

(2016) 07 BOM CK 0139
In the Bombay High Court
Case No : Second Appeal No. 359 of 2001

Amruta Kaluji Shejul

APPELLANT

Vs

Vithal Ganpat Wadekar

RESPONDENT

Date of Decision : 15-07-2016

Acts Referred:

Limitation Act, 1963 — Article 59

Citation : (2016) 5 AIRBomR 641 : (2016) AIRCC 3241 : (2016) 5 BCR 57 :
(2017) 1 MhLJ 539

Hon'ble Judges : R.K. Deshpande, J.

Bench : Single Bench

Advocate : Shri R.L. Khapre with Shri P.B. Patil, Advocates, for the Appellants;
Shri S.A. Mohta, Advocate, for the Respondent Nos. 2a to 2f

Final Decision : Dismissed

Judgement

R.K. Deshpande, J.—The deceased-respondent No.1 Vitthal Ganpat Wadekar was the original plaintiff No.1, whereas the deceased-respondent No.2 Mahadeo Ganpat Surve was the original plaintiff No.2. Both the plaintiffs were real brothers. The plaintiff No.1 was the son-in-law (husband of the daughter) of one Laxmibai, whereas the plaintiff No.2 was the son of Laxmibai, adopted on 9.5.1952. The dispute in this matter pertains to 12 acres of land out of Survey No.117, situated at Mouza Belgaon, Tq. Mehkar, District Buldana, sold by Laxmibai to the deceased-defendant No.1 Amruta and the defendant No.3 Yashwant by the registered sale-deeds dated 4.6.1974 and 19.7.1976; to the deceased-defendant No.2 Dagdu by the registered sale-deed dated 13.4.1976; and to the defendant No.4 Gajanan by the registered sale-deed dated 24.5.1978.

2. The plaintiffs approached the Civil Court by filing Regular Civil Suit No.22 of 1986 with the case that they had purchased the land Survey No.117, admeasuring total 4.86 HR, equivalent to 25 acres and 13 gunthas, out of their own funds by the registered sale-deed dated 9.6.1965 at Exhibit 65 from one Rodji Bajirao; and by executing the registered settlement-deed at Exhibit 66

dated 9.6.1965 the land admeasuring 12 acres out of Survey No.117 was given to Laxmibai for maintenance during her lifetime, and she was not authorised/competent to mortgage or sale the said land to anyone. Laxmibai died on 4.5.1983 and thereupon the plaintiffs became entitled to take over the possession of the said land. The defendants have, however, obstructed them on the ground that they are in possession as the owners of the said land on the basis of the aforementioned sale-deed executed by Laxmibai in their favour. The plaintiffs, therefore, claimed a declaration that the aforementioned sale-deeds are not binding upon them and the defendants have no right to be in possession of the suit property, and hence the decree for possession was also claimed.

3. The Trial Court answered the issue of title in favour of the plaintiffs on the basis of the sale-deed dated 9.6.1965 at Exhibit 65 from Rodji Bajirao. It recorded the finding that the plaintiffs have established that the suit land was transferred by the settlement-deed dated 9.5.1965 at Exhibit 66 to Laxmibai, creating in her a limited interest upto life for maintenance. The Trial Court also held that the instrument at Exhibit 66 is governed by subsection (2) of Section 14 of the Hindu Succession Act, 1956, and the terms and conditions enumerated therein indicate that it was not a transfer in lieu of preexisting right of Laxmibai in the property. The contention of estoppel under Section 115 of the Indian Evidence Act, 1872 read with Section 4 of the Transfer of Property Act, 1882 on the fact of attestation by the plaintiff No.1 on the sale-deed dated 4.6.1974 at Exhibit 74, executed by Laxmibai in favour of the defendant Nos.1 and 3, was rejected by the Trial Court. The Trial Court also rejected the contention of the defendants that it was Laxmibai, who was the real owner and had purchased the suit land benami in the name of the plaintiffs by the registered sale-deed dated 9.6.1965 at Exhibit 65. The contention that the defendants were bona fide purchasers of the suit property under the sale-deeds dated 4.6.1974 at Exhibit 74, dated 13.4.1976 at Exhibit 76, and dated 19.7.1976 at Exhibit 78 from Laxmibai without notice for valuable consideration, was also rejected by the Trial Court. The lower Appellate Court has concurred with these findings and the decree passed regarding ownership of the plaintiffs over the suit property and possession in favour of the plaintiffs, was maintained by dismissing the appeal.

4. This appeal was admitted by this Court on 3.10.2005, framing the following two substantial questions of law :

Serial Nos.

Substantial questions of law

Findings

(i)

Whether the Courts below have erred in applying the provisions of Benami Transaction Prohibition Act in respect of transaction of purchase of property made on 9.6.1965 which was admittedly long prior to coming into force of Benami

Transaction Act?

Does not survive.

(ii)

Whether the judgment of the lower Court is perverse and is based principally on the application of Benami Transaction Prohibition Act and without depending on the said Act any Court would have reasonably come to the conclusion that Laxmibai was the true owner of the property?

No

Subsequently, during the course of final hearing of this appeal on 16.6.2016, the following additional substantial questions of law were framed :

Serial Nos.

Substantial questions of law

Findings

(i)

Whether the defendants have established that Survey No.12/2, admeasuring 20 acres and 6 gunthas located at Belgaon was an ancestral property in the hands of the plaintiffs and Laxmibai?

No

(ii)

Whether the defendants have established that Laxmibai had preexisting right of maintenance in Survey No.12/2 situated at Belgaon, sold on 09.06.65?

No

(iii)

Whether the suit in question challenging the sale deeds dated 04.06.74, 13.04.76 and 17.07.76 at Exh Nos.74, 76 and 78 respectively was barred by the law of limitation?

Yes

(iv)

Whether the defendants have established that they are the bona fide purchasers of the property for valuable consideration?

Yes

The parties were put on notice and were given sufficient time to address this Court on all the aforesaid substantial questions of law. The matter was heard on 17.6.2016, 27.6.2016, 28.6.2016, 29.6.2016 and 30.6.2016.

As to substantial question of law at Serial No.(i) dated 3.10.2005 :

5. Before this Court, it is conceded by both the parties that it would be permissible for the appellant-defendants to establish that the sale-deed dated 9.6.1965 at Exhibit 65 in the name of the plaintiffs was a benami transaction and such a plea would not be barred by the provisions of the Benami Transactions (Prohibition) Act, 1988 for two reasons (i) that it was a transaction much prior to coming into force of the said Act on 19.5.1988, and (ii) that even if the said Act applies, leading of such evidence would be permissible to the extent provided under subsection (3) of Section 4 of the said Act. In view of this, the substantial question at Serial No.(i), framed on 3.10.2005, does not at all survive.

As to substantial questions of law at Serial No.(ii) dated 3.10.2005 and at Serial No.(i) dated 16.6.2016 :

6. The substantial question of law at Serial No.(ii), framed on 3.10.2005, and at Serial No.(i), framed on 16.6.2016, can be decided together, as they are interlinked. Both the Courts are concurrent in holding that the appellant-defendants have failed to establish that it was Laxmibai, who purchased the entire land Survey No.117 in the name of the plaintiffs as benami. Shri Khapre, the learned counsel appearing for the appellant-defendants, submits that such a finding is in ignorance of (i) the important admissions given by the plaintiff No.2 himself, (ii) the fact that the sale-deed in favour of the defendant Nos.1 and 3 executed on 4.6.1974 at Exhibit 74 was signed by the plaintiff No.1 as an attesting witness, (iii) the fact that the plaintiff No.1 has failed to enter the witness-box to avoid answers to the questions leading to estoppel, (iv) the fact that on the same day, i.e. on 9.6.1965, Laxmibai and the plaintiffs had sold the ancestral property, i.e. the land Survey No.12/2, admeasuring 20 acres and 6 gunthas, situated at Belgaon, to a third person, viz. Namdeo Surve, and though such a sale-deed was in possession of the plaintiffs, the same is not produced on record, (v) the fact that the corpus out of sale of Survey No.12/2 was utilised for purchase of the suit land on 9.6.1965 at Exhibit 65, and (vi) the fact that the land Survey No.12/2, admeasuring 20 acres and 6 gunthas, was an ancestral property in the hands of the plaintiffs and Laxmibai.

7. The undisputed factual position is that both the plaintiffs are real brothers. The plaintiff No.1 was the son-in-law of Laxmibai, whereas the plaintiff No.2 was the son adopted by Laxmibai on 9.5.1952. The land Survey No.12/2, admeasuring 20 acres and 6 gunthas, located at Belgaon was sold on 9.6.1965 jointly by the plaintiff Nos.1 and 2 along with Laxmibai to a third person, viz. Namdeo Survey, and a copy of such sale-deed was not produced on record of the lower Courts. On the same day, i.e. 9.6.1965, the land Survey No.117, situated at Belgaon, of which the suit property is the part, was purchased under the registered sale-deed dated 9.6.1965 at Exhibit 66 from Rodgi Bajirao in the name of the plaintiff Nos.1 and 2 only. The said Rodgi Bajirao has not been examined as witness. On the same day, i.e. on 9.6.1965, the plaintiffs had executed a registered deed of settlement at Exhibit 65, creating only a life

interest for Laxmibai in the suit property for her maintenance on the terms and conditions specified therein, including that she shall not have any right to mortgage, sale or transfer it in favour of any person. Laxmibai has transferred different portions of suit property by registered sale-deeds dated 4.6.1974 at Exhibit 74 in favour of the defendant Nos.1 and 3, dated 13.4.1976 at Exhibit 76 in favour of the defendant No.2, and dated 19.7.1976 at Exhibit 78 in favour of the defendant No.4. Laxmibai died on 4.5.1983. The suit in question was filed on 11-2-1986.

8. The questions, which are required to be addressed firstly, are whether the land Survey No.12/2, admeasuring 20 acres and 6 gunthas, located at Belgaon, and sold to Namdeo Survey jointly by the plaintiffs and Laxmibai, was an ancestral property, and whether the purchase of land Survey No.117 by the registered sale-deed dated 9.6.1965 at Exhibit 65 in the name of the plaintiffs was out of corpus of joint family property ? a benami transaction by Laxmibai.

9. On the position of law, I need not refer to several decisions cited before me, but the reference to few, to recapitulate the well-settled position of law, would be enough. It has to be stated that the proof of existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundations of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case. This is what the Apex Court has held in *Srinivas Krishnarao Kango v. Narayan Devji Kango and others*, reported in AIR 1954 SC 379 (Para 10).

10. In the decision of the Apex Court in the case of *Achuthan Nair v. Chinnammu Amma and others*, reported in AIR 1966 SC 411, it has been held in para 7 that under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus.

11. Keeping in view the aforesaid law laid down and turning to the facts of the present case, it has to be accepted that the plaintiffs have established their ownership over the suit property on the basis of the sale-deed at Exhibit 65, which stands exclusively in their name. The plaintiffs, who have come forward with this plea, have discharged the burden, and the defendants, who are coming before the Court with a case that the suit property was acquired with the aid of nucleus of the joint family property, have to lead evidence and prove the relevant facts, viz. that the suit property was purchased out of the income, which was derived by Laxmibai by way of sale of the land Survey No.12/2 to Namdeo Surve, and that the said property was an ancestral property in her hands.

12. The plaintiff No.2, the adopted son of Laxmibai, has entered the witness-box. He has stated that on his day of adoption, i.e. 9.5.1952, Laxmibai was staying at Pangarkhed, and at that time, she had 18 acres of land at Pangarkhed. The defendants have not brought on record any evidence to show that the land of 18 acres at Pangarkhed in the hands of Laxmibai was an ancestral or joint family property and that the said land was sold by Laxmibai at any point of time during her lifetime. It is not the evidence brought on record by the defendants that apart from the land at Pangarkhed, Laxmibai had any other land at any other place, much less at Belgaon. Undisputedly, on 9.6.1965, both the plaintiffs along Laxmibai sold the land Survey No.12/2, situated at Belgaon to Namdeo Surve. There is no evidence on record as to when was this land Survey No.12/2 purchased jointly by the plaintiffs and Laxmibai. It is not the evidence on record that this land was purchased out of the sale proceeds of the land at Pangarkhed, if it was sold.

13. Thus, there is absolutely no evidence brought on record to establish that there existed some joint family property in the hands of Laxmibai on the date of purchase of the suit property or that the suit property was purchased out of the nucleus of the joint family property or that the sale proceeds of land Survey No.12/2 were utilized/given by Laxmibai for purchase of suit property at Exhibit 65. Merely because the plaintiffs have executed a deed of settlement at Exhibit 66 for maintenance of Laxmibai on the same day, i.e. 9.5.1965, it would not follow that the plaintiffs had purchased the suit property with the aid of the funds provided by Laxmibai and in consideration of that, the deed of settlement was executed. The substantial questions of law are answered accordingly.

14. Relying upon the decision of the Apex Court in the case of Gopal Krishnaji Ketkar v. Mohamed Haji Latif and others, reported in AIR 1968 SC 1413, and inviting my attention to the provisions of Sections 103 and 114(g) of the Evidence Act, 1872, it is urged by Shri Khapre, the learned counsel for the appellant-defendants, that the defendants are the purchasers of the suit property from Laxmibai, who died prior to filing of suit, and the defendants were not the members of her family, but are the strangers. The plaintiffs being in possession of the information as to the nature of property in the hands of Laxmibai and the sources of her income, the burden shall be upon them to bring on record such

facts.

15. The decision of the Apex Court in Gopal Krishnaji Ketkar's would not be of much help to Shri Khapre for the appellant-defendants. In the said decision, the question involved was whether the land comprised in Survey Plot No.134 was the property of Dargah or whether it belonged to the appellant. One of the factors to be considered was of the income from Durgah and production of accounts of income by the appellant would have shown the element of his ownership over the said plot. The appellant failed to produce either his own accounts or the accounts of Durgah to show the income on the specious plea that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Durgah was the owner of Plot No.134. The Apex Court held in para 5 as under :

"5. ? We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practise for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

16. Section 114 of the Indian Evidence Act, relied upon by Shri Khapre for the appellant-defendants, read with the illustration as to clause (g), is reproduced below :

"114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration

The Court may presume

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

As to illustration (g) A man refused to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family."

The illustration speaks about the production of evidence and it does not pertain to supply of information within the personal knowledge of the party to the litigation. The decision in Gopal Krishnaji Ketkar's case also deals with non-production of documentary evidence and it does not deal with nondisclosure of information, which is within the personal knowledge of the party to the litigation. The decision cited, therefore, is not applicable to the facts of the present case.

17. The plaintiff No.2 supposed to be in the knowledge on the nature of property in the hands of Laxmibai and the source of her income. Section 106 of the Evidence Act states that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. Order 11, Rule 1 of the Code of Civil Procedure deals with discovery by interrogatories, and it is reproduced below :

"Order 11, Rule 1 ? Discovery by interrogatories. In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: provide also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness." The main object of interrogatories is to enable a party to obtain from his adversary, the information as to facts which relate to the matters in question. This helps in reducing the burden in respect the facts which are within the special knowledge of adversary. The another source of obtaining such information is the cross-examination of party having special knowledge of such information. It is possible that the person or party having knowledge of such information avoids in cross-examination to part with it and that will show the conscious withholding of information, requiring the Court to draw an adverse inference against such person or party. Drawing of an adverse inference is a matter of discretion, which has to be exercised in the facts and circumstances of the case. In the absence of such conscious withholding of information, it may not be proper for the Court to draw an adverse information.

18. The defendants have not invoked the provision of Order 11, Rule 1 of the Code of Civil Procedure to tender interrogatories to the plaintiffs to seek information as to the facts which related to the matter in question. The plaintiff No.2 has entered the witness-box and was subjected to cross-examination by the defendants. The entire cross-examination of this witness nowhere discloses any efforts on the part of the defendants to elicit the information about the nature of the property in the hands of Laxmibai and the source of her income to purchase the property located at Belgaon jointly with the plaintiffs, which was sold on 9.6.1965, to Namdeo Surve. Had such efforts been made to expose the conduct of the plaintiff No.2 of hiding or suppressing such information, it would have become possible for the Court to draw an adverse inference. In the absence of such efforts being made, the onus of proof shall not shift upon the plaintiffs. The contention of Shri Khapre for drawing of an adverse inference is, therefore, rejected.

As to substantial question of law at Serial No.(ii) dated 16.6.2016 :

19. Undisputedly, the plaintiffs had transferred the suit property to Laxmibai

under the registered settlement-deed dated 9.5.1965 at Exhibit 66 upon the terms and conditions enumerated therein, which include the condition of creating a life interest for maintenance of Laxmibai and she was not authorised/competent to mortgage or sale the suit property to anyone. The Courts below have held that such a document is covered by subsection (2) of Section 14 of the Hindu Succession Act, and the contention of Shri Khapre for the appellant-defendants is that by virtue of subsection (1) of Section 14 of the said Act, the limited interest of Laxmibai becomes absolute, once the fact of her possession over the suit property is established. The learned counsels appearing for the parties have relied upon several decisions of the Apex Court in support of their rival submissions. It is not necessary for me to refer to all such decisions, except ? (i) in the case of Raghubar Singh and others v. Gulab Singh and others, reported in AIR 1998 SC 2401, and (ii) in the case of Jupudy Pardha Sarathy v. Pentapati Rama Krishna & Ors., reported in 2016(1) All M.R. 434 (S.C.).

20. In the decision of Raghubar Singh's case, cited supra, the Apex Court has traced out the history of bringing into force the provisions of Section 14 of the Hindu Succession Act. In para 13, the Apex Court was considering the obligations of a Hindu husband towards the maintenance of his wife during his lifetime and after his death. Paras 14 to 16 of the said decision being relevant, are reproduced below :

"14. According to the old Shastric Hindu Law, marriage between two Hindus is a sacrament ? a religious ceremony which results in a sacred and a holy union of man and wife by virtue of which the wife becomes a part and parcel of the body of the husband. She is, therefore, called Ardhangani. It is on account of this status of a Hindu wife, under the Shastric Hindu law, that a husband was held to be under a personal obligation to maintain his wife and where he dies, possessed of properties, then his widow was entitled, as of right, to be maintained out of those properties. The right of a Hindu widow to be maintained out of the properties of her deceased husband is, thus, a spiritual and moral right, which flows from the spiritual and temporal relationship of husband and wife, though the right is available only so long as the wife continues to remain chaste and does not remarry."

"15. Mulla in his classic work on "Hindu Law", 14th Edn., dealing with the characteristic of the right of maintenance of a Hindu wife observes:

"A wife is entitled to be maintained by her husband, whether he possesses property or not. When a man with his eyes open marries a girl accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style. The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship, and quite independent of the possession by the husband of any property, ancestral or self-acquired."

Mayne in his Treatise on "Hindu Law and Usage"

11th Edn., while tracing the history and origin of the right of maintenance of a Hindu wife says: "The maintenance of a wife by her husband is, of course, a matter of personal obligation, which attaches from the moment of marriage."

"16. The obligations, under the Shastric Hindu Law, to maintain a Hindu widow out of the properties of her deceased husband received a statutory recognition with the coming into force of the Hindu Women's Rights to Property Act, 1937. The law on the subject was, thereafter, consolidated and codified by the Hindu Married Women's Right to Separate Maintenance and Residence Act, 1946 which came into force on April 23, 1946. The right to maintenance of the Hindu widow, as a preexisting right, was thus recognised by the two statutes referred to above but it was not created for the first time by any of those statutes. Her right to maintenance existed under the Shastric Hindu Law long before statutory enactments came into force. After the attainment of independence the need for emancipation of women from feudal bondage became even more imperative. There was growing agitation by Hindu women for enlargement of their rights as provided by the Shastric Hindu Law in various spheres. It was at this juncture that the Parliament stepped in and enacted various statutes like the Hindu Marriage Act, 1956. The Hindu Adoption and Maintenance Act, 1956, and The Hindu Succession Act, 1956 providing for intestate succession."

21. Though there is no reference to the aforesaid decision by the Apex Court in the last decision in the case of *Jupudy Pardha Sarathy*, cited *supra*, para 15 of the said decision is relevant, and hence it is reproduced below :

"15. It is well settled that under the Hindu Law, the husband has got a personal obligation to maintain his wife and if he is possessed of properties then his wife is entitled to a right to be maintained out of such properties. It is equally well settled that the claim of Hindu widow to be maintained is not a mere formality which is to be exercised as a matter of concession, grace or gratis but is a valuable, spiritual and moral right. From the judicial pronouncement, the right of a widow to be maintained, although does not create a charge on the property of her husband but certainly the widow can enforce her right by moving Court and for passing a decree for maintenance by creating a charge."

22. The decision of the Apex Court interprets the provisions of Section 14 of the Hindu Succession Act in the light of spiritual and moral right of a Hindu widow flowing from spiritual and temporal relationship of husband and wife. Under the Shastric Hindu Law, a husband was held to be under personal obligation to maintain his wife as a result of union of husband and wife, and if he dies, then his widow is entitled as a matter of right, to be maintained out of the ancestral or joint family property or the property of her husband. Such a right of a Hindu widow, can be described as an "inherent" or "preexisting" right of maintenance. Subsection (1) of Section 14 of the Hindu Succession Act applies to the cases of inherent or preexisting right of maintenance and in such cases, the applicability of subsection (2) therein is excluded.

23. In the background of the aforesaid position of law, it will have to be seen in the facts of the present case as to whether Laxmibai had preexisting right of maintenance out of the suit property or it was a right created for the first time by the settlement-deed dated 9.6.1965 at Exhibit 66. If it is held that it was a preexisting right of Laxmibai, then any restrictions put on her rights under the document at Exhibit 66, would not prevent her from becoming an absolute owner of the suit property. But if it is held that she had no preexisting right, then the deed of settlement at Exhibit 66 would be one under subsection (2) of Section 14 of the said Act and she would not become an absolute owner thereof, as has been held by the Courts below. In such event, subsection (1) of Section 14 of the said Act shall have no application.

24. Laxmibai could enforce the right of maintenance only against the ancestral or joint family property, or the property of the husband, if any, in the hands of the plaintiffs. I have already held that the defendants have not brought on record any evidence to show that the land of 18 acres situated at Pangarkhed in the hands of Laxmibai was an ancestral or joint family property or the property of her husband and that the said land was at any point of time sold by Laxmibai during her lifetime. There is no evidence on record to show that Laxmibai or her husband possessed any other property at any other place, much less at Belgaon. Though there is evidence on record to show that the plaintiffs and Laxmibai jointly sold the land Survey No.12/2 at Belgaon on 9.6.1965, there is no evidence on record to indicate the date and the source of fund available with Laxmibai to jointly purchase this property. The defendants have also failed to establish that the suit land was purchased out of the nucleus of the joint family property or that the sale proceeds of the land Survey No.12/2 were utilised by Laxmibai for purchase of the suit property at Exhibit 65. In the absence of existence of aforesaid kind of evidence, it cannot be said that there was preexisting right of maintenance of Laxmibai, which could be enforced against the suit property. The document at Exhibit 66 was not covered by subsection (1) of Section 14 of the Hindu Succession Act. The substantial question of law is, therefore, answered accordingly.

25. Shri Khapre, the learned counsel for the appellant-defendants, has invited my attention to subsections (1) and (3) of Section 20 of the Hindu Adoptions and Maintenance Act, 1956 along with subsection (1) of Section 22 therein, to urge that even if the plaintiff No.2 was the adopted son of Laxmibai, he was under statutory obligation to maintain her and thus it was a preexisting right of maintenance of Laxmibai. He submits that the settlement-deed dated 9.6.1965 at Exhibit 66 shall, therefore, be covered by subsection (1) of Section 14 of the Hindu Succession Act, 1956.

26. Subsections (1) and (3) of Section 20 and subsection (1) of Section 22 of the Hindu Adoptions and Maintenance Act being relevant, are reproduced below :

"20. Maintenance of Children and aged parents. -(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her

legitimate or illegitimate children and his or her aged or infirm parents.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property."

(Emphasis supplied).

There cannot be any dispute over the proposition that even the adopted son carries the same obligation to maintain his aged or infirm parents, like natural son. However, such right cannot be equated with the inherent or preexisting right of maintenance, like one which exists against the husband arising out of spiritual or temporal relationship. The right of maintenance of mother against a son, is not the personal obligation to be enforced against the son. The obligation upon the son is statutorily created under the provisions of the Hindu Adoptions and Maintenance Act, and it is subject to the rider under subsection (3) of Section 20 of the said Act that such parents are unable to maintain themselves out of their own earnings or other property. Such adjudication has to be by a Court of competent jurisdiction. If the Court passes a decree for maintenance, that would only create a charge over the property. The obligation so created for the first time, shall not convert the limited or restricted right into one of absolute ownership under subsection (1) of Section 14 of the Hindu Succession Act, 1956.

27. Under subsection (1) of Section 22 of the said Act, the obligation of the heirs of the deceased Hindu to maintain the dependents of the deceased is only out of the estate inherited by him from the deceased. This is a matter of fact, which is required to be pleaded and proved, and the obligation is not automatic. In the absence of evidence of existence of such estate, the right of heirs of the dependents of the deceased shall not survive. The obligation so created in respect of parents is only during the lifetime without creating any right or interest, as contemplated under subsection (1) of Section 14 of the Hindu Succession Act, to dispose of the property given for maintenance.

28. In the present case, the plaintiff No.2 has discharged his obligation to maintain Laxmibai, the adoptive mother, till her lifetime, and the document created at Exhibit 66 created for the first time on 9.6.1965, making a provision for maintenance of Laxmibai would not be enough to convert her limited right into one of the absolute ownership in respect of the suit property, as contemplated by subsection (1) of Section 14 of the Hindu Succession Act. She would not, therefore, become an absolute owner of the said property, and by virtue of subsection (2) of Section 14 of the said Act, the property under Exhibit 66 shall revert back to the plaintiffs upon her death. The contentions of Shri Khapre, the learned counsel for the appellant-defendants, based upon Sections 20 and 22 of the Hindu Adoptions and Maintenance Act, 1956, are, therefore, rejected.

As to substantial question of law at Serial No.(iv) dated 16.6.2016 :

29. Shri Khapre, the learned counsel appearing for the appellant-defendants, pressed into service the provisions of Section 115 of the Indian Evidence Act, 1872 in relation to an issue of estoppel and Section 41 of the Transfer of Property Act, 1882 in relation to an issue of ostensible ownership. In response to the contention of the appellant-defendants that the sale-deed dated 4.6.1974 at Exhibit 74 bears the signature of the plaintiff No.1 as an attesting witness, who made the representation to the appellant-defendants to believe that Laxmibai is the real owner of the suit property, the Trial Court records the finding that no such interference can be drawn and the appellant-defendants failed to make any enquiry in respect of the title of Laxmibai over the suit property, which has been admitted in the cross-examination of the defendant No.1. The lower Appellate Court concurs with the finding recorded by the Trial Court and rejects the contention of the appellant-defendants that the estoppel operated against the respondent-plaintiffs.

30. The plaintiffs are held to be the real owners of the suit property. The question is whether the transfer of suit property by Laxmibai in favour of the defendant Nos.1 and 3 on 4.6.1974 at Exhibit 74 is protected under the provisions of Section 41 of the Transfer of Property Act read with Section 115 of the Evidence Act. The equitable principle of estoppel contained in Section 115 of the Evidence Act is also one which is contained in Section 41 of the Transfer of Property Act. Hence, the provisions of Section 115 of the Evidence Act and Section 41 of the Transfer of Property Act being relevant, are reproduced below :

"115. Estoppel.-When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

"41. Transfer by ostensible owner.- Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provide that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

The transfer of property by a person other than the real owner becomes voidable at the instance of the real owner on the ground that the transferor had no authority to make it, and, therefore, it is not binding upon him. Section 41 of the Transfer of Property Act is aimed at protecting the transfer by an ostensible owner with the consent ? express or implied ? of the real owner of the immovable property for consideration, provide that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. However, where the real owner of the property by his own conduct, as per Section 115 of the Evidence Act, intentionally causes another person, i.e. the transferee, to believe that the transferor is the true

owner or is authorised by him to transfer the property, it shall not be necessary for the transferee to make any further enquiry to establish that he took reasonable care to ascertain that the transferor had power to transfer the property.

31. In the decision of the Apex Court in the case of M/s. Grasin Industries Ltd. and Anr. v. M/s. Agrawal Steel, reported in 2010 AIR SCW 232, cited by Shri Khapre for the appellant-defendants, the Apex Court has held in para 5 as under :

"5. In our opinion, when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document properly and understood it and only then he has affixed his signatures thereon, otherwise no signature on a document can ever be accepted. In particular, businessmen, being careful people (since their money is involved) would have ordinarily read and understood a document before signing it. Hence, the presumption would be even stronger in their case. ..."

32. In the decision of the Apex Court in the case of Dattatraya v. Rangnath Gopalrao Kawathekar, (dead) by his legal representatives and others, reported in AIR 1971 SC 2548, cited by Shri Khapre for the appellant-defendants, it was a case where the plaintiffs' suit was for possession of the suit properties on the basis of title by way of registered sale-deed dated January 12, 1952 from the defendant No.1, the owner of the suit properties. The defendant No.2, who was the real brother of the defendant No.1 and in possession of the properties, took the stand that in the partition, the suit properties fell to his share and his brother, the defendant No.1, had no right to alienate the same. The plaintiffs pleaded in the plaint that the second defendant had specifically admitted in the sale-deed that the suit properties were the exclusive ownership of his brother and he had no right on the same. The defendant No.2 took the stand in the written statement that the deal in question was a forgery and he had not executed it.

33. The Apex Court has held in the aforesaid decision that from the document, it is clear that the second defendant admitted that the suit properties were of the exclusive ownership of the first defendant and he had no right in the same. The Apex Court held that the second defendant after executing that the document is now trying to resile from the administration made by him with a view to take the advantage of the situation in which the plaintiffs were placed. The Court held that the sale-deed relied upon by the plaintiffs proved the admission of the second defendant that the suit properties belonged to his brother and that his brother had sold the same to the plaintiffs. The Court held that the admission is a piece of evidence, which proves the title of the defendant No.1 to the suit properties and it further proves alienation effected by the first defendant in favour of the plaintiffs.

34. In the decision of the Apex Court in the case of Mahboob Sahab v. Syed Ismail and others, reported in AIR 1995 SC 1205, the plaintiffs claimed to be the

owners of the suit property on the basis of the oral gift executed by their father jointly in their favour and their mother Smt. Chandi, the third defendant in the suit, in the month of April, 1958. The challenge was to the sale-deed executed by the father at Exhibit D1, dated May 12, 1961, in respect of the said property in favour of the appellant before the Apex Court. Neither the mother nor the father examined as witness to prove the gifts said to have been given in favour of the plaintiffs. One of the plaintiffs, viz Ibrahim in his evidence admitted the execution of sale-deed by his father and he acted as an attesting witness to the sale transaction under Exhibit D1. The Apex Court confirmed the decision of the lower Appellate Court that the oral gift in favour of the plaintiffs was not established. On the aspect of validity of sale-deed at Exhibit D1, the Apex Court held in para 7 of the decision that the plaintiff Ibrahim had attested Exhibit D1 when his father conveyed the lands as an owner. Though the sale was against his interest, he had not objected to the sale. He, thereby, is estopped by conduct and record to assail Exhibit D1 sale or to claim any interest in the lands.

35. In the decision of the Apex Court in the case of Vimal Chand Ghevarchand Jain and Ors. v. Ramakant Eknath Jajoo, reported in AIR 2009 SC (Supp) 1550, cited by Shri Khapre, it was a suit for possession based on the registered sale-deed executed by the father of the defendant in favour of the partnership firm. The defendant himself had signed the deed as a witness. The plaintiff became the owner of the suit property on dissolution of the firm and the possession of it, was given to the father of the defendant as a licensee after the execution of the sale-deed and the licence fee was paid by the son by cheque, which was dishonoured. The question was whether the plaintiff proved his title on the basis of the registered sale-deed. The Apex Court held that the deed of sale being a registered one and apparently containing stipulation of transfer of right, title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said deed was, in fact, not executed or otherwise did not reflect the true nature of transaction. The Apex Court held that evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father, i.e. the vendor in the said sale-deed, he did not examine himself and, therefore, an adverse inference should have been drawn by the Trial Court. It holds that a heavy burden of proof lay upon the defendant to show that the transaction was a sham one or the parties did not intend to enter into any transaction at all.

36. Now coming to the facts of the present case in the light of the evidence on record and the law laid down by the Apex Court, the document, which is a sale-deed in question and dated 4.6.1974 at Exhibit 74, need to be seen. It contains a clear recital that the part of the property sold is owned and possessed by Laxmibai. The document is registered and it carries a presumption of its genuineness. It was a specific stand taken in the written statement by the defendants that the plaintiff No.1 had attested the sale-deed dated 4.6.1974 at Exhibit 74. The defendant No.1, the purchaser of the suit property under the sale-deed at Exhibit 74, entered the witness-box and stated on oath that both the

plaintiffs were present at the time of execution of the sale-deed and the plaintiff No.1 signed it as an attesting witness. There is no cross-examination of the defendant on this aspect of the matter by the plaintiffs. This evidence, therefore, has to be accepted as sufficient to shift the onus upon the plaintiffs for the reason that the plaintiff No.1 is presumed to know the contents of the document at Exhibit 74 representing the defendants that the suit property is owned and possessed by Laxmibai and though the sale was against his own interest, he does not have any objection for such sale.

37. The plaintiffs do not dispute execution or genuineness of the sale-deed at Exhibit 74 or even the sale-deeds at Exhibits 76 and 78. In spite of knowing specific stand taken by the defendants in written statement that the sale-deed dated 4.6.1974 at Exhibit 74 bears the signature of the plaintiff No.1, the plaintiff No.2, who entered the witness-box, states that he did not meet the plaintiff No.1 since 1974 and remains silent as to the signature of the plaintiff No.1 on Exhibit 74 as an attesting witness. The plaintiff No.2 also does not speak about the execution of sale-deed by Laxmibai and admits the fact that neither Laxmibai nor plaintiffs were in possession of the suit property since 1974.

38. In the light of the aforesaid evidence, it was necessary for the plaintiff No.1 to have entered the witness-box to put the controversy beyond the pale of doubt by discharging the onus shifted upon the plaintiffs. Section 114, Illustration (g) of the Evidence Act regarding presumption of existence of certain facts for failure to produce certain evidence, which could be and is not produced, will have to be invoked. In the present case, the plaintiff No.1 could have entered the witness-box to deny his signature on Exhibit 74 as an attesting witness and his presence at the time of execution of this document. The adverse inference is, therefore, required to be drawn to hold the presence of the plaintiffs at the time of execution of document at Exhibit 74 and that it bears the signature of the plaintiff No.1 as an attesting witness.

39. Shri Mohta, the learned counsel appearing for the respondent-plaintiffs, has invited my attention to the admission of the defendant No.1 in his cross-examination that he did not make any enquiry as to the title of Laxmibai before getting the sale-deed at Exhibit 74 executed and, therefore, there is noncompliance of Section 41 of the Transfer of Property Act because of failure on the part of the defendant No.1 to take reasonable care to ascertain that the transferor had power to make transfer. The contention cannot be accepted for the reason that once the real owners of the suit property have, by their own conduct, as per Section 115 of the Evidence Act, intentionally caused the defendants to believe that the transferor is the true owner or is authorised by them to transfer the suit property, for which they had no objection, the transaction at Exhibit 74 in favour of the defendants has to be presumed as bona fide with the consent of the plaintiffs and such direct representation by signing as attesting witness, protects the transaction under Section 41 of the Transfer of Property Act. It was a sale by ostensible owner, viz. Laxmibai, with the consent

of the real owners, who are the plaintiffs, for valuable consideration. The substantial question of law at Serial No.(iv) dated 16.6.2016 is answered accordingly.

As to question of limitation :

40. Shri Khapre, the learned counsel for the appellant-defendants, submits that the limitation was governed by Article 59 of the Limitation Act, which prescribes the period of three years from the date of knowledge of the transaction. He submits that in the year 1974 itself, the plaintiffs acquired the knowledge of sale-deed dated 4.6.1974 and the plaintiff No.2 has admitted that neither Laxmibai nor plaintiffs were in possession of the suit property since then. According to him, the period of three years has to be counted from 4.6.1974 and the suit brought on 11.2.1986 was barred by the law of limitation. He has relied upon the decisions of the Apex Court in the cases of Noorul Hoda v. Bibi Raifunnisa, reported in 1996(7) SCC 767, and Abdul Rahim & Ors. v. Sk. Abdul Zabar & Ors., reported in 2009(5) Mh.L.J. 701 (S.C.). Shri Khapre, therefore, submits that the suit should have been dismissed as barred by the law of limitation.

41. The case of the respondent-plaintiffs is that the question of limitation is governed by Article 65 of the Limitation Act, which prescribes the period of twelve years from the date on which the possession of the defendants becomes adverse. According to the plaintiffs, even if the date of first sale-deed, i.e. 4.6.1974 at Exhibit 74, is taken to be the date from which the limitation is to be counted, the suit filed on 11.2.1986 would be within a period of twelve years. In support of the respondent-plaintiffs on the point of limitation, Shri Mohta, the learned counsel for the respondent-plaintiffs, has relied upon the decisions of the Apex Court in the cases of Ghanshyamdas Vallabhadas Gujrathi v. Brijraman Rasiklal, reported in 1984(2) Bom.C.R. 50, Ameena Bi v. Kuppuswami Naidu and others, reported in (1993) 2 SCC 405, State of Maharashtra v. Pravin Jethalal Kamdar (dead) by LRs., reported in AIR 2000 SC 1099, Ranbir Singh and others v. Kartar Singh and others, reported in AIR 2003 SC 1858, Prem Singh Ors. v. Birbal Ors., reported in 2006(6) Bom.C.R. 332, and Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and others, reported in (2008) 4 SCC 594.

42. Subsection (1) of Section 31 of the Specific Relief Act, 1963 deals with the declaration of cancellation of a written instrument, and it reads as under :

"31. When cancellation may be ordered.-(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

The filing of suit by any person for cancellation of written instrument operating against him is discretionary and depends upon the reasonable apprehension of such person that if such instrument is left outstanding, it may cause him serious injury. If a written instrument is void ab initio, a suit for getting such a

declaration from the Court of competent jurisdiction is not required to be filed, and even if such instrument remains outstanding, a plea that such instrument is void can be raised anywhere in any proceedings by way of defence and the bar of limitation to raise such challenge would not arise. In a suit based on title claiming the relief of possession, any written instrument put forth in defence considered to be void, need not be challenged and the limitation for filing such a suit would be of twelve years from the date when it becomes adverse to the plaintiff and it shall be governed by Article 65 of the Limitation Act. But this is not true in a case where a written instrument operating against a person is voidable. It has to be necessarily challenged within a period of limitation of three years, as prescribed by Article 59 of the Limitation Act and the period of limitation starts running from the date when such an instrument first become known to him.

43. The decision of the Apex Court in the case of MD. Noorul Hoda v. Bibi Raifunnisa and others, reported in (1996) 7 SCC 767, lays down in very clear and unequivocal terms the law on this aspect in para 6 of the judgment, the relevant portion of which is reproduced below :

"6. ... The present Article 59 of the Schedule to the Act will govern any suit to set aside a decree either on fraud or any other ground. Therefore, Article 59 would be applicable to any suit to set aside a decree either on fraud or any other ground. It is true that Article 59 would be applicable if a person affected is a party to a decree or an instrument or a contract. There is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the inter se parties. The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to avoid the decree by a specific declaration, whether Article 59 gets attracted? As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel an instrument, a contract or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, through not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that the word "person" in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily

bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him."

44. The aforesaid decision has been followed by a Three Judge Bench of the Apex Court in the case of Abdul Rahim and others v. Sk. Abdul Zabar and others, reported in (2009) 6 SCC 160. In para 28 of the said decision, it has been held as under :

"28. A suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. The suit, therefore, should have been filed within a period of three years from the date of knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place. The suit having not been filed within a period of three years, the suit has rightly been held to be barred by limitation."

The Apex Court thereafter follows the earlier decision in Md. Noorul Hoda's case, cited supra, and allows the appeal maintaining the order of the Trial Court dismissing the suit as barred by the law of limitation prescribed under Article 59 of the Limitation Act.

45. The question as to whether a document/written instrument is void or voidable, depends upon the nature of such document and the challenges raised. It has to be decided in the facts and circumstances of each case. Normally, Article 59 of the limitation Act is attracted where a suit has been filed by a party to such an instrument. In case where suit to avoid such instrument is filed by a person not party to such instrument, the decision in the case of Md. Noorul Hoda's case, cited supra, lays down a test as to whether the title to the property can be established without avoiding an instrument, which stands as an insurmountable obstacle in a way which otherwise binds the plaintiff, though not a party. If answer is in the negative, the limitation for filing a suit to challenge it shall start running from the date of knowledge of such instrument to the party challenging it, as prescribed under Article 59 of the Limitation Act.

46. The burden of proof that the suit filed is within a period of limitation, is upon the plaintiffs, who have come before the Court to get the same set aside or cancelled. It is not the case of plaintiffs that these sale-deeds were obtained from Laxmibai by practising misrepresentation and/or fraud. The challenge to the sale-deeds cannot be said to be on the ground of voidness. In the present case, the sale-deeds at Exhibits 74, 76 and 78 are covered by Section 41 of the Transfer of Property Act and the transactions become voidable at the instance of the plaintiffs. It is not the pleading in the plaint that the plaintiffs filed the suit challenging the sale-deeds, within a period of three years from the date of their knowledge about execution of such sale-deeds. This is also not the evidence brought on record by the plaintiffs. On the contrary, the evidence brought on record and the findings recorded in earlier paras clearly establish the knowledge of the plaintiffs about the possession of the defendants and the execution of sale-deeds on 4.6.1974, 13.4.1976 and 19.7.1976 itself. These instruments stand as

insurmountable obstacle and binds them. In fact, they have made a prayer for setting aside these instruments. The limitation is, therefore, governed by Article 59 of the said Act and the suit should have been brought within a period of three years, as contemplated by Article 59 of the Limitation Act, from the date of knowledge of these sale-deeds to the plaintiffs. The suit filed on 11.2.1986 was, therefore, clearly barred by the law of limitation, as prescribed under Article 59 of the Limitation Act. The substantial question of law at Serial No.(iii) dated 16.6.2016 is answered accordingly.

47. In view of the aforesaid answers to the substantial questions of law, the suit is required to be dismissed as barred by the law of limitation. Hence, the appeal is allowed. The judgments and orders dated 12.2.1993 passed by the Trial Court in Regular Civil Suit No.22 of 1986, and dated 31.8.2001 passed by the lower Appellate Court in Regular Civil Appeal No.40 of 1993, are hereby quashed and set aside. Regular Civil Suit No.22 of 1986 is dismissed. No order as to costs.