

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
SECOND APPEAL NO.643 OF 2018
WITH
INTERIM APPLICATION NO.1740 OF 2021**

Shri. Baba Dhondiba Shinde (Dukare)
Age: 75 yrs., Occu: Agriculture,
R/o Kasegaon, Tal. Pandharpur,
Dist. Solapur.

..Appellant
(Ori. Plaintiff)

Versus

Sou. Jayashri Shivaji Shinde (Dukare)
Age: 52 yrs., Occu: Household,
R/o Kasegaon, Tal. Pandharpur,
Dist. Solapur.

..Respondent
(Ori. Defendant)

...

Mr. Vishwanath Talkute a/w Mr. Pratik Bhojane a/w Ms. Sampada Patil
a/w Mr. Mahesh Bhosale, Advocate for Appellant.
Mr. Ajay A. Joshi, Advocate for Respondent.

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CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : 22nd SEPTEMBER, 2025.

PRONOUNCED ON : 25th SEPTEMBER, 2025.

FINAL ORDER:-

1. The present Second Appeal takes exception to judgment and decree dated 04.05.2017 passed by learned District Judge, Pandharpur in Regular Civil Appeal No.13/2016, thereby upholding judgment and decree dated 30.11.2015 passed by learned Civil Judge Junior Division, Pandharpur in Regular Civil Suit No.357/2002, thereby dismissing suit of appellant/plaintiff claiming relief of partition and separate possession.

2. The appellant/original plaintiff filed Regular Civil Suit No.357/2002 contending that suit properties were originally owned by

Dhondiba i.e. father of plaintiff. The plaintiff and husband of defendant were real brothers. In the year 1985, there was partition between Dhondiba and his sons in respect of landed property. It was agreed that land allotted to share of Dhondiba will be partitioned after his demise between plaintiff and husband of defendant. Dhondiba expired on 26.07.2002. Thereafter, husband of defendant informed plaintiff that Dhondiba sold out his share to defendant. Accordingly, Mutation Entry No.11600 is effected. According to plaintiff, he is entitled for half share in suit property.

3. The defendant filed written statement, accepted relationship between parties and pleaded that on 29.05.2002 Dhondiba sold his share in property to her by executing registered sale deed. Since then, she is in possession of suit property.

4. The Trial Court framed issues, recorded evidence of parties and finally dismissed suit holding that plaintiff failed to prove that land owned by Dhondiba was agreed to be divided between him and Shivaji. The Trial Court further affirmed case of defendant that Dhondiba sold his share to her. The plaintiff filed Appeal impugning judgment and decree passed by Trial Court before District Judge, Pandharpur, who dismissed Appeal upholding decree as passed by Trial Court.

5. Mr. Vishwanath Talkute, learned Advocate appearing for appellant would submit that both Courts erroneously put burden upon plaintiff to prove that sale deed dated 29.05.2002 was executed with undue influence specially when respondent was in position of active confidence over Dhondiba. He would submit that Dhondiba died on 26.07.2002, whereas sale deed suffers from vice of perversity. He would invite attention of this Court to Section 111 of Indian Evidence Act to contend that although transaction may not *void ifso facto*, burden of establishing its perfect fairness, adequacy and equity would cast upon person in whom confidence has been reposed. He would, therefore, urge that defendant and her husband Shivaji had confidential or fiduciary relations with Dhondiba and took advantage over plaintiff under pretext of sale deed. It was burden of defendant that transaction was fair and honest. In support of his contentions he relies upon exposition of law by Supreme Court in case of ***Krishna Mohan Kul Alias Nani Charan Kul and Another Vs. Pratima Maity and Others***¹.

6. Per contra, Mr. Ajay Joshi, learned Advocate appearing for respondent would submit that Dhondiba had absolute title in suit property as per partition of year 1985. He alienated his share to defendant under registered sale deed and eventually, title and possession in suit property vested in defendant. Both Courts have concurrently held that defendant proved execution of sale deed in her

¹ (2004) 9 SCC 468.

favour and title is validly passed to her. The plaintiff failed to establish his case about agreement between parties that after death of Dhondiba suit property to be divided between plaintiff and his brother Shivaji.

7. Having considered submissions advanced and on perusal of reasoning adopted by Courts in impugned judgments it can be observed that plaintiff instituted suit seeking decree of partition and separate possession in relation to Gut Nos.890 and 891/3, which were fallen to share of Dhondiba in partition of 1985. There is absolutely no evidence to show that Dhondiba had restricted right to enjoy his share after partition of 1985. The condition stipulated in application filed at Exhibit-128 can be interpreted to mean that in case Dhondiba dies intestate, property left behind by him can be divided equally amongst plaintiff and his brother Shivaji. Further, Courts have rightly relied upon Section 11 of Transfer of Properties Act, which prescribes that any condition in restraint of alienation will be become void. Since property was vested with Dhondiba as absolute owner after partition, his right to create third party interest could not have been fettered.

8. The defendant acquired ownership under sale deed dated 29.05.2002 executed by Dhondiba. It is a registered sale deed. The defendant relied upon evidence of Shivaji and a witnesses on sale deed. Pertinently, plaintiff has not claimed relief for setting aside sale deed or declaration that sale deed is invalid. Although pleading is incorporated contending that Dhondiba was not keeping well at the time of sale

deed or he was not physically fit to understand consequences, in absence of prayer for setting aside sale deed, claim of plaintiff seeking partition in suit property, which is transferred under sale deed by Dhondiba in favour of defendant cannot be considered. Even otherwise, there is no evidence on record to indicate that Dhondiba was incapable to execute sale deed or he was victim of fraud or misrepresentation.

9. Both Courts have concurrently recorded finding upholding defendant's title based on sale deed over suit property. In that view of matter, no substantial question of law arises for consideration. Hence, Second Appeal stands dismissed.

10. In view of dismissal of Second Appeal, pending Interim Application also stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE