares each and since Govindrao has sold his part of the share, Ramchnadra will be entitled to be declared as owner of the remaining part. The Trial Court failed to note the effect of Section 14 of the Act of 1956 and thus rendered erroneous finding.

18. So far as the First Appellate Court is concerned, it has discarded the document Exh.-35. Despite doing so, the First

Appellate Court held that Govindrao has sold his part of share and, therefore, he will not be entitled to claim any share in the remaining property left behind by Sadashiv and accordingly, held that the suit would lie between Anubai, Deokabai and Ramchandra. The First Appellate Court thus committed error of law. Once it has discarded Exh.-35, the property left behind by Sadashiv, will be governed by Section 8 of the Act of 1956 and, therefore, Laxmibai will be entitled to 1/5th share and upon her death, Govindrao will be entitled to 1/4th of 1/5th share of Laxmibai. The First Appellate Court failed to consider the effect of Section 8 of the Act of 1956 and rendered an erroneous finding.

19. Put all together, in absence of Govindrao, neither the suit nor the counter claim was maintainable. The suit seeking partition and counter claim were bad for non joinder of necessary party. The suit and counter claim are/were, thus, liable to be dismissed. In view thereof, separate finding on substantial questions of law is not called for. Hence following order.

#### **ORDER**

- (i) The appeal is partly allowed.
- (ii) Judgment and decree dated 05.07.2010 passed by District Judge-9, Nagpur in Regular Civil

Appeal No.269/2009 and judgment and order dated 12.03.2009 passed by 6<sup>th</sup> Jt. Civil Judge Junior Division, Nagpur in Regular Civil Suit No. 1045/2005 stand quashed and set aside.

(iii) The Regular Civil Suit No.1045/2005 and Counter Claim therein stands dismissed.

(iv) Parties to bear their own costs.

**(Anil L. Pansare, J.)**

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