



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

SECOND APPEAL NO.521 OF 2006

[Vinod Bhagwantrao Bhirad **..Vs..** Shivanand @ Shivaji Harishchandra
Awatirakh and Others]

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Mr S. D. Chopde, Advocate for Appellant.
Mr A. J. Thakkar, Advocate for Respondent No.1.

CORAM : M. W. CHANDWANI, J.

DATE : 8th JULY, 2025.

1. Heard.
2. By this appeal, the appellant challenges the judgment and decree dated 18.04.2006 passed by the Additional District Judge, Akola in Regular Civil Appeal No.96 of 2001 thereby overturning the judgment and decree dated 27.02.2006 passed by the Joint Civil Judge Junior Division, Balapur in Regular Civil Suit No.83 of 1997.
3. The appellant - original defendant No.2 purchased coparcenary property from original defendant No.1 – Brijmohan Premlal Jaiswal. After attaining the age of majority, respondent No.1 - the original plaintiff on 12.07.1997 filed a suit for partition, separate possession and setting aside the alienation made by his father Harishchandra on the premise that Harishchandra who was addicted to liquor, had sold the

suit property to Brijmohan Jaiswal and executed the sale-deed of the suit property which was a nominal document. Meanwhile, Brijmohan Jaiswal sold the suit property to the present appellant. The appellant as well as his predecessor in-title appeared before the Trial Court and resisted the claim of respondent No.1 – the original plaintiff. The other family members including Harishchandra were party defendants to the suit but they did not participate in the said suit. The Trial Court dismissed the suit. Respondent no.1 – original plaintiff filed an appeal against the order of dismissal before the Additional District Judge, Akola which came to be allowed by holding that the sale-deed executed by Harishchandra was not for legal necessity and proceeded to hold that the respondent No.1 – original plaintiff has 1/3rd share in the suit property. However, the First Appellate Court held that the decree will be executable subject to any decision for general partition that may be brought by the appellant. Feeling aggrieved with the judgment and decree of the First Appellate Court, the present appeal came to be filed.

4. This Court by order dated 07.02.2008 framed the following substantial questions of law :

“i) Whether a suit for partial partition of the joint family property is maintainable while seeking setting aside alienation of the part of the property only which is sold ?

ii) Was the suit filed within limitation ?”

5. Mr. S. D. Chopde, learned counsel appearing on behalf of the appellant submitted that respondent No.1 – original plaintiff has not added all the ancestral properties and therefore, a suit for partial partition is not maintainable. According to him, the First Appellate Court erred in relying on the judgment of *Patilbua Pandu Landge vs. Sadashiv Vithoba Kamble and Others, 1976 Mh.L.J. 158*. He strenuously argued that a judgment of the Hon’ble Supreme Court as well as a judgment of the Single Bench of this Court has held otherwise. To buttress his submission, he seeks to rely on the decision of this Court in the case of *Govindrao S/o Gangaramji Ajmire vs. Dadarao alias Shrawan S/o Gangaramji Ajmire (dead), 2004 (3) ALL MR 660* as well as the decision of the Hon’ble Supreme Court in the case of *Kenchegowda (since deceased) by legal representatives vs. Siddegowda alias Motegowda, (1994) 4 SCC 294*. According to him, in view of the legal position held by the Hon’ble Supreme Court in the case of *Kenchegowda* (supra) as well as by this Court in the case of *Govindrao*

Gangaramji Ajmire (supra), a suit for partial partition is not maintainable. Hence, the decree passed by the Trial Court dismissing the suit ought not to have been set aside by the First Appellate Court.

6. Next, Mr. Chopde would submit that the suit is barred by law of limitation. He contends that the First Appellate Court erred in not considering that the suit has been filed after 18 years of alienation made by Harishchandra. According to him, the suit has not been filed within three years from the date of sale-deed and therefore, the suit is barred by law of limitation.

7. Conversely, Mr. A. J. Thakkar, learned counsel appearing on behalf of the respondent No.1 vehemently submitted that the First Appellate Court has rightly considered the law laid down by the Division Bench of this Court in the case of Patilbua Pandu Landge (supra) and opined that in exceptional circumstances, a suit for partial partition is maintainable more particularly, by alienating interest in any specific property belonging to coparceneray. Therefore, the present appeal does not survive and the same needs to be dismissed.

8. Having heard the learned counsels appearing on behalf of the respective parties and having gone through the

impugned judgments and decrees of both the Courts below, it transpires that there are other joint family properties which have not been included in the suit. A suit was filed for partial partition and setting aside the alienation in respect of specific property which has been alienated by Harishchandra - the father of respondent No.1/the original plaintiff in favour of Brijmohan Jaiswal - the original defendant No.1 who in turn, sold the suit property to the present appellant. Now, the question that arises is, whether such suit filed by non-alienating the family members against a stranger/purchaser to seek partial partition in specific property without adding other joint family property is maintainable.

9. The First Appellate Court while answering this question relied on the decision of the Division Bench of this Court in the case of *Patilbua Pandu Landge* (supra) and in para 14 of its judgment has held that the non-alienating coparcener can bring the suit for partition of specific property alienated to the third person only. Such a suit is maintainable and if decree is passed in such suit it is executable subject to the decision of general suit for partition brought by the purchaser of the property, till then such decree passed should be stayed.

10. The contention of Mr. Chopde is that, in wake of the decision of the Hon'ble Supreme Court in the case of Kenchegowda (supra), the decision of the Division Bench of this Court in the case of Patilbua Pandu Landge (supra) relied upon by the First Appellate Court is not good in law.

11. The general rule is that, in order to seek partition, all property should be brought in the common hotchpotch. A suit for partition should embrace the entire family property. However, this rule is subject to certain qualifications and exceptions. As per para 327 of Mulla's Hindu Law, 23rd Edition, 2019 it is open to the members of the joint family to make a division and severance of interest in respect of part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family.

12. The Division Bench of this Court in para 17 of Patilbua Pandu Landge (supra) has held that a suit by non-alienating coparceners against the stranger/purchaser for partition of the specific alienated property without bringing a suit for general partition is maintainable. The only requirement of a valid partial partition is that all the coparceners must consent to it.

When one or more of the non-alienating coparceners bring a suit for partition of a specific item of the joint family properties, they clearly declare their consent to partial partition of that property. So far as the alienating coparcener is concerned, his consent must be presumed because he has alienated his undivided interest in the specific item of the property, which conduct means that he is willing to have his undivided interest in the property separated for the purposes of being given to the alienee. In order to satisfy the requirement that all the coparceners must consent to the partial partition, the only further qualification required for the validity of a suit by the non-alienating coparceners for partition of only one specific property forming part of the joint family properties is that all the coparceners must be made parties to the suit and they must all consent to partial partition.

13. In the case of Govindrao Gangaramji Ajmire (supra) and Kenchegowda (supra) relied upon by the appellant, the members of the joint family objected to the suit for partition of partial property. In that scenario, it was held that the suit for partial partition is not maintainable.

14. In the present case, defendant No.3 - the father of the plaintiff himself sold the suit property and therefore, his consent is to be presumed. The other co-parceners, though are parties to the suit, did not object the partial partition. Hence, all the members have consented to the partial partition. Therefore, the present suit is maintainable.

15. In view of the above, I do not find force in the argument of the learned counsel for the appellant. The First Appellate Court was right in holding that the suit filed by respondent No.1 is maintainable and directed the appellant to file a suit for general partition.

16. Even otherwise, the First Appellate Court did not give a direction as to partition of the suit property but directed that the decree in this case would be subject to the decision of the suit for general partition which is to be brought by the appellant. It is informed that the suit for partition filed by the appellant is pending.

17. This takes me to the next issue of limitation. Evidently, respondent No.1 attained majority in the year 1997 and then in the same year, the suit for setting aside alienation of coparcener made by Karta of Hindu undivided family has been filed.

Section 6 of the Limitation Act, 1963 exempts a minor from initiating a suit/application. A minor can only file a suit within a period of three years from the date when he attains the age of majority. A minor, after attaining majority can file a suit for setting aside the alienation made by Karta of Hindu undivided family. The suit has been filed within three years from the date on which respondent No.1 attained majority. Therefore, no substantial question of law with regard to limitation arises in this appeal. Consequently, the appeal fails and it is **dismissed**.

JUDGE

Tambe.