

(2007) 08 BOM CK 0066
In the Bombay High Court
Case No : Second Appeal No. 139 of 1998

Subhash Khandekar and Bharat Khandekar	APPELLANT
Vs	
Sow. Prayagbai Biradar, Dead and Others	RESPONDENT

Date of Decision : 20-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3A, 151
Hindu Succession Act, 1956 — Section 30, 6

Citation : AIR 2008 Bom 46 : (2008) 1 MhLj 908

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : S.P. Chapalgaonkar, for the Appellant; M.R. Sonawane, holding for V.D. Salunke, for Respondent No. 2, S.G. Rudrawar, for Respondent Nos. 4 and 5, A.B. Kale, for Respondent Nos. 7 to 9 and A.B. Kale, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—This Second Appeal arises out of judgment rendered by learned IInd Additional District Judge, Latur, allowing appeal (R.C.A.No. 123/1991) preferred by original plaintiff No. 2 -Kantabai. By the impugned judgment, the first appellate Court decreed suit of original plaintiff No. 2 - Kantabai for partition and separate possession as well as for declarations.

2. Originally suit (Spl.C.S.No. 123/1985) was filed by original plaintiff No. 1 - Prayagbai and plaintiff No. 2 - Kantabai against deceased defendant No. 1 Manohar and others. They claimed partition and separate possession of two agricultural lands bearing S. No. 250 and S.No. 493 situated at village Nalegaon in Ahmedpur Tahsil. They sought joint 1/3rd share therein. They further sought declaration that compromise decree rendered in previous suit (R.C.S.No. 166/1981) was not binding on their rights, title and interest and so also an exchange deed dated 27.2.1984 executed by defendant No. 5 Trimbak is not binding on their rights and further declaration that defendant No. 4 Shantabai is not legally wedded wife of deceased Vasant and hence, defendant No. 3 Gopal is

not their legitimate son. They further sought maintenance allowance at the rate of Rs. 150/-p.m. each and creation of charge thereof on the remaining 2/3rd share of the suit lands. The suit was originally filed against 12 defendants.

3. The following pedigree table is duly proved in accordance with concurrent findings of the trial Court and the first appellate Court.

(4)	Manohar	(Deft.1)	
Yamunabai (Ist wife)	(2nd wife)	(Plff. No. 1)	(Deft. No. 2)
Godavaribai Vasant (Daughter) (Deceased Son)			
(L.R.of deceased Deft. No. 1 Manohar)			
Kantabai Shantabai (wife) (2nd wife - (plff. No. 2/appellant) Illegitimate (Deft. No. 4)			
Gopal Lata Manisha Sanjay (Illegitimate son) (Daughter (Daughter (Son- (Deft. No. 3) No. 1) No. 2) No. 2)			

4. Briefly stated, the plaintiffs' case is that deceased Vasant was the only son of deceased defendant No. 1 Manohar and was given to bad habits. He was addicted to multiple vices. He developed intimacy with defendant No. 4 Shantabai who gave birth to defendant No. 3 Gopal, out of such illicit relations. He neglected the plaintiff No. 2 and drove her out of the house. She filed maintenance application against him vide Misc. Application No. 22/1980. In the meanwhile, deceased Vasant, deceased defendant No. 1 Manohar and illegitimate son -Gopal shown as under guardianship of Shantabai manipulated a compromise decree by filing suit (R.C.S.No. 134/1978) wherein, it was shown that defendant No. 3 Gopal was grand son of deceased defendant No. 1 Manohar and internal partition was effected as between them and Vasant. The compromise decree was again varied in yet another suit (R.C.S.No. 166/1981) filed by deceased Vasant as plaintiff No. 2 and Gopal as plaintiff No. 1 against Manohar and others. Then compromise decree was brought about showing that both the suit lands were allotted to deceased Vasant and defendant No. 3 Gopal whereas defendant No. 1 Manohar and Yamunabai had relinquished their shares. On the basis of such compromise decree deceased Vasant exchanged S. No. 250 with defendant No. 5 Trimbak vide an exchange deed dated 27.2.1984. The exchange deed was outcome of collusive transaction between them because defendant No. 5 Trimbak had a greedy eye on the fertile land S. No. 250 which is quite valuable. Deceased Vasant and defendant No. 1 Manohar illegally alienated land S.No. 493 without any legal necessity in favour of defendant Nos. 6 to 10 by various sale deeds. That land bearing S.No. 493 is of inferior quality. Though, deceased Vasant had no authority to alienate the land S.No. 250 yet, he illegally entered into the exchange transaction with defendant No. 5 Trimbak which does not bind rights of the plaintiffs. The exchange transaction was challenged by defendant No. 1 Manohar and his daughter Godavaribai by filing a suit (Spl.Civil Suit No. 9/1994). During pendency of that suit, Vasant died on 3.11.1984. It was, thereafter, that both these plaintiffs came forward with their suit for

partition and declarations as stated before.

5. By filing their common written statement (Exh.64) defendant Nos. 7 and 8 resisted the suit. They denied that the plaintiff No. 2 is wife of deceased Vasant. They asserted that defendant No. 3 Gopal is the son and defendant No. 4 Shantabai is the legally wedded wife of deceased Vasant. They denied that the plaintiffs were entitled to claim 1/3rd share in the suit lands. They further denied that sale transactions in respect of S.No. 493 was without legal necessity. They contended that deceased Vasant and original defendant No. 1 Manohar alienated the said land on account legal necessity of the joint Hindu family. They would submit that they are the bonafide purchasers of the said land and are entitled to protect their rights.

6. Original defendant Nos. 3 and 4 resisted the suit by their joint written statement (Exh.69). They denied truth into all the material averments made by the plaintiffs. They submitted that defendant No. 4 - Shantabai is the legally wedded wife and defendant No. 3 - Gopal is the legitimate son born to her from deceased Vasant. They contended that deceased Vasant alienated the land S.No. 493 in order to satisfy the legal necessity and with consent of his father - Manohar. It is denied that deceased Vasant was addicted to vices. It is further denied that the compromise decree in previous suit (R.C.S.No. 166/81) is brought about in collusion with each other with a view to deprive the plaintiffs of their rights. According to these defendants, as a result of partition effected on Gudipadwa of 1978 land S.No. 250 was allotted to the share of defendant No. 3 - Gopal and S.No. 493 was allotted to deceased Vasant whereas, Manohar and Yamunabai were satisfied with the share in moveable properties such as cash and valuable articles as shown in the compromise decree. They asserted that the transactions are binding on members of UHF and the plaintiffs cannot claim any right of partition or declaration as sought.

7. Original defendant No. 5 Trimbak also supported the transaction of exchange. He denied that previous compromise decree rendered in the suit (R.C.S.No. 166/1981) is collusive. He asserted that the exchange transaction is for benefit of the family of defendant No. 1 Manohar and deceased Vasant. It was also beneficial to the minor defendant No. 3 Gopal. He asserted that his land Gat No. 98 was exchanged in lieu of land S.No. 250 because land Gat No. 98 is fertile and of more acreage. That is convenient for cultivation by the family members of defendant Nos. 1 to 4 inasmuch as it is situated adjoining public road. He exchanged the land because his another land is adjacent to S.No. 250 and, therefore, it was convenient for him to acquire that land. He contended that the transaction would be binding on both the plaintiffs. He asserted that he has agreed to alienate the land S.No. 250 in favour of original defendant Nos. 11 and 12 under a written agreement of sale dated 4.5.1985 and delivered possession to them. By their similar written statement (Exh.96) defendant Nos. 11 and 12 resisted the suit. They asserted that they have agreed to purchase land S.No. 250 from defendant No. 5 Trimbak for valuable consideration of Rs. 2,18,750/-.

They have parted with amount of Rs. 50,000/-towards earnest money. They submitted that they have filed a separate suit (Spl.Civil Suit No. 89/1987) against defendant No. 5 Trimbak for specific performance of the said agreement. They further contended that they have claimed injunction against defendant No. 1 Manohar and others in another suit (R.C.S.No. 211/1985) which came to be decreed. Hence, they urged for dismissal of the suit.

8. Original defendant No. 1 Manohar died without filing written statement. His legal representative Godavaribai (daughter) did not file any written statement. So also, original defendant No. 2 Yamunabai, defendant No. 6 Azimuddin, defendant No. 9 Abdul Malik and defendant No. 10 Dnyanoba did not file any written statement.

9. The parties went to trial over issues struck by the trial Court below Exh.98. They adduced oral and documentary evidence in support of the rival contentions. The trial Court dismissed the suit though declaration was rendered that defendant No. 3 Gopal is illegitimate son and defendant No. 4 Shantabai is illegitimate wife of deceased Vasant.

10. It appears that subsequently, original plaintiff No. 1 Prayagbai backed out from the litigation. She filed a compromise purshis stating that she was not willing to proceed with the suit. So, only original plaintiff No. 3 Kantabai remained in the fray. She alone preferred the appeal (R.C.A.No. 123/91) in the first appellate Court. Original plaintiff No. 1 Prayagbai was joined as Respondent No. 12 before the first appellate Court in the said appeal.

11. The first appellate Court held that the decree in the previous suit (R.C.S.No. 134/1978) as well as in another suit (R.C.S.No. 166/1981) could not bind rights of the plaintiff No. 2 - Kantabai. The first appellate Court held that deceased Vasant prevailed on original defendant No. 1 Manohar to bring about such consent decrees only with a view to give land S.No. 250 to defendant No. 3 - Gopal though, the latter could not claim any share in the properties. The first appellate Court held that on death of Vasant, plaintiff Kantabai had the right to claim his share in the suit lands. The first appellate Court reversed the findings of the trial Court and fully decreed the suit. The first appellate Court held that the exchange transaction between deceased Vasant and defendant No. 5 Trimbak is illegal, null and invalid. The first appellate Court held that plaintiff Kantabai is entitled to inherit entire S.No. 250 and that the decree in suit for specific performance (Spl.C.S.No. 89/1987) also deserved to be set aside. That decree was set aside with direction to refund the earnest amount alongwith interest to defendant Nos. 11 and 12.

12. Feeling aggrieved, original defendant Nos. 11 and 12 have preferred this Second Appeal.

13. The following substantial questions of law arise for determination in this Second Appeal.

(i) Whether in the facts and circumstances of the present case, the exchange deed dated 28.2.1984 between deceased Vasant and defendant No. 5 Trimbak is proved to be a transaction without legal necessity or without any benefit of the joint Hindu family of deceased Vasant and deceased defendant No. 1 Manohar.?

(ii) Whether in the facts and circumstances of the present case, plaintiff No. 2 Kantabai could claim relief of partition and separate possession in respect of the suit land bearing S.No. 250, particularly, during the life time of defendant No. 1 Manohar after the demise of Vasant.?

(iii) Whether in the facts and circumstances of the present case, the first appellate Court committed patent error and rendered perverse findings in respect of declarations as regards nature of the compromise decree passed in suit (R.C.S.No. 134/1978) holding the same as collusive, null and inoperative and that the exchange transaction dated 27.2.1984 as null, invalid and illegal and further to set aside the judgment in another suit (Spl.C.S.No. 89/1987) and to cancel that decree without any claim in the plaint and to give direction for refund of the earnest amount to the present appellants.?

My findings on the above points are:

(i) Yes.

(ii) No

(iii) Yes.

The reasons are discussed hereinafter:

14. Before I proceed to scrutinise the evidence, let it be noted that the pleadings of the original plaintiff No. 2 are silent in so far as absence of legal necessity at the time of exchange deed is concerned. What is stated in the plaint is that deceased Vasant was addicted to multiple vices and defendant No. 5 Trimbak had greedy eye on land S.No. 250. It is further pleaded that defendant No. 3 Gopal could not have become owner of the land S.No. 250 under the previous compromise decree because he had no right being illegitimate son and hence, the exchange deed executed on his behalf by Vasant is also null and void. It is pertinent to note that plaintiff Kantabai did not claim any share during life time of said Vasant. The concurrent findings of the trial Court and the first appellate Court are that original plaintiff No. 2 -Kantabai is the first wife of deceased Vasant and that he performed second marriage with defendant No. 4 Shantabai from whom defendant No. 3 Gopal was born as the illegitimate son. There is no dispute about the fact that both the suit lands (S. No. 493 and S.No. 250) were the ancestral properties in the hand of defendant No. 1 Manohar. Whether he effected partition and gave those lands to deceased Vasant and Gopal is not the material question for consideration at this stage. There cannot be duality of opinion that being illegitimate son, original defendant No. 3 -Gopal could have no right of inheritance in respect of the said ancestral properties. The legal position is amply clear in view of Shantaram Tukaran Patil and Another Vs. Dagubai

Tukaram Patil and Others, . A Division Bench of this Court held that the property to which an illegitimate child can lay claim must be the separate property of the parents and not the coparcenary property in which the parent has a share.

15. In Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others, , the Apex Court succinctly clarified the legal position in the context of right of a child born of marriage which is void under the Hindu Marriage Act. So, it is manifestly clear that defendant No. 3 Gopal could not claim any right in respect of ancestral properties or the coparcenary properties in which deceased Vasant had a share. Further admitted fact is that deceased Vasant entered into the exchange transaction with defendant No. 5 Trimbak as per terms of the exchange deed dated 27.2.1984. The original defendant No. 5 Trimbak, admittedly, gave his own land S.No. 98 to deceased Vasant in lieu of suit land S.No. 250. The terms of the exchange deed dated 27.2.1984 purport to show that although, as per the compromise decree in the previous suit (R.C.S.No. 166/1981) defendant No. 3 - Gopal had become owner yet, his putative father - Vasant had entered into the transaction of exchange of S.No. 250 in lieu of land S.No. 98, admeasuring 5 Hectares 25 Ares alongwith right to draw water of the well and electricity pump installed thereon for benefit of the family. It is clearly stated that land S.No. 250 is a dry land whereas the land S.No. 98 is Bagayat land and more in acreage but the transaction was entered into due to convenience of the parties. It is pertinent to note that there is absolutely no reliable evidence on record to show that land S.No. 98 is of palpably low price and worthless as compared to land S.No. 250.

16. The land S.No. 98, which was acquired by the joint family of deceased Vasant or himself, whatever may be the fact, is not brought in the common hotch potch. The plaintiff No. 2 - Kantabai utterly failed to explain as to why S.No. 98 is not included in the claim clause and no right is claimed in respect of the same. If the exchange transaction is sought to be avoided then there cannot be lopsided demand only to the extent of relief in respect of the land which was given in exchange i.e. S.No. 250 while retaining the land which was obtained in exchange i.e. S.No. 98.

17. The first appellate Court even granted declaration to the effect that compromise decree in previous suit (R.C.S.No. 134/78) is collusive, null and not binding on the plaintiffs and deserves to be set aside. The first appellate Court also held that the decree in the suit (Spl.C.S.No. 89/87) is illegal and the same was set aside. The first appellate Court directed that the present appellants would be entitled to refund of the earnest amount together with interest accrued thereon. But from whom.? No answer can be located from the final order rendered by the first appellate Court. Moreover, those decrees were not subject matter of the challenge in the suit. The first appellate Court held that plaintiff No. 2 Kantabai was not interested in claiming any share in S.No. 493 and, therefore, the suit to the extent of share in the said land need not be decreed. However, the entire S.No. 250 was allotted to her share without considering the claims of other sharers which perhaps would arise after death of original defendant No. 1

Manohar. Such kind of directions of the first appellate Court are not only in the excess of its jurisdiction and scope of the appeal in the first appellate Court but are totally perverse. The decree for specific performance, which was rendered in another suit (Spl.C.S.No. 89/1987) could not be set aside and cancelled and the suit of the present appellants could not be dismissed with direction for refund of the amount alongwith interest. The fundamental principles of Civil Jurisprudence are lost sight of by the first appellate Court while granting such reliefs.

18. Let it be noted that plaintiff No. 2 Kantabai did not claim any relief in respect of land S.No. 493 before the first appellate Court. She did not seek any such relief by filing cross-objection or counter appeal in this Court. The first appellate Court held that claim of the plaintiffs was settled outside the Court in respect of S.No. 493. Still, however, the land S.No. 250 was available to plaintiff Kantabai for obtaining her share by inheritance being widow of deceased Vasant. Thus, only original defendant No. 5 Trimbak and his prospective transferees (appellants herein) are severely affected by the impugned judgment.

19. Clinching question is whether deceased Vasant had the legal right to exchange the land S.No. 250 in favour of defendant No. 5 Trimbak in lieu of land S.No. 98 owned by the latter. Even assuming for a moment that minor defendant No. 3 Gopal was having some rights in respect of the said land then also being father the undivided interest of the minor could be transferred on account of legal necessity. There was no need for deceased Vasant to obtain permission as required under the Hindu Minority and Guardianship Act. This Court in Sandhya Rajan Antapurkar and Ors. v. State of Maharashtra 2000 (2) Mh.L.J.158, held that a Hindu Manager can alienate undivided share of minor member of the family without prior permission of the Court for legal necessity of the family or for welfare of the minor. In the present case, defendant No. 3 - Gopal had in fact, no legal right to claim any share in the coparcenary property. Therefore, deceased Vasant could enter into the transaction of exchange. That transaction could be questioned only by original defendant No. 1 Manohar.

Admittedly, deceased defendant No. 1 Manohar never challenged the said transaction. Plaintiff No. 2 Kantabai cannot be regarded as coparcener of the joint Hindu family. After the death of Vasant, the only male member of the family was original defendant No. 1 Manohar. He alone inherited the rights to hold the coparcenary property whatsoever it may be, and the original plaintiff No. 2 had no locus-standi, therefore, to challenge the exchange transaction. For, she could not be regarded as a coparcener of the family nor the land S.No. 250 was the separate property of deceased Vasant when the earlier compromise decrees are held as collusive and inoperative.

20. There cannot be any doubt that after death of Vasant, plaintiff No. 2 Kantabai could inherit his undivided share or the property left by him. Obviously, a question arises as to what was the property left by deceased Vasant at the time of his death. It appears that he alienated land S.No. 493 to various purchasers during his life time. As stated before, plaintiff Kantabai did not challenge such

alienations and is apparently disinterested in obtaining any share in the land S.No. 493. That land was lost to the family when Vasant died. He had exchanged S.No. 250 in lieu of S.No. 98. Obviously, only land S.No. 98 was left with the family when Vasant died as on 3.11.1984. Original plaintiff No. 2 Kantabai has not included said S.No. 98 in the suit. Her rights cannot be determined without bringing the said land S.No. 98 in the common hotch potch. She could not be allowed to play hot and cold at the same time.

21. I shall now briefly advert to the oral evidence of the parties. P.W. 1 Kantabai deposed that land S.No. 250 is Bagayat land whereas land S.No. 493 is inferior dry land. Her version purports to show that land S.No. 98 is at the distance of about 2 miles from the village locality and is of inferior quality. She vaguely deposed that exchange deed was obtained by fraud after serving liquor to deceased Vasant. Her cross-examination reveals that agricultural land owned by her maternal grand father is adjacent to the land S.No. 250. She admitted, unequivocally, that since she had left house of the deceased husband, she does not know what had happened during the intervening period of 12 years in the said house. In other words, she has no personal knowledge as to whether deceased Vasant was addicted to vices. She admitted that when the exchange transaction was effected, her father-in-law - Manohar was alive. She also admitted that defendant No. 5 Trimbak owns a land adjoining to the land S.No. 250. She denied that land S.No. 98 is Bagayat land and is of more value as compared to land S.No. 250. She also denied the suggestion that her father instigated her to file the suit as he desired to grab the land S.No. 250 which is adjacent to the land of her maternal grand father. It is explicit that P.W. Kantabai has no personal knowledge as to whether the transaction of exchange is genuine or that it was obtained by playing any fraud on deceased Vasant. There is no substance in her contention that Vasant had executed the exchange deed under drunken condition. For, she could not gather any personal knowledge in this behalf. It cannot be overlooked that the transaction of exchange was never challenged in the life time of Vasant and moreover, no other member of the family including deceased defendant No. 1 Manohar came forward to say that the exchange transaction was outcome of any fraud played on deceased Vasant. There is hardly any evidence adduced by original plaintiff No. 2 Kantabai regarding her contention of fraud underneath the exchange transaction. The version of D.W.Trimbak would show that the exchange transaction is genuine. He deposed that his S.No. 98, admeasuring 13 acres and odd gunthas, was exchanged in lieu of S.No. 250 which admeasures 8 acres 28 gunthas. His version purports to show that land S.No. 250 is a dry land but adjoining to the village locality and is convenient for his cultivation and, therefore, the exchange transaction was entered into by him with deceased Vasant. He admitted that permission was not obtained for the exchange transaction though, land S.No. 250 was shown to be owned by minor Gopal.

22. It is not necessary to discuss remaining oral evidence adduced by the other defendants. Suffice it to say that the transaction of exchange was, in fact, not

detrimental to the interest of the joint Hindu family of Vasant and Manohar or for that matter of Vasant and Kantabai. Being widow of deceased Vasant, plaintiff Kantabai has no legal right to challenge the said exchange deed unless and until it is proved that the same was outcome of any fraud played on deceased Vasant. There is no iota of evidence on record to infer that defendant No. 5 Trimbak played fraud on deceased Vasant at the relevant time.

23. Mr.M.R.Sonawane, learned advocate holding for Mr.V.D.Salunke, advocate for Respondent No. 2, contended that the compromise decrees rendered in two suits R.C.S.No. 134/1978 and R.C.S.No. 166/1981) were brought about by deceased Vasant and defendant No. 1 Manohar in collusion with each other. He argued that both the decrees were brought about only with a view to bestow status of son to defendant No. 3 Gopal and somehow give him the rights in respect of S.No. 250 to the exclusion of the rightful claimants i.e. plaintiff Kantabai and original plaintiff No. 1 Prayagbai. He would submit that the exchange transaction is illegal and invalid because said Gopal had no right, whatsoever, to deal with the land bearing S.No. 250. He contended that the very fact that subsequent agreement of sale in favour of defendant Nos. 11 and 12 (appellants) was for value of Rs. 2,18,750/-would indicate that exchange deed, which purports to show value of the lands in question as only Rs. 30,000/-, is invalid and illegal. At a times valuation is shown less by consent of parties to exchange deed because mutually they save stamp duty and registration charges. The subsequent higher valuation by itself would not be proof of alleged fraud. Mr. Sonwane, further seeks to rely on G. Nirmalamma and Ors. v. G. Seethapathi and Ors. AIR 2001 A P 104, in support of his contention that even illegitimate son is required to be treated as a coparcener. A Single Bench of Andhra Pradesh High Court held that such illegitimate son cannot claim partition during life time of the father. Needless to say whether a coparcener by legal fiction or not, defendant No. 3 Gopal could not claim any share in coparcenary properties which were in the hands of deceased Vasant and defendant No. 1 Manohar. Mr.Sonwane, also relied on Babulal and Ors. v. Smt. Chaturiya and Ors. 2001 AIHC 1537 and Raghuvir Singh and Ors. v. Ramdarshan and Ors. 2002 AIHC742, in support of his argument that though a separate suit challenging compromise decree would be barred Under Order XXIII Rule 3-A of the C.P.C. yet, the Court has powers to convert the suit as an application u/s 151 of the C.P.C. to set aside the same. In the case in hand, it is not necessary to elaborately consider the aforementioned cases. It may be mentioned that plaintiff Kantabai was not a party to either compromise decree.

Obviously, the said compromise decrees did not bind her.

24. Mr.Chapalgaonkar, learned advocate appearing for the appellants, referred to Dr. Damodar Tukaram Gaunkar v. Shri Gopinath Rama Gaunkar and Ors. 2006 (3) ALL MR 88 and Bahu Bali Ramappa Padnad and Another Vs. Babu alias Babu Rao S. Padnad and Others, . He argued that without following the procedure enumerated Under Order XXIII Rule 3-A of the C.P.C. the compromise decrees could not have been set aside by the first appellate Court. Neither argument in

this behalf needs consideration. The main reason is that the compromise decrees were rendered on the basis of agreement between deceased Vasant, defendant No. 1 Manohar and defendant No. 3 Gopal through his mother i.e. defendant No. 4 Shantabai to which plaintiff Kantabai was not a party. She need not claim any declaratory relief in respect of such decrees and can claim immunity in so far as her rights are concerned.

25. Considering the status of original plaintiff No. 2 Kantabai, it is amply clear that she could claim right of succession only u/s 6 of the Hindu Succession Act, 1956. Her husband -Vasant predeceased original defendant No. 1 Manohar i.e. his father. The right of plaintiff No. 2 Kantabai could arise only at the time of death of her husband (Vasant). She cannot challenge the transfer made by deceased Vasant during his life time because deceased Vasant was entitled to deal with his undivided share in the joint family property. Even the right of a Hindu to dispose of his undivided share by testamentary succession is saved by Section 30 of the Hindu Succession Act. It follows that his transfers cannot be challenged by the widow. Apart from that, the property gained by exchange transaction i.e. S.No. 98 is not included in the suit and that was the only property left in which deceased Vasant had undivided share when he died. His interest in the said property (S. No. 98) can be claimed by plaintiff No. 2 Kantabai under the proviso appended to Section 6. It is important to note that Explanation 1 of the proviso to Section 6 makes it manifest that for the purpose of the said Section, the interest of the Hindu Mitakshara coparcener shall be deemed to be the share in the property that could have been allotted to him if a partition of the property had taken place immediately before his death. Obviously, it was necessary to see whether deceased Vasant could have been allotted any share in the suit land bearing S.No. 250 if the partition had taken place immediately before his death. For the purpose of such notional partition, the interest of deceased Vasant ought to be determined as regards property available to the family. Since he had already transferred S.No. 250 in lieu of S.No. 98, by exchange transaction, it goes without saying that the said land was not available immediately for partition at the time of his death.

Original plaintiff No. 2 -Kantabai was not his coparcener and had no right to claim partition during his life time. The legal fiction created by proviso appended to Section 6 of the Hindu Succession Act is of no avail to plaintiff Kantabai so as to claim any share in respect of S.No. 250 because deceased Vasant had left no interest in the said land.

26. The trial Court rightly held that plaintiff Kantabai could claim only inheritance in so far as the property left by deceased Vasant is concerned. The trial Court was right in holding that lands S.No. 250 and S.No. 493 were not left by deceased Vasant when he died. Therefore, plaintiff Kantabai could not claim share in either of the said land without availability of relief to set aside the alienations in respect of S.No. 493 and the exchange of S.No. 250. The trial Court was therefore, right in dismissing the suit, particularly, when the land

S.No. 98, which was obtained in exchange by deceased Vasant was not included in the hotch potch and no claim was laid in that respect. The first appellate Court unnecessarily went astray while granting the reliefs of declaration though some of them were not even sought in the claim clause of the plaint. Especially, the decree for specific performance of the agreement as rendered in (Spl.C.S.No. 89/87) between the appellants and defendant No. 5 Trimbak was entirely alien yet, that was set aside.

27. For the foregoing reasons, the impugned judgment of the first appellate Court is quite unsustainable and liable to be set aside. Hence, the appeal is allowed. The impugned judgment is set aside. The trial Court's judgment is restored and the suit is dismissed. The parties to bear their own costs throughout.