



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

SECOND APPEAL NO.251 OF 2007

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| 1. Vithabai wd/o Vithoba Mulkalwar
Aged about 79 years | Deleted as per Registrar's
order dated 3/5/2012 |
| 2. Gunwanat s/o Vithoba Mulkalwar,
Aged about 50 years. | |
| Both resident of Pombhurna, Tah. Pombhurna,
District Chandrapur(Mah.) | |
| 3. Chandrakala w/o Anandrao Punpareddiwar,
Aged about 54 years,
Resident of Bori Tahsil Chamorshi,
District Gadchiroli (Mah.) | |
| 4. Ashok s/o Vithoba Mulkalwar,
Aged about 38 years. | Appeal Dismissed against
Appellant Nos.4 & 5.As per
Court's order Dt.19.06.2019. |
| 5. Ku. Sunanda d/o Vithoba Mulkalwar,
(now Smt. Sunanda w/o Ramesh Channawar)
Aged about 41 years | |
| Nos. 3 to 5 R/o Pombhurna Tahsil Pombhurna,
District Chandrapur (Mah.) | |
| 6. Ku Asha d/o Vithoba Mulkalwar,
(Now Smt. Asha w/o Rajendra Shantalwar)
aged about 36 years,
R/o. Rohana Tahsil Saoner, Dist. Nagpur. | |
| | ...APPELLANTS
(RA Same) |

VERSUS

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| 1. Kamalbai w/o Shankar Gaddewar
Aged about 66 years, resident of
Babupeth Chandrapur. | ...Deleted. |
| (1-a) Kalpana Bajirao Wadettiwar,
Aged about 50 years, Occ. Teacher.
R/o. Near Sadique Company, Gadchiroli,
Navegaon, Tah. & Dist. Gadchiroli. | |

- (1-b) Vasanti Arun Yenpeddiwar,
Aged about 45 years, Occ. Tailoring,
R/o. T. B. Hospital, Ramnagar Ward,
Chandrapur, Tah. And District Chandrapur.
- (1-c) Mangala Suresh Kasturwar,
Aged about 40 years, Occ. Service.
R/o. Near Sadique Company, Navegaon Area,
Gadchiroli, Tah. And Dist. Gadchiroli.
- (1-d) Kishore Shankar Gadewar,
Aged about 38 years, Occ. Service.
R/o. Babupeth, Near Mahadeo Temple,
Dr. Sarvapalli Radhakrushnan Chowk,
Chandrapur, Tah. And District Chandrapur.
- (1-e) Smt. Bharti wd/o Sanjay Gadewar,
Aged about 30 years, Occ. Household,
R/o. C/o Shri Prabhakar Mulkkalwar,
At Kunthada, P. O. Kunthada,
Tah. Kunthada, P. O. Kunthada,
Ta. Chamorshi, District Gadchiroli.
2. Indubai wd/o Moreshwar Mulkalwar,
Aged about 78 years, Occ. Cultivation.
R/o Pombhurna Tahsil Pombhurna
Dist. Chandrapur (Mah.)
3. Sau. Jyoti w/o Ashok Todewar,
Aged about 30 years, Occ. Household,
R/o Near Saudagar Baba Durgah Kampetee,
Tah. Kamptee, District Nagpur.
4. Pankaj s/o Bandu Mulkalwar,
Aged about 35 years, Occ. Cultivation,
R/o. Hanuman Ward Pombhurna,
Dist. Chandrapur.
5. Suresh s/o Moreshwar Mulkalwar, ..Appeal dismissed
Aged about 35 years Occ. Cultivation. Vide order dt. 29.04.2010
R/o Pombhurna, District Chandrapur.
6. Sau. Manda w/o Arun Sangldwar,
Aged about 43 years, Occ. Household.
Ordinance Factory Chanda, Tah. Bhadrawati,
District Chandrapur.

7. Uddhav s/o Kawadu Juware,
Aged about 71 years, Occ. Cultivation.
R/o. Pombhurna District Chandrapur.
8. Sharad s/o Kawadu Juware,
Aged about 40 years, Occ. Cultivation.
R/o. Pombhurna District Chandrapur.
9. Rambhaua Chimdyalwar, ..Deleted
Aged about 76 years Occ. Business and Cultivation.
- (9-a) Deorao s/o Rambhau Chimdyalwar,
Aged about 60 years, Occ. Goldsmith,
R/o Near Mahadeo Temple, Mul,
Tahsil Mul District Chandrapur.
- (9-b) Gajanan S/o Rambhau Chimdyalwar,
Aged about 55 years, Occ. Cultivation,
R/o Chandli Bujruk, Tah. Sawali,
District Chandrapur.
- (9-c) Dilip s/o Rambhau Chimdyalwar,
Aged about 45 years, Occ. Cultivation
R/o Chandli Bujruk, Tah. Sawali,
District Chandrapur.
- (9-d) Vijay s/o Rambhau Chimdyalwar,
Aged about 40 years, Occ. Goldsmith,
R/o Mulk, Tahsil Mul, Dist. Chandrapur.
10. Vitthal s/o Donuji Preddiwar,
Aged about 50 years, Occ. Cultivation
R/o. Dongargaon, Tahsil Mul,
District Chandrapur.
11. Kiran s/o Vitthal Poreddiwar,
Aged about 25 years, Occ. Business,
12. Sandeep s/o Vitthal Poreddiwar,
Aged about 21 years, Occ. Education.
Nos. 10 to 12 R/o Dongargaon,
Tahsil Mul, District Chandrapur (Mah.)
13. Surekha d/o Vitthala Poreddiwar,
(Now Smt.Surekha w/o Ravindra Pupreddiwar),
aged about 25 years, Occ. Household,
Near T. B. Hospital, Ramnagar,

Chandrapur, Tah. and Dist. Chandrapur(Mah.) ...**RESPONDENTS**
(RA same)

Shri Sukhdev Devdatta, Advocate h/f Shri Shantanu Ghate, Advocate for appellant.
Shri Ganesh Khanzode, Advocate for respondent no.1(a) to 1(e).
Shri Anjan De, Advocate for respondent no.9(a to d)

CORAM:- M.W. CHANDWANI, J.
RESERVED ON :- 10th JULY, 2025
PRONOUNCED ON :- 22nd AUGUST, 2025

JUDGMENT:

1. Heard.
2. By order dated 13.02.2009, the following substantial questions of law were framed:

“Whether the properties purchased by Vithoba in his name along with original defendant nos.1, 2 and 4 could have been included in suit for partition for giving share to the plaintiff?”

And

Whether the property with defendant No.8 Moreshwar could have been excluded fro such partition?”

Few facts which are necessary to dispose of this appeal can be summarized as under:

3. Deceased respondent no.1- Kamlabai filed a suit for partition and separate possession of immovable properties against the appellants thereby claiming herself to be the daughter of Pisabai, who was the second wife of deceased Vithoba. Defendant no.8-Moreshwar is son of Jankubai, the first wife of deceased

Vithoba. Vithoba died in the year 1970. Appellant no.1 – Vithabai who is the original defendant no.1, is the third wife of Vithoba and appellant nos.2 to 7 (original defendant nos.2 to 7) are the children born out of the wedlock between appellant no.1 – Vithabai and deceased Vithoba. Respondent no.1 (Original plaintiff) claimed in the suit that defendant no.8-Moreshwar was already separated from Vithoba and got the suit property admeasuring 6.09 acres which is in his possession. Whereas, rest of the property is inherited by respondent no.1 and the appellants. Therefore, she is entitled to a share in the suit property. The appellants came up with a defence that the suit property situated at Chandli (Bk.) was purchased by Vithoba in the joint name of appellant no.1, 2 and 4 with intention to exclude the other co-sharers and it was in the nature of gift or advancement towards appellant nos.1, 2 and 4. Therefore, they sought rejection of the suit. The trial Court decreed the suit. An unsuccessful attempt was made before the learned first appellate Court. Against dismissal of the first appeal, the present second appeal came to be filed and the above-mentioned substantial questions of law were framed.

4. It is the contention of Shri Sukhdev Devdatta, learned counsel for the appellants that the learned trial Court as well as

the first appellate Court have erroneously held that the suit property held by original defendant no.8-Moreshwar i.e. son of the first wife of deceased Vithoba is his separate property. According to him, if the learned trial Court held that respondent no.1-Kamlabai inherited the property after the death of Vithoba, then the property of defendant no.8 – Moreshwar should also have been subject matter of partition. He further submits that the suit property situated at Chandli (Bk.) was purchased in the name of Vithoba, appellant nos.1,2 and 4 and therefore, it be treated as a gift given by Vithoba to appellant no.1, 2 and 4 and respondent no.1 will be entitled only to 1/8th share in the property situated at Pombhurna. The learned trial Court should not to have included the property which has been purchased in the name of appellant no.1, 2 and 4.

5. The learned counsel for the appellants further submits that property purchased by Vithoba in the name of his widow – Vithabai and the appellant nos.2 and 4 was in the nature of gift advanced towards them and therefore, the respondent/original plaintiff has no share in the suit property as it is the exclusive property of Vithabai and appellant nos.2 and 4. Therefore, Section 82 of the Trust Act will not be applicable here. In the alternate, it

is also submitted that it was a benami transaction in favour of Vithabai and appellant nos.2 and 4 and therefore, the suit is hit by the provisions of the Benami Transactions (Prohibition) Act, 1988 (for short “**Act of 1988**”). To buttress his submission, he seeks to rely upon the decisions of *Thulasi Ammal Vs. The Official Receiver, Coimbatore*¹ and *Hazaribagh M.M. Col.Ltd. Vs. Mrs. A. Kapoor*² wherein, it has been observed that the intention of the person who contributed the money was giving beneficial interest to the person in whose name the purchase was made. In such a scenario, it will be the exclusive property of the person in whose name the purchase was made and Section 82 of the Trust Act will not be applicable. Reliance also placed on the decision in the case of *Thakur Bhim Singh (dead) by LRs and another Vs. Thakur Kan Singh*³ wherein, the Supreme Court observed in para 18 which reads thus:

“18. The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus: (1) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is

1 (1934) VOL. XL LW 633

2 AIR 1952 Pat 61

3 (1980) 3 SCC 72

evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct etc.”

6. Shri Ganesh Khanzode, learned counsel for respondent nos.1 (a) to 1 (e) and Shri Anjan De, learned counsel for respondent nos.9 (a to d) submitted that the learned trial Court as well as first appellate Court have considered all these points and given concurrent findings that the suit property situated at Chandli (Bk.) has been left by Vithoba. Therefore, respondent no.1 being one of the daughters of Vithoba is entitled to 1/8th share in the suit property and the property that fell in the share of respondent no.2 was separate property. Both of them supported the decision of the trial Court as well as the first appellate Court and sought rejection of the appeal.

7. Perusal of the record, more particularly pleadings and evidence reveals that respondent no.8 separated from Vithoba during his lifetime and the agricultural property was given to him in partition. This has been held by the trial Court and has been endorsed by the first appellate Court as well. Once respondent no.8 separated from his father during his lifetime, then the

property held by him will be his separate property. There are no two ways about this and therefore, no perversity is found in the findings of the trial Court as well as the first appellate Court in this regard.

8. Admittedly, the suit property situated at Chandli (Bk.) was purchased by Vithoba from the sale proceeds of the ancestral property sold by Vithoba. Just because it is purchased in the name of some of the coparceners, that does not change the nature of the property. The property which has been purchased out of income of the ancestral property will remain as joint family property.

9. The arguments advanced by the learned counsel for the appellants cannot be accepted for more than one reasons. Firstly, the suit property in the name of deceased Vithabai and appellant nos.2 and 4 was purchased from the joint family fund without the consent of the other co-sharers wherein, each member including the original plaintiff had a share. Secondly, the theory of advancement/gift has been presented before the Court but in evidence, appellant no.2 has deposed that the property was purchased by Vithoba in their name only with a view to avoid property dispute. Therefore, the theory of gift or advancement has not been established. Thirdly, the suit property was not purchased

by Vithoba from his own earnings but from the joint family fund and therefore, the argument that the property was purchased by Vithoba for the benefit and advancement of Vithabai and appellant nos.2 and 4 does not sustain; more particularly, when it has not been purchased with the consent of all the co-sharers of the joint family property. Therefore, the reliance on the cases of ***Thulasi Ammal and Hazaribagh M.M. Col.Ltd.*** (*supra*) is misplaced. Fourthly, the suit is filed in the year 1977; whereas, the Benami Transaction (Prohibition) Act came into force w.e.f. 05.09.1988. Needless to mention that the provisions of the Act of 1988 came into force in 1988 and will not affect the proceedings which were pending prior to the enactment of the Act of 1988 like the present proceedings. Even otherwise, the transaction in the present case is not covered under the definition 'Benami' in the Act of 1988 and is an exception as contemplated under Section 2(9)(A)(b)(i) of the Act of 1988. Therefore, the appellant cannot take benefit of the Act of 1988. The argument of the learned counsel for the appellants does not hold water and the decision in the case of ***Thakur Bhim Singh*** (*supra*) relied upon by the learned counsel for the appellants will not be helpful.

10. The decisions of the Supreme Court relied upon by the counsel for the appellants in the cases of *Angadi Chandranna Vs. Shankar and others*¹ and *Marabasappa (dead) by LRs and others Vs. Ningappa (dead) by LRs and others*² will not be applicable in view of the admitted position that the suit property situated at Chandli (Bk.) was purchased out of sale proceeds of ancestral property.

11. There is no doubt about the fact that this Court can interfere with the concurrent findings of fact if the trial Court as well as the first appellate Court have failed to consider any material aspect or where the findings are either vitiated by non-consideration of relevant evidence or by erroneous approach adopted in the matter. No such grounds have arisen in the present case so as to warrant the interference of this Court in second appeal.

12. In view of the above, the appellants have failed to show any perversity in the findings of the trial Court as well as the first appellate Court by reason of non-consideration of any relevant evidence or consideration of any irrelevant material. Therefore, reliance placed by the learned counsel for the appellants on the

1 2025 SCC OnLine 877

2 (2011) 9 SCC 451

decisions in the cases of *Krishna Mohan Kul alias Nani Charan Kul and another Vs. Pratima Maity and others*¹ and *Phool Pata and another Vs. Vishwanath Singh and others*² will not be helpful to him.

13. To conclude, no substantial question of law arises.

Hence, the appeal stands dismissed.

JUDGE

Wagh

1 (2004) 9 SCC 468

2 (2005) 6 SCC 40