IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 86 OF 2021

1. Kalawati w/o Pandurang Kokate
Age 60 Occu agri R/O Katrabad
Tq. Parand Dist. Osmanabad.

2. Ashok Pandurang Kokate
Age 53 Occu agri R/O Katrabad
Tq. Parand Dist. Osmanabad

3. Bhagwan Pandurang Kokate
Age 50 Occu agri R/O Katrabad
Tq. Parand Dist. Osmanabad.

4. Daivshala Vilas Lungase
Age 48. Occu agri R/o Jamgaon(Agalgaon)
Tq. Barshi Dist. Solapur. ...Appellants
(ORI. DEFT NO 3 to 6)

VERSUS

1. Rukmin W/O Bhima Gaikwad
Age 50 occ. Household
R/O Upalai Road Barshi
TQ. Barshi Dist. Solapur. ORI. PLAINTIFF

2. Pandurang Keshav Kokate (died)

3. Kadubai w/o Pandurang Kokate
Age 75 occu agri. R/O Gondil plot,
Upalai Road, Barshi.
Tq. Barshi Dist. Solapur. ORI. DEFT. NO 1 AND 2
...RESPONDENTS

...

Mr. A. S. More, Advocate for Appellants
Mr. V. D. Salunke, Advocate for Respondent No.1

CORAM : R.M. JOSHI, J
DATE : JUNE 15, 2026

JUDGMENT :

1. This Second Appeal takes exception to judgment and decree

passed in Regular Civil Suit No. 284/2005 dated 19.12.2009 and confirmation thereof by judgment and decree dated 21.01.2020 passed in Regular Civil Appeal No. 41/2017.

2. In brief, it is the case of Appellants/Original Defendants that Respondent No. 1 – Rukmin filed suit bearing RCS no. 284/2005 for seeking partition of suit properties admeasuring 3A 19R from Gat No. 86/B and area of 3H 70R from Gat No. 87/2B. The Defendant Nos. 1, 2 and 5 filed written statement claiming that suit properties are not ancestral joint family properties. It is further claimed that properties are self acquired properties of Defendants. The suit came to be resisted on the ground that there was previous partition by consent decree in RCS No. 102/2005, suit filed between Original Defendant No. 1 – Pandurang Keshav Kokate (now deceased) and other Defendants. It is the case of Plaintiff that RCS No. 102/2005 was a collusive suit between the Defendants and since Plaintiff was not a party to said suit, said decree does not bind him. It is the contention of Plaintiff that decree was obtained by Defendants in said suit admitting that suit properties are ancestral properties and hence, it cannot be allowed now to say that the suit properties are self acquired properties of Defendants.

3. With these pleadings, suit was tried before Trial Court. The parties led evidence. Learned Trial Court dismissed the suit by holding that

Plaintiff has failed to prove that the suit properties are joint family properties. It is further held that issue about the decree in RCS No. 102/2005 being collusive or otherwise does not arise.

4. The Plaintiff being aggrieved by the judgment and decree passed by Trial Court preferred Appeal being RCA No. 41/2017. This Appeal came to be allowed by passing impugned judgment and decree with observations that the mutation which is relied indicates that the properties were joint family properties and considered in RCS No. 102/2005. It is also held that since Plaintiff is not party to the said suit, the decree passed therein does not bind him.

5. There is no dispute between parties with regard to fact that Pandurang married to Kadubai and Rukmin is born (original Plaintiff) out of this legal wedlock. It is further undisputed fact that during the subsistence of first marriage, Pandurang performed second marriage with Kalawati (Defendant No. 3) and out of the said marriage, three children were born i.e. Ashok (Defendant No. 4) & Bhagwan (Defendant No.5). Thus, there is no dispute between the parties with regard to the fact that the Defendant No. 3 is not legally wedded wife of Pandurang and Defendant Nos. 4, 5, and 6 are not born out of a valid marriage.

6. This Court, by order dated 22.10.2021 while admitting the Appeal framed following substantial questions of law:

1. Whether the suit properties were the self acquired properties of defendant No.1?

2. Whether defendant Nos. 4 to 6 have right and share in the suit properties, in view of the fact that they are the children of the second wife of deceased Pandurang?

3. What is the effect of decree in Regular Civil Suit No.102/2005 on the parties?

4. What are the shares of the parties in the suit properties?

7. Learned Counsel for Appellants/Original Defendants submit that Trial Court as well as First Appellate Court committed error in considering the admission of Defendants in previous suit bearing RCS No.102 of 2005 to the effect that the suit properties are ancestral properties of Defendant No. 1. It is his submission that such admission would not bar Defendant No. 1 to take plea before Trial Court with regard to correct status/position of suit properties i.e. properties to be self-acquired properties of Defendant No. 1. It is his submission that in this regard evidence was led before Trial Court and such Trial Court has committed error in dismissing the suit. To support this submission, he placed reliance on ***Basant Singh vs. Janki Singh and Others, AIR 1967 SC 341*** to submit that the admission of party in the previous proceedings would not be a conclusive and it is open for the parties to lead evidence in order to prove otherwise. In this regard, reference is made to paragraph 5 of the said judgment. It is his submission that once it is held that the said alleged admission of Defendants in the

previous suit i.e. RCS No. 102 of 2005, the consent decree, even if passed therein, would not become an impediment for accepting the contention of the Defendants. Apart from this, it is his submission that First Appellate Court also fell in error while determining the shares of parties. In support of this submissions, reference is made to the judgment of the Hon'ble Supreme Court in case of ***Revansidappa and Another vs. Mallikarjun and Others, 2023 AIR(SC) 4707***.

8. Learned counsel for Respondent No.1/original Plaintiff supported the impugned judgment and order. It is his submission that original Defendants have obtained consent decree with the plea that the subject properties are ancestral properties and, therefore, it is not open for them to take any different plea than the one raised in said proceedings. It is his submission that in view of estoppel created for the Defendants to take a plea about the suit properties being self-acquired properties, the judgment and decree passed by the Trial Court and confirmed by the First Appellate Court does not deserve any interference. He also contends that shares are determined by First Appellate Court keeping in mind settled law and hence, there is no perversity in the impugned judgment and decree.

9. This Court has framed first substantial question of law which reads thus:

"Whether the suit properties were the self acquired properties of

defendant No.1?"

In connection with this question, it would be relevant to take note of the observations made by First Appellate Court in the impugned judgment. The points for determination were framed as to whether the suit properties are joint family properties or self acquired properties of Defendant No. 1.

> *"I perused entire evidence and considered arguments of both the parties, it is clear that, except bare words of plaintiff, plaintiff not adduced evidence about Joint Hindu Family property. However, plaintiff relied on mutation entries produced by defendants. It is clear from mutation entries No. 2440 and 2663 that, suit properties were came to defendant No.1 by partition from his brother. One pherphar No. 1035 shows that, suit properties are purchased by Dhondiba Keshav Kokane- brother of defendant No.1. Defendant No.1 not given evidence to show that, he himself purchased suit properties, though he pleaded same. It is admitted that, there is Joint Family Property and if property came to head of that family by partition then it cannot be said that, such head of family is sole owner as other members can acquire share by their birth. Conclusion of Trial Court about self acquired property is thus erroneous. Moreover, on perusal of plaint of RCS No. 102/2005 it is clear that, plaintiff of that suit also admitted that, suit properties are properties of Joint Hindu Family. Plaintiff of that suit namely Bhagwan i.e. present defendant No.5 contended that, suit properties are purchased by present defendant No.1 4 & 5 by doing labour work. But it is clear by mutation entries No. 2440 and 2663 that, suit properties came to defendant No.1 by partition. At the time of acquisition of suit property i.e. at the time of sale deed of Dhondiba i.e. in 1970 and 1971 present defendant No.4 to 6 were not born. Hence, how they can purchase suit properties by doing labour work? Defendants taken mutual destructive pleas Plaintiff discharged her burden by her oral evidence and on relying mutation entries No. 2440 and 2663 and on relying of*

admission given in plaint of RCS No.102/2005 to prove that suit properties are Joint Family Properties."

10. Apart from this, it is not in dispute that in RCS No. 102 of 2005, Defendant No.1 and other Defendants obtained a consent decree specifically contending that suit properties are ancestral properties. Thus, it not only remains an admission in previous proceedings, but also culminates into a decree on such admission. Needless to say that there cannot exist two decrees in respect of same properties, one holding that the suit properties are joint family ancestral properties and another to the effect that they are self acquired properties of Defendant No. 1. It is necessary to take note of the fact that undeniably Plaintiff is son of the Defendant No.1. He, however, was kept away from the proceedings being RCS No. 102/2005 and a decree is obtained by the Defendants behind his back on the averments that the suit properties are not joint family ancestral properties of Plaintiff and Defendants therein. No decree could have been obtained by the Defendants of partition excluding the Plaintiffs, who is a coparcener of joint family of Plaintiff and Defendant No.1.

11. In light of these facts, a question would now arise as to whether it is open for the Defendants to claim in the present proceedings that the properties are not ancestral properties, but are self-acquired properties of Defendant No.1. A perusal of the judgment of Hon'ble Supreme Court in case of **Basant Singh** (supra), more particularly, paragraph 5 of the said

judgment indicates that it deals with a situation wherein there is an admission given by the party in previous proceedings and not that any decree is obtained upon the same and whether contradictory decree could be passed on same judgment. A distinction, therefore, will have to be drawn as to the situation wherein a decree of admission is obtained and in such situation, unlike an admission of the fact may or may not have a bearing on the decree to be passed, it would not be permissible for the party to retract from the said admission and now to claim a decree that properties are self-acquired properties of Defendant No.1. In respectful view of this Court, the said judgment has no application to present case.

12. Once it is admitted that the Defendants in the previous proceedings bearing RCS No. 102/2005, have admitted that the properties being ancestral properties and have obtained consent decree, it would not be open for the Defendants to claim and substantiate too in the present proceedings, that the suit properties are not ancestral properties but are self-acquired properties of Defendant No. 1. It was, therefore, not open for Defendants to claim in subsequent suit that suit properties are self acquired properties of Defendant No. 1.

13. Coming to the substantial question of law No. 3 framed by this Court as to whether what is the effect of decree in Regular Civil Suit No.102/2005 on the parties is concerned, admittedly the said decree exists.

The said decree not being challenged before any competent Court, cannot be interfered with in other proceedings. In absence of any prayer with pleadings, the decree passed in earlier proceedings cannot be set aside. It however would not bind Plaintiff, he being not party to the said suit. However, the decree passed in RCS No. 102/2005 would bind the parties thereto i.e. Defendants therein. Thus, the Defendants who were the parties to the said suit, now cannot permitted to claim that suit properties are self acquired properties.

14. Insofar as substantial question of law nos. 2 and 4 are concerned, in view of the admitted fact with regard to the status of parties, the judgment of Hon'ble Supreme Court in the case of ***Revansidappa and Another*** (supra) would be applicable to the instant case. It would be relevant to take note of observations made therein in paragraph 43 of the said judgment, which reads thus.

> *43. Sub-section (3) of Section 6 indicates by a deeming provision what would constitute the interest of a Hindu Mitakshara coparcener. As already discussed, the deeming fiction requires an assumption of a hypothetical state of affairs in terms of which a notional partition is deemed to have taken place immediately before the death of the Hindu Mitakshara coparcener. Now, let us assume for the sake of example that there are four coparceners- C1, C2, C3, and C4. C2 has died. C2 is survived by a widow, a son, and a daughter but it so transpires that one of the children is born from a marriage which is null and void Under Section 11 of the HMA 1955. C2 would have a 1/4th share in the coparcenary which consisted of him and his three brothers' C1, C3 and C4. Now, in order to ascertain C2's*

share in the property and the devolution of this shares among C2's heirs, the Explanation mandates an assumption that a partition took place immediately before C2's death. In such a partition, between him and his brothers, C2 gets 1/4th share in the larger coparcenary comprising himself and his 3 brothers. Now, within his own branch, C2, his widow and his child born from a valid marriage would each have a 1/3rd share. In other words, in the notional partition which is deemed to have taken place in terms of the Explanation the share of C2 is ascertained at 1/3rd. In working out the devolution of interest and the distribution of property following the death of C2, C2's 1/3rd share would be equally distributed between his widow, child born from the marriage which was valid and the child born from the marriage whose legitimacy is protected by Section 16(1) of the HMA 1955 though the marriage was null and void. In other words, such a child would have a share in the property which would be allotted to his parent (C2) if a partition had taken place immediately before the death of C2. The widow would take a 1/3rd share (her share in the notional partition) plus 1/3rd in the 1/3rd share of C2 (her share in succession, as an heir to C2). The child who was born from the valid marriage would acquire a 1/3rd share plus a 1/3rd share in C2's 1/3rd share. The child who has the benefit of Section 16(1) of the HMA 1955 acquires a 1/3rd share in the 1/3rd share which was allotted to C2 presuming that the partition had taken place immediately before the death of C2. This child, unlike the child born out of a lawful marriage, is not entitled to a share in the notional partition itself. After the father's share is determined in such notional partition, a child whose legitimacy is protected Under Section 16(1) and 16(2) will have a share in the father's share, along with the surviving widow and the other children. This, in our view, would be the correct and proper interpretation of the Explanation to Section 6 which mandates the assumption of a notional state of affairs namely, a partition immediately before the death of the Hindu male coparcener.

15. In view of the aforesaid observations made by the Hon'ble Supreme Court, no fault can be found with the determination of shares of

parties by judgment and decree passed by the First Appellate Court. The substantial question of law framed, therefore, deserves to be answered in favour of the Plaintiff and stand answered accordingly. Hence, Second Appeal stands dismissed. Pending civil application(s), if any, stands dismissed.

16. At this stage, learned Counsel for the Appellants seeks continuation of interim relief in favour of Appellants by order dated 26.10.2021 for a period of 12 weeks from today.

17. Learned counsel for the Respondents/original plaintiffs opposes the said continuation of grant of interim relief.

18. Since the relief granted in favour of Appellants is in force from October 2021, this Court finds no justification not to consider the request made by learned counsel for Appellants. Hence, order dated 26.10.2021 stands extended for a period of 12 weeks from today.

(R. M. JOSHI, J.)

Malani