



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

SECOND APPEAL NO. 57 OF 2016

APPELLANTS :

(Original Defendant/
Respondent No.5)

1. Sou. Jyoti w/o Arunrao Bhongade,
Aged about 45 years,
Occupation Agriculture,
R/o. Kanholibara, Tahsil Hingna,
District Nagpur.

(Original Defendant/
Respondent No.2)

2. Shri Kishor s/o Mannalal Sanchariya,
Aged about 54 years,
Occupation Agriculture,
R/o. Anji (Mothi),
Tahsil & District Wardha.

VERSUS

RESPONDENTS :

(Original Plaintiff/
Appellant No.1)

1. Sumant S/O Pandhari Chafle,
Aged about 27 years,
Occupation Student, R/o. Sukli (Ubar),
Tahsil Arvi, District Wardha.

(Original Plaintiff/
Appellant No.2)

2. Sou. Manisha w/o Naresh Nistane,
Aged about 36 years,
Occupation Household, R/o Telipura,
Wardha, Tahsil & District Wardha.

(Original Plaintiff/
Appellant No.3)

3. Sou. Bharti w/o Bhaskarrao Dadhe,
Aged about 34 years,
Occupation Household, R/o Ganesh
Nagar, Near Hanuman Mandir, Wardha,
Tahsil & District Wardha.

(Original Plaintiff/
Appellant No.4)

4. Ku. Bhakti d/o Pandharinath Chafle,
Aged about 28 years,
Occupation Student, R/o Sukli (Udhar),
Tah. Arvi, District Nagpur.

(Original Defendant/
Respondent No.1)

5. Shri Pandhari s/o Yadavrao Chafle,
Aged about 58 years,
Occupation Agriculture, R/o Pulai,
Tahsil & District Wardha.

(Original Defendant/
Respondent No.3)

6. Sou. Jijabai w/o Pandhari Chafle,
Aged about 55 years,
Occupation Household, R/o Sukli (Ubhar),
Tahsil Arvi, District Wardha.

(Original Defendant/
Respondent No.4)

7. Sau. Swati w/o Dhirajrao Kawale,
Aged about 32 years,
Occupation Service, R/o D-34, Maroti
Building, Shruti Complex, Sector-2,
Near Bhakti Vedant Hospital, Meera
Road, East Thane, Mumbai.

Shri P. D. Randive, Ms. Riya Hotchandani and Shri Gaurav Balpande,
Advocates for appellants.

Shri M. P. Dhruv, Advocate for respondent Nos.1 to 4, 6 and 7.

CORAM: ROHIT W. JOSHI, J.

DATED : 08/05/2025.

ORAL JUDGMENT :

1. The present second appeal was earlier dismissed by judgment dated 25/08/2016. Subsequently, the appellants filed an application for review bearing MCA No.1039/2016 which came to be allowed vide judgment dated 29/10/2021. The judgment dated 25/08/2016 dismissing the second appeal was set aside and second appeal was restored to file. In the circumstances, the second appeal again came up for hearing. Vide order dated 04/07/2022, following substantial questions of law have been framed :

“(1) Whether after the death of Yadaorao Chafle leaving behind the suit property inherited by Pandhari Yadaorao Chafle in partition of 1970, it becomes the individual property of Pandhari Yadaorao Chafle or it becomes ancestral property of Pandhari Yadaorao Chafle ?

(2) Whether during the life time of father his son and daughter i.e. original plaintiffs can ask for partition of the suit property and further can ask for equal share in the suit property ?”

2. The appellants in the present second appeal are original defendant Nos.2 and 5. The respondent Nos.1 to 4 are original plaintiffs. The respondent No.5 is the original defendant No.1. The respondent Nos.6 and 7 are original defendant Nos.3 and 4. The parties will be referred in the judgment as plaintiffs and defendants.

3. The plaintiff Nos.1 to 4 are related to each other as brothers and sisters. The defendant No.1 is their father. The defendant No.4 is another sister of plaintiff. The defendant Nos.1 and 3 is father and mother respectively of plaintiffs and defendant No.4.

4. The defendant No.1 - father had sold the suit property i.e. land bearing Field Survey No.231/1 (Old Field Survey No.89/3) admeasuring area 2.94 HR situated in Mouza Pulai, Tahsil and District Wardha vide registered sale deed dated 14/02/2007 to defendant No.2. The plaintiffs who are son and daughters of the vendor – defendant No.1 have challenged the said sale deed by filing the special suit bearing Special Civil Suit No.54/2007. It will be pertinent to state that before initiation of the suit, defendant No.2 has sold the suit property to defendant No.5. Initially, defendant No.5 was not party to the civil suit, however, on realizing that the suit property was sold by the defendant Nos.2 to defendant No.5, the defendant No.5 was subsequently arrayed as party defendant in the civil suit. These

purchasers namely; defendant No.5 and 2 are the appellants Nos.1 and 2 respectively in the present Second Appeal.

5. The learned Trial Court has dismissed the suit vide Judgment and Decree dated 15/06/2011. The learned Trial Court held that the property was an ancestral property, however, the learned Trial Court held that the suit property is an ancestral property, however, the plaintiffs had failed to prove that the defendant No.1 had sold the same on account of vices or for want of legal necessity. In that view of the matter, the learned Trial Court has held that the sale deed was binding on the plaintiffs and defendant Nos.3 and 4.

6. Aggrieved by the dismissal of the suit, the plaintiffs preferred an appeal bearing Regular Civil Appeal No.211/2012. The learned First Appellate Court has held that the suit property was an ancestral property in the hands of defendant No.1. It is held that the plaintiffs are entitled to seek partition with respect to the said property. The appeal is accordingly, allowed by setting aside the sale deed dated 04/01/2007 executed by defendant No.1 in favour of the defendant No.2 and subsequent sale deed dated 14/02/2007 executed by defendant No.2 in favour of the defendant No.5 and decree for partition and separate possession is passed granting 1/6th share to the plaintiffs and defendant Nos.1 and 4. The defendant No.3 who is wife of defendant No.1 is not allotted any share. Aggrieved by the said decree passed by the First Appellate Court, the present second appeal is

preferred.

7. As stated above, the appeal was initially dismissed and thereafter, the application for review filed by the appellants which was allowed. The appeal is restored and it was admitted vide order dated 04/07/2022 on substantial questions of law framed above.

8. Shri Randive, learned counsel for the appellants contends that the suit property is not an ancestral property. According to him, the suit property was initially held by two brothers namely; Yadavrao Chafle and Narayan Chafle. Yadavrao is the father of defendant No.1 – Pandhari Chafle. Shri Yadavrao expired in the year 1968 after commencement of the Hindu Succession Act, 1956. Shri Randive, learned counsel submits that since Yadavrao has expired after the commencement of Hindu Succession Act, 1956 and there is no material on record to infer that the suit property was an ancestral property in the hands of Yadavrao, the suit property which is inherited by Pandhari – defendant No.1 after the demise of Yadavrao in the year 1968 is his separate property and not ancestral property. Shri Randive, learned counsel contends that since the property is separate property of Pandhari - defendant No.1, he has absolute right to deal with the said property as per his own free will and discretion. He contends that during the life time of Pandhari, the plaintiffs who are her children cannot claim their right over the suit property. He places reliance on the judgment of Hon'ble Supreme Court in the matter of Commissioner of

Wealth-Tax, Kanpur, etc. Vrs. Chander Sen, etc., reported in AIR 1986 SC 1753 and in the matter of Yudhishter Vrs. Ashok Kumar, reported in AIR 1987 SC 558.

9. Per contra, Shri M. P. Dhruv, learned counsel for the respondents contends that the property was ancestral property in the hands of Pandhari. He draws attention to Exh.57 which shows that the suit property and other agricultural lands were partitioned between the two brothers Yadavrao (father of defendant No.1) / vendor and Narayan in the year 1958. He contends that since the property is received in partition between the two brothers, it will have to be treated as ancestral property of Yadavrao and not his separate property. He elaborates the submission stating that on partition of ancestral property, although the property becomes separate qua the collaterals, qua the defendants the property shall continue to remain ancestral property.

10. Shri Dhruv, learned counsel has drawn the attention of this Court to the cross-examination of the defendant No.2 wherein, the statement has appeared in the cross-examination that the suit property was ancestral property. Shri Dhruv, learned counsel states that in view of said admission, no fault can be found in the findings recorded by both the learned Courts that the property was ancestral property in the hands of Pandhari / defendant No.1 / vendor.

11. I have perused the rival pleadings, depositions of the witnesses and record of the case with the able assistance of the both learned advocates. A perusal of the averments would indicate that although it is repeatedly stated that the suit property was an ancestral property, essential facts indicating as to why the plaintiffs considered the suit property to be ancestral property are not mentioned in the plaint. It must be mentioned that the nature of property, whether it is separate property or ancestral property is not a pure question of fact or pure question of law. It is always mixed question of law and fact.

12. The essential facts indicating the manner in which the property was owned by Pandhari ought to have been mentioned in the plaint. However, the plaint averments are absolutely silent on this aspect. In my considered opinion, essential facts to infer that the suit property is an ancestral property are pertinently missing in the plaint.

13. As regards Exh.57, there is entry with respect to suit property i.e. old Filed Survey No.89/3 that there was partition between Yadavrao and his brother Narayan with respect to the said property on 06/10/1958 under which the suit property along with some other property had fallen to the share of Yadavrao.

14. Shri Dhruv, learned counsel has placed reliance on this document to contend that since the property is received by Yadavrao in

partition, it must be inferred that this property is an ancestral property.

15. I am afraid that the said contention cannot be accepted. It is always not necessary that the property received in partition is an ancestral property of the person who received it under partition. The partition of a property can also be between two persons who hold it as co-owners. There may be many situations where the property is jointly held by two or more persons not as ancestral property, which is partitioned between them, to wit, a property received by children from their mother is not an ancestral property, however, the children can partition the property inherited from their mother. Such transaction of partition is permissible. However, although the property is received by partition, the same will not be ancestral property. Therefore, merely because the property is received by Yadavrao in partition between himself and his brother, it cannot be said that the property is ancestral property. It needs to be reiterated that there is no pleading that the property was held by father of Yadavrao as ancestral property. The mode and manner in which Yadavrao and his brother Narayan owned the property is also not mentioned. In that view of the matter, merely on the basis of the document at Exh.57 which is an extract of record of right, it cannot be said that the suit property was an ancestral property in the hands of Yadavrao.

16. It is not in dispute that Yadavrao has expired in the year 1968. There is no material on record to indicate that the property was held by Yadavrao as an ancestral property. Since Yadavrao has expired in the year 1968, the property which is devolved upon his son Pandhari, will be separate property of Pandhari since it is inherited under Section 8 of the Hindu Succession Act, 1956. Since the property is not ancestral property, Pandhari will have absolute right to deal with the same including right to alienate the same. The learned advocate for the appellant has rightly placed reliance on the judgments of the Hon'ble Supreme Court in the matters of Chander Sen and Yudhishter.

17. As regards the admission in the cross-examination of defendant No.2, he has undoubtedly admitted in his cross-examination that the suit property was ancestral property. It needs to be stated that the defendant No.2 is not a family member. He has purchased the property from defendant No.1. It should be stated that earlier prior to commencement of the Hindu Succession Act, property which was received by a son from his father was treated as ancestral property. The Hindu Succession Act, 1956 has brought about a change in the position. The property which devolves on the son of a male Hindu who dies after 1956, is inherited by him as his separate property. However, this distinction at times also skips attention of learned advocate and learned Courts in several matters. In several matters, a self-acquired property which is inherited from a male Hindu after 1956, is referred as ancestral

property because it is received by inheritance. The defendant No.2 who is a layman in the field of law is therefore, not expected to understand the distinction. It appears that the statement in the cross-examination that the property was ancestral property since the property was received by Pandhari from his father - Yadavrao, much weightage cannot be given to such admission. It is already explained about that the issue regarding nature of property in the hands of person which is inherited by him is not a pure question of fact. It is a mixed question of law and fact.

18. That apart, as is rightly pointed out by the learned advocate for the appellants, such admission will be a piece of evidence which will have to be appreciated along with other evidence on record. The burden to prove that the suit property was ancestral property was undoubtedly on the plaintiffs. The plaint averments and substantive evidence that has come on record from the side of plaintiffs is absolutely silent with respect to the nature of suit property. Merely a word “ancestral property” has been used all throughout without explaining how the property can be said to be ancestral property.

19. In my considered opinion, Shri Randive, learned counsel for the appellants is right in placing the reliance on the Judgment of this Court in the matter of **Ujwala Vrs. Prakash and others**, reported in **2024 SCC OnLine Bom 3870** wherein Para Nos.16 and 19, this Court has held as under :-

“16. The Section 58 of the said Act provides that an admitted fact need not be proved, but proviso of Section 58 provides that even though the fact is admitted, court may, in its discretion, require that facts admitted to be proved, otherwise than by such admissions. In this case, it is bounden duty of plaintiff to prove that ancestral property was in existence and it was sold with the help of its sale proceeds suit property at Nagpur was purchased. The burden lies upon the plaintiff to prove that the suit property was purchased by him after sale of the ancestral property. In this regard, the plaintiff's mere pleading and oral evidences are not sufficient as it lacks material corroboration of alleged sale deed of ancestral property. It is against the principle of civil trial “that first plead and then prove”. Thus, best possible evidence of sale deed of alleged ancestral property is not produced by the plaintiff. Therefore, legitimate adverse inference can be drawn against the plaintiff that there is no such evidence in existence, hence it is not produced on record as per Section 114 illustration (g) of the Indian Evidence Act, 1872. It is settled law that the plaintiff must stand on his own foote and cannot take disadvantage of weakness of the defence of the defendants. Though defendant no. 4 stated in her written statement that she has no concern with the suit property at Nagpur, it is not conclusive admission as she had denied the nature of suit property that it is not purchased out of funds of sale of property of joint family.

19. The plaintiff asserted that there is coparcenary joint family and these two suit properties are coparcenary properties. The burden of proof lies upon the plaintiff to prove the existence of coparcenary Hindu family and its coparcenary property, which is basis of the suit of the plaintiff which goes to the root of this case. Though plaintiff pleaded that suit property at Nagpur is purchased with sale proceeds of the ancestral property of joint family, there is no such independent evidence of it and mere

pleading is not sufficient. Therefore, as held above an adverse inference under Section 114 illustration (g) of Indian Evidence Act can be safely drawn against the plaintiff that no such evidence of sale deed of the ancestral properties is in existence, hence it is not produced on record and property at Nagpur is not coparcenary property.”

20. In the case of **M. Yogendra and others Vrs. Leelamma N. and others**, reported in **AIR OnLine 2009 SC 499**, relied upon by the learned advocate for the respondents – plaintiffs, the Hon’ble Supreme Court has quoted with approval the judgment in the matter of **Commissioner of Wealth-Tax, Kanpur, etc. Vrs. Chander Sen, etc.**, reported in **AIR 1986 SC 1753**. The said judgment in the matter of **Chander Sen** itself clearly spells out the distinction in case where he may expire before the commencement of Hindu Succession Act, 1956 and after the commencement of Hindu Succession Act, 1956. It is categorically held in the said case that when a male Hindu dies after the commencement of Hindu Succession Act, 1956, his property which devolves on Class-I legal heirs by succession and held by them as his separate property and not ancestral property. In the facts of the present case also, the plaintiffs like in the reported case has failed to prove any material on record to establish that the suit property was an ancestral property. The said judgment, therefore does not support the case of the respondents.

21. As regards the judgment in the matter of **Rohit Chauhan Vrs. Surinder Singh and others**, reported in **AIR 2013 SC 3525**, it is held that

a property in the hands of sole coparcener allotted to him in partition becomes a separate property and the moment coparcener gives birth to a child, it again assumes ancestral character. However, the said judgment does not help the case of the plaintiffs – respondents since they have failed to prove that Yadavrao, the father of the defendant No.1 vendor held the property as his coparcener property.

22. Shri Dhruv, learned counsel has tendered pursis dated 08/05/2025 across the bar along with its extract of revenue record, certified copy whereof is received by him on 07/05/2025 is filed. The said document refers to land bearing Survey Nos. 89/1, 89/3 and 117. The registered partition deed is referred in the document is not brought on record before both the learned Courts. The said document is also not filed in the present second appeal. The revenue entry, in the absence of document of partition referred in it cannot be of any help to the respondents. Although it is taken on record, it is not tendered along with proper application as contemplated under Order 41 Rule 27 of the CPC. Had a proper application been filed, the appellants would have got proper opportunity to oppose the request to grant permission to lead additional evidence with respect to the said document. There is no pleading with respect to the alleged partition dated 16/10/1969 which is referred in the mutation entry. The document also does not throw light on the nature of the property. The document, therefore, does not help the case of plaintiffs. It will be pertinent to mention that the

respondents have relied upon revenue record at Exh.57 according to which, the suit property bearing Old Survey No.89/3 had fallen to the share of Yadavrao – father of respondent under a partition dated 06/10/1958 between Yadavrao and his brother Narayan. The document produced today refers to partition dated 16/10/1969 which is 11 years subsequent to the partition referred in Exh.57. The property which was already partitioned in the year 1958 itself could not be partitioned again in the year 1969, unless there is re-union. Re-union is not even pleaded. The document produced on record today is therefore, liable to be discarded.

23. In the light of reasons that are recorded above, the substantial questions of law are answered in favour of the appellants and against the respondents. The judgment and decree dated 16/12/2015 passed by learned Ad-hoc District Judge-1, Warhda in RCA No.211/2012 is quashed and set aside.

24. The appeal is allowed. Parties to bear their own costs.

25. At this stage, Shri Dhruv, learned counsel for the respondents – plaintiffs makes a request that he intends to approach the Hon'ble Supreme Court assailing the present judgment. In that view of the matter, the appellants are restrained from creating third party interest over the suit property for a period of eight weeks from today.

26. Since the second appeal is disposed, civil applications pending if any, are disposed of accordingly.

[ROHIT W. JOSHI, J.]

Choulwar