
(1992) 11 BOM CK 0023

In the Bombay High Court

Case No : First Appeal No's. 34 and 36 of 1989

Dagadu Patilba Kharde and Another

APPELLANT

Vs

Bhamabai alias Shamabai Shinde and Others

RESPONDENT

Date of Decision : 24-11-1992

Acts Referred:

Evidence Act, 1872 — Section 115, 3, 68, 8
Hindu Succession Act, 1956 — Section 19, 6, 8

Citation : (1994) 2 BomCR 489 : (1993) 95 BOMLR 662

Hon'ble Judges : N.P. Chapalgaonker, J;M.S. Vaidya, J

Bench : Division Bench

Advocate : D.S. Wabale, in F.A. No. 34 of 1989 and A.S. Wabale, in F.A. No. 36 of 1989, for the Appellant; D.S. Wabale in F.A. No. 36 of 1989 for respondent Nos. 5 and 6, R.T. Sharma in F.A. Nos. 34 and 36 of 1989 for respondent Nos. 1 to 4 and A.S. Wabale in F.A. No. 34 of 1989 for respondent Nos. 5, 6 and 7, for the Respondent

Judgement

M.S. Vaidya, J.—These two First Appeals are directed against the judgment and decree dated 12th November, 1982 passed by the IInd Joint Civil Judge (S.D.), Ahmednagar, in Special Civil Suit No.40/1977. The original appellants in First Appeal No.36/1989 were original defendant Nos. 1 to 3. Out of them, original defendant No.1, who was appellant No.1 has died pending these appeals and his legal representatives were brought on record during the pendency of the said appeals. First Appeal No.34/1989 is preferred by original defendant Nos. 4 and 5. As both the appeals were directed against one and the same decree, the appeals were heard together with the consent of the parties and they are being disposed of by this common judgment.

2. That, the facts which were not in dispute before us may be stated at the outset. Defendant No.1 Rambhau had two wives, namely, Kausalyabai and Tanhabai who are appellant Nos.1A and 1B in First Appeal No.36/1989 as legal representatives of deceased Rambhau. Rambhau had three sons by name, Deoram (who died on 20-12-1971 leaving behind him the original plaintiffs who

are respondent Nos. 1 to 4 in both the appeals); Malak " Mahipati (Original Defendant No.2); and Popat (Original Defendant No.3). Original plaintiff No.1 Bhamabai is the widow of Deoram and the other original plaintiffs are his daughters. The daughters were minors when the suit was filed. But they have since become majors are represented before us by a Counsel, namely, Shri R.T. Sharma. The family of Deoram and his sons was a joint Hindu Family having lands and some other property at Village Varshinde. Deoram was married to plaintiff No.1 sometime in 1958 to 1960. The native place of plaintiff No.1 was Village Fatyabad which was at a distance of about 10 kms. from Village Varshinde. Her father Sakharam held some lands at Village Fatyabad. He had only three daughters, out of whom one was married 7 or 8 years before the marriage of plaintiff No.1 Bhamabai with Deoram and the other was married some 5 or 6 years after the marriage of plaintiff with Deoram. For one reason or the other, sometime before 1960, defendant No.1 Rambhau had broken the Khata of lands which was standing in his name and had nominated his three sons as holders of distinct lands which were located at Varshinde. The family, however, continued to be joint because it is nobody's case that there was any severance of status despite the distribution of lands and breaking of Khatas. Defendant No.1 Rambhau held jointly with one Bhimaji Balaji Dighe two pieces of land at Varshinde bearing Survey Nos.159/1 and 159/3. They sold the said pieces of lands to Vithoba Gajaba Wabale and Namdeo Gajaba Wabale under a sale deed dated 21-1-1962 (Exhibit 126) for a sum of Rs.6,000/-. The object of sale was said to be purchase of another piece of land as per the text of the said sale deed. On or about the same day, Kaushalyabai, the step-mother of Deoram sold her two pieces of lands Survey Nos.157/2 and 157/4 to some third party describing it as a land purchased by her earlier for a sum of Rs.3,000/- (The aforesaid sale deed was produced on record but was not proved). Thereafter, on 15-2-1962, Deoram purchased from one Yashodabai Pandharinath Joshi, the suit land i.e. southern half portion of consolidated Survey No.63 of Village Mandave for a sum of Rs.10,800/-. Deoram is said to be a tenant in the said land and after certain proceedings, private sale in his favour was said to have been validated by the tenancy authorities. The aforesaid sale deed did not describe the land as a Bagayat land nor did it refer to any well located in it. Village Mandave where this land was located, is at a distance of only a furlong or two from Village Fatyabad which was the home town of Sakharam, the father of plaintiff No. 1 Bhamabai. It is this sale deed and the land involved therein which is the subject matter of litigation in the present proceedings.

3. Defendant No.1 Rambhau had one daughter and her marriage had taken place sometime in the year 1967. An amount of Rs.2,000/- was raised for that marriage by deceased Deoram by executing a conditional sale deed of some land in favour of one Jyotiba Malhari vide sale deed Exhibit 129. Soon after this, Deoram became ill of Cancer and had to be treated at Bombay for some time. Deoram succumbed to the disease and died on 20-12-1971. Thereafter, on 4-8-1976, defendant No.1 Rambhau executed in favour of defendant Nos. 4 and

5 an agreement of sale of the suit land for a sum of Rs.60,000/- stating therein that an amount of Rs.30,000/- was received by Rambhau as a part of the consideration for the payment of the loans due to Land Mortgage Bank, Union Bank, Mandave Multi-Purpose Society and some other hand loans. In this deed of agreement of sale, the suit land was described as "Vihir Bagayat and Patsthal" (Irrigated on well water as well as canal water) and it was further stated therein that the vendor had only one-half share in the well that was located in the land. Defendant No.1 Rambhau had described that land as the land purchased by him. This agreement of sale was attested by plaintiff No.1 Bhamabai and some others. On the same day, a possessory receipt (vide Exhibit 127) was executed by defendant No.1 Rambhau and the same was also attested by plaintiff No.1 Bhamabai and some other witnesses. This aforesaid transaction also is a subject matter of the present litigation.

4. According to the contentions of the plaintiffs, the suit land was purchased by Deoram out of his personal savings to the tune of Rs. 4,000/- and a contribution made by his father-in-law Sakharam. It was the contention of the plaintiffs that as Sakharam did not have any male issue or any male member in the family except himself who could cultivate his lands, he had called Deoram to live with him at Fatyabad and in order to ensure that Deoram would continue to live there, Sakharam had purchased the aforesaid land for Deoram particularly with his own money and partly with the monies of Deoram himself. According to defendant Nos. 1 to 3, Deoram had continued to be a member of the joint family of Rambhau and his sons and all the family lands were under joint cultivation. According to defendant Nos. 1 to 3, the suit land was purchased out of the sale proceeds of the two sale deeds dated 27-1-1962, one executed by Deoram and his co-owner Bhimaji Dighe and the other sale deed by Kaushalyabai. They contended that the amount which was falling short to make the payment of the consideration for the sale deed dated 15-2-1962 (Exhibit 74) was paid out of the savings of the family. Therefore, they contended that the suit land was a joint family land of the family of Rambhau and his sons. The next contention of the plaintiffs was that as the suit land was a separate land of Deoram acquired with the help of his father-in-law, the said land could not be agreed to be sold by defendant No.1 Rambhau. According to defendant Nos.1 to 3, Rambhau continued to be the Karta of the family, as he ever was, at the time when the suit transaction dated 4-8-1976 was made and that it was in his capacity, as such, that he had agreed to sale that land to defendant Nos. 4 and 5 for payment of the debts which were incurred for the development and cultivation of the suit land, for sinking well in it and the other loans that the family had to incur to meet the expenses of treatment given to Deoram during his last illness. It was, therefore, contended that the aforesaid agreement was executed by the Karta of the family for meeting the family necessities and was, therefore, perfectly binding on the plaintiffs. Defendant Nos. 1 to 3, in one set and defendant Nos. 4 and 5 in another set, contended in their respective pleadings that since the death of Deoram, the suit land stood mutated in the name of defendant No. 1 Rambhau

and the plaintiff No. 1 had never taken any exception to it. It was contended also that the suit transaction dated 4-8-1976 was done with full knowledge of plaintiff No. 1 Bhamabai and she had, in fact, attested not only the agreement of sale but also the possessory receipt (Exhibits 61 and 127 respectively). It was in essence, therefore, contended that plaintiff No. 1 had no right whatsoever to challenge the suit transaction dated 4-8-1976 made in favour of defendant Nos. 4 and 5 and that she was estopped from doing so. Defendant Nos. 4 and 5 contended, further, that they had entered into the said transaction after due enquiries and that when it was represented to them that the sale of the land was necessary for meeting the liability of the joint family, they had entered into the transaction and had paid a huge amount of Rs. 30,000/- as against the agreement of sale. It was also contended by the defendants that plaintiff No. 1 had written a letter dated 6-9-1976 (Exhibit 143) to Trimbak Bhiwaji Kharde, an uncle of defendant Nos. 4 and 5, demanding from the defendant Nos. 4 and 5 the amount of her 1/3rd share in the agreed price under agreement of sale dated 4-8-1976. It was also contended that in view of this letter also plaintiff No. 1 was estopped from challenging the transaction in question. According to the plaintiffs, she had not signed any of the aforesaid documents, much less, with the knowledge of the contents thereof. It was, in a way, contended that the aforesaid documents on the basis of which estoppel was pleaded were not genuine documents.

5. It was not in dispute that the suit land was in possession of defendant Nos. 4 and 5 since the date of this transaction and that soon after the said transaction, defendant Nos. 4 and 5 had filed in the Court of Civil Judge (J.D.), Shrirampur, Regular Civil Suit No. 557/1976 on 19-10-1976 and had obtained, though ex-parte, a decree against plaintiff No. 1 restraining her from obstructing the peaceful possession and enjoyment of the suit land by the then plaintiffs i.e. present defendant Nos. 4 and 5. According to plaintiff No. 1, the said decree was obtained behind her back and without her knowledge. But it was not disputed that the possession of the suit land was with defendant Nos. 4 and 5 for all these years.

6. With the contentions, as aforesaid, Special Civil Suit No. 40/1977, out of the decision of which the present appeals arose, came to be filed on 10-2-1977 for a declaration that the suit land, which had devolved upon the plaintiffs as the heirs of Deoram, belonged to them exclusively and for possession of the said land. It was also prayed that defendant No. 1 Rambhau be restrained from selling the suit land to defendant Nos. 4 and 5 or from alienating the same or creating third party rights in the said lands in any manner. She also prayed for incidental reliefs, such as, determination of mesne profits since determination of the suit and the cost of the suit. All the defendants prayed in their respective pleadings that the suit filed by the plaintiffs be dismissed with costs.

7. On the pleadings, the learned Civil Judge had framed issues at Exhibit 39 in the suit. After recording the evidence, the learned Civil Judge held that it was proved that Deoram had lived and died at Village Varshinde. He held that the

defendants had failed to prove that the suit land was purchased with joint family funds and it was, as such, a joint family property. He upheld the case of the plaintiffs that they were the exclusive owners of the suit land on account of the devolution of the land on the death of Deoram. It was held that, as such, defendant No. 1 Rambhau had no authority to sale the land to defendant Nos. 4 and 5 and that, therefore, the agreement of sale was not binding on the plaintiffs. He held that the defendants had failed to prove that the plaintiffs were estopped from challenging the agreement of sale on the various grounds raised by them. Holding that plaintiffs were entitled to the reliefs sought, the learned Civil Judge proceeded to decree the suit declaring the title of the plaintiffs to the suit property and directing the defendant Nos. 4 and 5 to deliver the possession of the suit land to the plaintiffs within a period of two months from the date of the said order. A decree for injunction was also passed against defendant Nos. 1 to 3 restraining them perpetually from transferring the suit land to defendant Nos. 4 and 5 or to anybody by any sale deed or by another mode. He saddled defendant Nos. 1 to 3 with cost of the suit and directed defendant Nos. 4 and 5 to bear their own cost. He also directed an enquiry into the future mesne profits from the date of the suit till the recovery of possession. It may be noted here in this very context that pending the suit on an application dated 7-3-1977 (Exhibit 22) filed on behalf of the plaintiffs, the trial Court had issued a temporary injunction against the defendants restraining them from alienating their land in dispute.

8. Shri D.S. Wabale, learned Counsel appearing for appellants in First Appeal No. 34/1989, strenuously urged before us that as the family of defendant No. 1 Rambhau and his sons had all along continued to be joint till the death of Deoram and even thereafter, the acquisition of the suit land, though in the name of Deoram, must be said to be an acquisition of the land for the joint Hindu family. Reliance was placed on the two sale deeds, both dated 27-1-1962, one executed by Rambhau and his co-owner and the other executed by Kaushalyabai to contend that the substantial amount for consideration of the sale deed, which ultimately was made in the name of Deoram, was raised by sale of the family lands and whatever was the deficit, it was paid out of the savings of the family which had considerable lands of its own at Varshinde. It was also contended that the land was purchased in the name of Deoram because he was the eldest son and there was some difficulty in purchasing the land in the name of Rambhau because of the Agricultural Lands Ceilings Act. It was further, contended that there was evidence on record to show that Deoram had lived all along at Varshinde in the joint family and that he had never gone to his father-in-law Sakharam. It was submitted, further, that Sakharam did not have adequate funds for handing them over to Deoram for purchase of a land for him and, in any event, there was no evidence that Sakharam had so much of amount or that deceased Deoram had saved Rs. 4,000/-, as was contended by the plaintiffs. Reliance was placed on the presumption of Hindu Law that when the family was joint and when it had nucleus, the purchase of the suit land must be said to be

for the family itself. It was further, contended that the plaintiffs had a heavy burden on them of proving that the acquisition of the suit land was a separate acquisition of Deoram and that the plaintiffs had failed to discharge that burden satisfactorily. It was further maintained that there was some evidence that defendant No. 1 Rambhau had sunk the well in the suit land and he and his other sons had supervised the said work for the purposes of improvement in the land. Finally, it was contended that the fact that plaintiff No. 1 Bhamabai had attested the documents executed on 4-8-1976 could show that till then, at least, he had never disputed that the suit land was a joint family land. It was, further, urged that in view of letter Exhibit 143, she had confirmed that she had only 1/3rd share in the suit land.

9. As against these submissions, it was urged by Shri R.T. Sharma, learned Counsel appearing for respondents/plaintiffs, that it was adequately proved by the evidence on record that Deoram had gone to live with his father-in-law at village Fatyabad and had worked for him for cultivating Sakharam's lands. It was submitted that this was not something unusual or unnatural and that till the land was purchased by Deoram with the help of Sakharam, it was quite probable that Deoram had saved an amount of Rs. 4,000/- by working on crop share basis in the fields of Sakharam. It was contended that the evidence on record did show that Sakharam had adequate lands and that he could have saved an amount of Rs. 6,000/- for helping his son-in-law for purchasing the land in 1962. It was pointed out that, in any event, in the evidence on record one of the witnesses of the defendant had admitted that Deoram lived sometimes at Varshinde and sometimes at Fatyabad. The learned Counsel vehemently urged that defendant No. 1 Rambhau or his so called joint family had no reason whatsoever to purchase a land 10 Kms, away from their own village Varshinde and particularly at a place like Mandave which was very close to the village Fatyabad from which Sakharam hailed. Reliance was placed on the evidence of some witnesses examined from Pravaranagar, who had proved the documents showing that Deoram was a shareholder of Pravaranagar Sugar Factory, that he had sold, off and on, the sugarcane to that factory and further, that he had earned a considerable income from the suit land. It was maintained that not only the acquisition of the suit land was made by Deoram but it was adequately proved that, in fact, it was being cultivated all along by Deoram. He maintained the mere fact that ration card of Deoram was at Varshinde or that his daughters were in the schools at Varshinde for a shortwhile here and there could not prove that Deoram lived continuously at Varshinde or that he did not live at Fatyabad at the place of his father-in-law. He contended that dependable witnesses from Fatyabad were examined to prove that Deoram did cultivate the lands of Sakharam, that he did live at Fatyabad and that the acquisition of the suit land was made by Deoram with his own savings supplemented by the savings of his father-in-law Sakharam. As regards, the documents alleged to be attested by the plaintiff No. 1 on 4-8-1976 and the letter dated 6-9-1976, it was submitted that the learned trial Judge was perfectly right in disbelieving those documents and in

holding that they were neither genuine nor were they made within the knowledge of plaintiff No. 1 Bhamabai. In any event, it was submitted that signing two documents as attesting witnesses could not by itself enable the defendants to impute plaintiff No. 1 the knowledge of the transaction that was made by defendant No. 1 Rambhau particularly for the purposes of depriving the plaintiffs of their legitimate entitlement to the suit property and the legitimate share in the joint family property. After reading the evidence of defendant No. 1 at length, it was submitted that it was very clear from his deposition that he was inclined to deprive the plaintiffs of all of their rights to the landed property of the family as well as landed property acquired by Deoram in his own name. It was further submitted that Kausalyabai was the step-mother of Deoram and the sale of her land could hardly be said to be the sale of the joint family property particularly when Kausalyabai was not at all examined as a witness in the suit. Likewise, it was submitted that the sale deed exhibit 126 dated 27-1-1962 by Rambhau and his co-owner Dighe could also hardly be said to be a joint family asset because it was never the case of Deoram that his co-owner was also the member of the joint family. It was submitted that the properties in which a third party, who was not a member of the joint family, had a share could hardly be said to be a member of the joint family. It was also submitted, in this context, that omission to examine co-owner Dighe as a witness went long way to disprove the case of defendants on the point that the said lands which were sold on 27-1-1962 belonged to the joint Hindu family of defendant No. 1 Rambhau. It was pointed out that the alleged joint family lands were in hilly area and there was no evidence to show that income therefrom could enable Ramrao to save anything for purchase of suit land. It was submitted that there was no question of meeting the legal necessity because though an amount of Rs. 30,000/- is said to have been paid by defendant No. 4 Rambhau, no evidence was adduced to prove that debts for which the suit land stood charged or the debts alleged to have been incurred for meeting the expenses of treatment to Deoram were really paid by defendant No. 1 Rambhau out of the said amount. It was submitted that the tenor of the transaction itself show that a vague case of legal necessity was being sought to be made out while executing the agreement of sale itself and that, all that was done keeping plaintiff No. 1, who was the only adult heir of deceased Deoram at that time, totally in dark. It was, therefore, submitted that the finding of the learned Civil Judge that the property in question was a self acquired property of deceased Deoram was unassailable and that the same deserved to be confirmed.

10. For more than one reasons, we do not think it necessary to decide in this case, the issue whether or not, the land in question was self acquired property of Deoram or the joint family property of defendant No. 1 and his sons. The main reason is that all the members of the family were neither parties to the suit nor was there evidence available for scrutiny in this suit. The two mothers of Deoram could be the heirs of Deoram and on his death they or, at least the real mother, were entitled to inherit his share in the alleged joint family property. True it is

that, after the death of defendant No. 1 Rambhau pending this appeal, his widows and daughters are brought on record as legal representatives but, in that event, they would be able to raise only those contentions which were raised by Rambhau in the suit. It may not be open to them to raise contentions independently of the contentions raised by Rambhau though their own interest demanded otherwise. This is likely to result in failure of justice. Secondly, such an issue can properly be decided in a general suit for partition rather than in a suit of present type and thirdly, the contention of defendant No. 1 Rambhau that he continued to be the manager of the joint Hindu family of himself and his sons and the plaintiffs even after the death of Deoram is not at all sustainable at law.

11. Shri D.S. Wabale., learned Counsel appearing for appellants in First Appeal No. 34/1989, contended that despite the death of Deoram in the year 1971, the family continued to be joint and plaintiff No. 1 and her daughters continued to be members of the family. It was also submitted that when the mutation was made in the name of defendant No. 1 Rambhau after the death of Deoram in the records of the suit land, plaintiff No. 1 Bhamabai had not taken any objections and that, therefore, she had virtually allowed or suffered defendant No. 1 Rambhau to represent her interest. He contended that, if under such circumstances, the agreement of sale in question was made by Rambhau with defendant Nos. 4 and 5, the same was binding on the plaintiffs. We are afraid, it is not possible to accept this contention. True it is, that the suit land was mutated in his own name by defendant No. 1 Rambhau after the death of Deoram but no evidence was adduced to show that a notice thereof was ever served on plaintiffs who were the heirs of Deoram and that, plaintiff No. 1 had suffered the mutation despite the awareness of the rights of plaintiffs in connection with the suit property. No consent can be inferred in such circumstances nor would there be an application of principle of estoppel on that count. According to plaintiff No. 1, she had started living at her father's place after the death of her father, which had admittedly occurred within a period of fortnight from the death of Deoram and that, she had never allowed defendant No. 1 Rambhau to represent the interest of the plaintiffs. True it is that, it was not disputed before us that, after the death of Deoram, the suit land was being cultivated by defendant No. 1 Rambhau, but it has got to be borne in mind, while appreciating facts of the case, that plaintiff No. 1 was only a young widow with three dependant daughters to be maintained and without having any support even from her father's family, to have the land cultivated on her own. It was quite possible under such circumstances that she had no alternative but to suffer defendant No. 1 Rambhau cultivating the land. In any event, defendant No. 1 Rambhau has told in his deposition that since the death of Deoram he has not paid anything to plaintiff No. 1 out of the yield of the suit land or any other properties. The plaintiffs have, therefore, brought the present suit within a theory of devolution of the suit land on them since the death of Deoram. Even if it is assumed, for the sake of argument, that the plaintiffs did live for some time with defendant No. 1 Rambhau, that circumstance, by itself, would not enable defendant No. 1

Rambhau to contend that in his capacity as the manager of the joint family he could represent the proprietary interests of the plaintiffs in the family property or in the suit land which was being claimed by the plaintiffs as her husband's exclusive property. It appears from the judgment of the lower Court that at no point of time the effect of devolution of the share of Deoram in the joint family property was argued or considered. In our considered view, it is this point which can be the basis of decision of the present suit.

12. Even if it is assumed for the sake of argument, though we are not very much inclined to hold so in view of the force of argument advanced on behalf of the plaintiffs before us, that the suit property was a joint family property of the family of Rambhau and his sons, section 6 of the Hindu Succession Act will have its own operation in the context of devolution of Deoram's share in the said property. Section 6 of the Hindu Succession Act, 1956 reads as follows.:

"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

It is not in dispute in the present case, that Deoram did have a share in the family property. On his death, his share in the family property would devolve under the proviso to section 6 read with section 8 of the Hindu Succession Act. The daughters, widow and the mother of Deoram would then be Class I heirs as per the schedule and they would take simultaneously and to the exclusion of all other heirs. u/s 19(b) of the Hindu Succession Act, the heirs would take the property not as joint tenants but as tenants in common with the other members of the family who had interest therein. In the commentary below section 6 in Mulla's Hindu Law (Fifteenth Edition at page 933), it is observed thus :-

"The estate which devolves on the classified heirs of the deceased coparcener

under the proviso is one which is carved out of the joint family property and becomes the independent and separate property of such heirs. It necessarily follows that neither the surviving coparceners nor the Karta of the joint family can deal with it without reference to them on the footing that he is continuing the joint family business for the benefit of such heirs alongwith the members of the joint family."

This principle would apply in the present case also, as a result of which, the property which had devolved on the plaintiffs on the death of Deoram would become the separate and independent property of the plaintiffs without leaving any scope to the alleged Karta defendant No. 1 Deoram to contend that even after the death of Deoram, he continued to be the manager of the family so as to be able to represent the proprietary interests of the plaintiffs, especially when he wanted to make certain transactions for alienation of the said property.

13. No ruling of the High Court of Bombay or of the Supreme Court was cited before us on the point. The point is considered in some other rulings to which we shall presently refer. In Chandradatta Shankardatta and Others Vs. Sanat Kumar Laxman Prasad and Others, , it was held that the Hindu Succession Act, 1956 had left undisturbed the law relating to Mitakshara coparcenary and coparceners, as it was in force prior to the commencement of the Act, except in so far as that law was modified by section 30 and the proviso to section 6 of the Act. On the death of a coparcener, if he is survived by female or male relative as is specified in the proviso to section 6, by operation of the Explanation I to that proviso, a notional partition is being effected immediately before the death of such coparcener, by which the share of the deceased is separated. The share so separated, it was further held, thus devolves by virtue of the proviso, on the personal heirs of the deceased instead of vesting in the other coparceners by survivorship. Such a partition does not bring about disruption of the coparcenary. It is only the interest of the deceased which is separated. It was pointed out that the coparcenary, minus the interest of the deceased, continues with its own incidents and the surviving coparceners continue as such. The theory of notional partition so propounded is now well established. In P. Govinda Reddy and Others Vs. Golla Obulamma, , the contention that despite such notional partition, the Karta could represent the estate of the deceased or his heirs was dispelled and it was observed thus:

"It cannot be said that notwithstanding ascertainment of interest of the deceased coparcener by notional partition and devolution of the same by succession on various heirs including the female heirs by operation of the proviso to section 6 of the Hindu Succession Act, the Karta of the Hindu Joint family can as such represent the interest devolved in specified shares on the female heirs and bring a suit for enforcement of mortgage security.

The other point involved in that suit pertained to mortgage which is not relevant for the purpose of this case.

14. Madras High Court also has taken similar view in *Veerasekhara Varmarayar Vs. Amirthavalliammal and Others*, and it was held that proviso to section 6 dealt not only with intestate succession, but also with testamentary succession, and section 30 of the Hindu Succession Act, 1956, expressly enabled a coparcener to dispose of his interest in the coparcenary property testamentarily. It was held, that in the event of a testamentary succession, from the very nature of the case, the legatee's interest was crystallised and specified at the moment of the death of the testator, even though the legatee might be an utter stranger to the entire family. It was held that, in that event, it could not be contended that so long as the legatee had not filed a suit for partition, the karta was entitled to deal with the deceased coparcener's interest in the coparcenary property, as if the same remained undisposed of. It was held that, consequently, section 6 had to be construed in such a way as to give effect to the object of the Legislature not only with regard to testamentary succession but also with regard to intestate succession, and the Karta would not be entitled to deal with the family property so as to affect the deceased coparcener's interest.

15. In *Bharat Trading (International) Ltd. by Power-holder A.P. Kaimal and Another Vs. P. Nachiar Ammal and Others*, it was held that, in a notional partition statutorily contemplated under the proviso read with Explanation 1 to section 6 of the Hindu Succession Act, 1956, the interest of the deceased coparcener in the joint family devolved by succession, in the absence of testamentary disposition by the concerned member, on all the class I heirs mentioned in the proviso and that, the estate which devolved on the classified heirs under the said proviso to section 6 was one which was carved out of the joint family and was independent and separate property of such heirs. It was further held that it followed that the property to which the classified heirs would succeed by reason of the statutory privilege under the proviso to section 6 was their property and it could not be dealt with without reference to them by the Karta of the family on the footing that he was continuing with the joint family business for the benefit of the members of the joint family.

With respect, we agree with the views expressed by the learned Commentators on Mulla's Hindu Law as well as the views of the learned Judges who had decided the aforesaid cases.

16. In this view of the matter, the contention of defendant No. 1 Rambhau or the contention of defendant Nos. 4 and 5, that after the death of Deoram, Rambhau continued to be manager of the joint family so as to entitle him to represent the interests of the plaintiffs in the property which had devolved upon them on account of the intestate succession opened on the death of Deoram. The agreement of sale dated 4-8-1976 (Exhibit 61), executed by Rambhau alone, could not, therefore, create in favour of defendant Nos. 4 and 5 any interest whatsoever in respect of the property that was inherited by the plaintiffs. The plaintiffs were entitled to ignore it because it was not an agreement executed by somebody who could represent their proprietary interest for such purposes. In

this context, a reference may be made to the ruling in *Salahuddin v. Dhanoo Lal*, AIR (32)1945 Pat 421. Considering law of Mitakshara in this context, the learned Judge who decided the case observed thus :-

"It seems to me, therefore, that the true position is that where a Mitakshara son seeks to set aside a decree upon a mortgage executed by his father and the sale held thereunder and then to obtain possession of the joint family estate, the suit cannot be held to be merely a suit for recovery of possession but for a declaration with consequential relief (see the case in 5 Pat. L.J. 394); but where a son seeks to recover the property which has been sold by the father by a private sale, the son can ignore the sale and simply seek to recover possession of the property covered thereby. In such a case he need not ask for a declaration and the suit cannot be treated to be a declaratory suit with a consequential relief but it must be treated simply as a possessory suit. "

17. The learned Counsel for the appellants in both the appeals then laid considerable emphasis upon the fact that the agreement of sale dated 4-8-1976 (Exhibit 61) executed by defendant No. 1 Rambhau in favour of defendant Nos. 4 and 5 and the possessory receipt of even date (Exhibit 127) were attested by plaintiff No. 1 Bhamabai, and it was contended that, the entire transaction was made with the consent and connivance of plaintiff No. 1. It was contended further, that in view of such consent, the plaintiffs were not entitled to dispute the alienation. While dealing with this point, the learned Civil Judge held that as plaintiff No. 1 Bhamabai had taken education upto vernacular 2nd or 3rd, it could reasonably be believed that she was able to sign but he held later on that, that could not mean that she was able to read and write or that she had adequate maturity to understand the nature of the transaction. Reliance was placed before him on the observations in *D. Damodaran Vs. D. Leelavathi Ammal and Another*, , in which case, a deed of mortgage of a house executed by a wife in his own capacity and as an owner thereof was attested by her husband. It was held that, the husband was estopped from denying the title of the wife and from claiming any share in the mortgaged property. On facts, it was held that, it could not be contended that the plaintiff in that matter was not aware of the recitals and that, therefore, the attestation would not in any way constitute an estoppel. The learned Civil Judge who decided the present suit, distinguished this ruling for some other reason. But the law on the point is very clear. In *Bhagwan Singh v. Ujagar Singh*, 1928 Bom.L.R. 26, it was laid down that, attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects. It was pointed out further that, where, however, in addition to the fact that he attested the deed, there was evidence to show that he consented to and acquiesced in the execution of the document, it was a legitimate inference to draw from such evidence that he not only witnessed the execution of the mortgage by the mortgagor, but also that he consented to the transaction and acquiesced in the mortgage being given. Similar view was taken by the Nagpur High Court in *Nainsukhdas v.*

Gowardhandas, AIR (35) 1948 Nag 110. relying upon Pandurang v. Markandeya, AIR 1922 P.C. 20. It is thus clear that the crux of the matter lies not in attestation of the document by itself but in the proof of the fact that the attesting witness who had attested a particular document had, in fact, the knowledge of the transaction and had de facto consented to it.

18. If viewed in this perspective, the facts of the present case show that the conclusion of the learned Civil Judge, who has decided the present suit, to the effect that it was not satisfactorily proved that plaintiff No. 1 had full knowledge of the transaction or had, in fact, consented to it. The learned Civil Judge rightly pointed out that though defendant Nos. 1 and 4 had consistently stated that plaintiff No. 1 had signed the agreement of sale and the possessory receipt in their presence, their evidence was interested evidence and the evidence of the independent witnesses who had attested the documents was conspicuously absent in the case. No reason was assigned, why the evidence of independent witnesses was not adduced. The version of defendant Nos. 1 and 4 in the respective depositions that the contents of the documents were read over and explained to plaintiff No. 1 could hardly be believed. He rightly pointed out that plaintiff No. 1 Bhamabai could only sign but she was not proved to be conversant with reading and writing. It is to be noted in this context, that she was an unsupported widow. When there was no explanation on record as to why the signatures of other male members of the coparcenery were not taken to attest the document, taking of her signature only on the two documents could be only with some ulterior motive. Indeed, the tenor of the deposition of defendant No. 1 in the present suit showed that he wanted to deny any right whatsoever to plaintiffs in any of the family properties. If this was the intention of defendant No. 1 in obtaining her signature on the documents in question, the credibility of the documents is certainly doubtful. It is not even the case of the defendants that the real mother of Deoram, who could have had some sympathy for plaintiff No. 1 was ever apprised of the transaction or that she was brought to the place where the documents in question were allegedly executed. There is reason to suppose that plaintiff No. 1 was taken to some place and her signatures were obtained without giving her the clear understanding of the effect of the documents on which her signatures were being taken as an attesting witness. It was clear case of defendant No. 4 in his deposition that he had entered into the transaction after consulting his lawyer at Shrirampur. As against that, there was no evidence that plaintiff No. 1 had the advantage of consulting anybody who could really understand the purport and import of the documents. The signature of plaintiff No. 1 appears to have been taken with the full knowledge of the legal position acquired, at least, by defendant Nos. 1 and 4. It is also significant to note in this context, that defendant No. 1 has stated in his deposition that he would not have ever executed the document in question, if he had some reason to believe that plaintiff No. 1 was not consenting to the transaction. This part of the deposition goes contrary to the case made out by defendant No. 1 in his pleadings that he was entitled as a Karta of the family to deal with the entire

family property including the suit land because, if that was his stand, there, was no question for obtaining a specific consent of plaintiff No. 1, as such, for the transaction in question. This means that, defendant No. 1 had probably a guilty conscience about the fact that after Deoram's death, he had got the land mutated in his own name in the revenue records and that, on that basis, he was dealing with the property in respect of which plaintiff No. 1 could probably raise objections. If so, the defendants have no explanation whatsoever as to why plaintiff No. 1 was not made to sign the documents in question in the capacity of one of the executants. Though defendant No. 4 tried to make out a case in his deposition that after the payment of the amount of consideration for the agreement, defendant No. 1 had paid some amount to plaintiff No. 1 Bhamabai, but this was not a case of defendant No. 1. In para 24 of his deposition, he told that he alone took the amount of earnest money from defendant Nos. 4 and 5. If at all defendant No. 1 himself claimed to be having full authority to deal with the property, he had no reason to ask plaintiff No. 1 alone, out of all the members of the family, to sign agreement of sale or the possessory receipt. In any event, since the death of Deoram the land was in his possession and at least for delivery of possession there was no question of obtaining any consent of plaintiff No.1. In the cross-examination of plaintiff No. 1, it was suggested that the talks of agreement of sale had taken place at the house of one Kapse in the presence of plaintiff No. 1. Plaintiff No. 1 had denied that fact. The defendants thereafter did not choose to examine that Kapse to prove that plaintiff No. 1 was present when the talks of the transaction were finalised. The defendants examined one witness, Bhanudas Shinde, to prove the signature of plaintiff No. 1 on the agreement of sale. On reading the deposition of the said witness, he appears to be an omnibus witness and he claimed to have witnessed the execution of the document though he himself had not even attested the document. His cross-examination (particularly Para 5) shows that probably he did not know anything about the execution of the document. According to defendant No. 4, the document of agreement of sale was scribed by one Khole at Shrirampur. That scribe was also not examined to support his version. The learned Civil Judge has rightly pointed out in his judgment, how defendant Nos. 1, 3 and 4 had different versions in their respective depositions as to the capacity in which plaintiff No. 1 had signed the agreement of sale exhibit 60. Defendant No. 4 was cautious enough to describe in his deposition plaintiff No. 1 as one of the executants of the document, but the document itself did not show that. In view of all these circumstances, there is ample reason to hold that the signatures of plaintiff No. 1 obtained on the agreement of sale exhibit 60 and the possessory receipt Exhibit 127 were probably not taken after giving her the knowledge of the nature of the transaction and, much less, after explaining to her the effect thereof. The theory of consent of plaintiff No. 1 to the transaction urged on behalf of the defendants thus falls to the ground.

19. Reliance was then placed on letter dated 6-9-1976 (Exhibit 143) which is purported to have been signed by Bhamabai for claiming the amount of her

share in the consideration of the said transaction. On the face of it, the document is of a suspicious value because of the erasers and alterations made in the name of addressee, the form of the letter and the place at which plaintiff No. 1 has signed on the said document. There is nothing on record to show that plaintiff No. 1 knew in person the addressee, Trimbak Shivaji Kharde, who happened to be father of defendant No. 5 and uncle of defendant No. 4. The said letter is said to have been scribed by the son of plaintiff's witness Ramdas Shedale. That is hardly any circumstance from which it could be inferred that the plaintiff had asked the said boy to write any such letter on her behalf. That scribe was not examined before the Court. The learned Civil Judge was right enough in holding that the said letter was not proved to have been written at the instance of plaintiff No. 1. Thus that document also does not come to the rescue of the defendants to enable them to contend that the plaintiff No. 1 Bhamabai had attested the documents with her consent to the transaction of the agreement of sale.

20. Thus, for these reasons, the mere fact that the signatures of plaintiff No. 1 appeared on the agreement of sale (Exhibit 60) or possessory receipt (Exhibit 127) cannot lead us to a conclusion that the plaintiff had consented to the transaction and that, therefore, she was not entitled to challenge the same. In any event, plaintiff Nos. 2, 3 and 4 were minors when the transaction was made and plaintiff No. 1 never purported to sign on behalf of her minor daughters. It is significant to note in this context, that defendant Nos. 4 and 5 have not so far even filed a suit for specific performance of the alleged agreement of sale. It was contended that this was not done in view of the interim injunction issued in this matter by the learned trial Judge. The order of interim injunction passed by the learned trial Judge did not bar the defendant Nos. 4 and 5 from filing under protest or subject to the decision of this suit, a suit for specific performance of the contract.

21. On this background, it is to be appreciated that all the plaintiffs have sought in this suit, apart from their declaration of title to the suit land, a perpetual injunction against defendant No. 1 restraining him from alienating the suit land to defendant Nos. 4 and 5. If the transaction is found unconscionable, the specific performance can certainly be refused by the Court. In the given circumstances, the learned Civil Judge held, though for different reasons, that the plaintiff was entitled to such an injunction. For the reasons recorded by us, we hold that plaintiffs are entitled to the relief of injunction granted by the lower Court. The learned Civil Judge has also declared the exclusive title of the plaintiffs to the suit property, a point which was really not very necessary for the decision of this suit. Plaintiffs were not entitled to such declaration without joining especially the mother of Deoram as parties to the suit and also the other members of the family. The defendants must, therefore, succeed to the extent of setting aside the declaration of the exclusive title of the plaintiffs to the suit property. But the rest of the decree, namely, decree for possession, future mesne profits and cost of the suit deserves to be confirmed in the light of the

conclusions arrived at by us and the position of law as set out earlier in this judgment.

22. In result, we allow the appeals in part and set aside the declaration of the plaintiff's title made in the decree passed by the learned trial Judge as the question can be decided in an appropriate suit between the concerned parties. The decree for delivery of possession, injunction, enquiry into future mesne profits and cost of the suit, however, deserves to be confirmed and accordingly we confirm the same. In the circumstances of the case, the parties shall bear their respective costs of the appeal.

23. At this stage, the learned Counsel for original plaintiffs as well as for original defendant Nos. 4 and 5, seek leave to prefer an appeal to the Supreme Court, and the learned Counsel for defendant Nos. 4 and 5 further prays for stay of the execution of the decree for a period of two months. Leave to appeal to the Supreme Court is rejected. However, the decree for possession should not be executed for a period of two months from today.