

Gangaram Sakharam Dhuri since deceased through L.R. Vishnu and Others Vs Gangubai Raghunath Ayare and Others

Court: Bombay High Court

Date of Decision: Feb. 21, 2007

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 2 Rule 6

Hindu Succession Act, 1956 â€” Section 15(1)

Registration (Amendment) Act, 1988 â€” Section 17(1)

Registration Act, 1908 â€” Section 17

Citation: (2007) 6 ALLMR 816 : (2007) 5 BomCR 306 : (2007) 5 MhLj 136

Hon'ble Judges: Abhay S. Oka, J

Bench: Single Bench

Advocate: Navin Parekh and Hetal Patel, for the Appellant; G.P. Bharucha, for Respondent Nos. 1, 3, 4 and 5 and K.D. Shah, for the Respondent

Judgement

Abhay S. Oka, J.

I have heard the submissions of the learned Counsel appearing for the parties on the last date and today the Appeal is kept for dictation of Judgment. The original appellant is the original second defendant who has taken exception to the Judgment and Decree dated

19th September, 1987 passed by the trial Court in a suit filed by the first respondent-plaintiff. The suit has been partly decreed. For the sake of

convenience, parties are hereinafter referred to with reference to their status in the trial Court.

2. With a view to appreciate the submissions which are made by the learned Counsel appearing for the parties, it will be necessary to refer facts of

the case. The plaintiff, first defendant and the third to fifth defendants are closely related to each other. The genealogy reads thus:

Gangaram Sakharam Dhuri | Sunderabai wife Gangaram

(died in 1967) | (died in 1972)

||||

Vishnu (son) Gangubai Ladubai Shantabai Tai

(died in 1971) (married (married (married (married

| daughter) daughter) daughter) daughter)

| plaintiff defendant defendant defendant

| (first No. 3 No. 4 No. 5

| respondent) (third (fourth (fifth

| respondent) respondent) respondent)

Laxmibai (Widow) defendant No. 1

(second respondent)

3. The dispute in the suit pertains to property bearing C.T.S. No. 1048 admeasuring 398.5 Sq.yards altogether with a building thereon by the

name ""Sai Niwas"" situated at Bandra, Bombay-50. There is hardly any dispute between the parties that one Gangaram Dhuri was the exclusive

owner of the said property. The said Gangaram Dhuri expired on 13th May, 1967. The fact that the said Gangaram died intestate is also not in

dispute. At the time of his death, Gangaram was survived by his widow Sunderabai, his son Vishnu and four daughters namely, the plaintiff and the

third to fifth defendants. According to the case of the plaintiff, she herself and her sisters being illiterate allowed their brother Vishnu to look after

the said property. It is the case of the plaintiff that while said Vishnu was managing the said property, he obtained signatures of the plaintiff and the

third to fifth defendants on several papers by making a representation that their signatures were required for transferring the said property in their

joint names. The widow of Gangaram, Sunderabai was not impleaded as a party to the suit. She died somewhere in the year 1972. Gangaram

Dhuri's son Vishnu was impleaded as the first defendant who died in the year 1971. Vishnu's widow Laxmibai was impleaded as the legal

representative of deceased Vishnu. It is an admitted position that Vishnu was survived by his widow, five daughters and two sons.

4. The plaintiff's husband received a letter dated 10th January, 1969 sent to him by the second defendant alleging that the plaintiff was in

possession of room No. 1 in the said property as the licensee of the deceased Vishnu. According to the plaintiff she learned from the said letter for

the first time that Vishnu had sold one half portion of the said property to the second defendant without her consent, plaintiff's husband replied to

the said letter by pointing out that he was a tenant in respect of the suit room No. 1 and not a licensee. It was contended in the reply that the

plaintiff being one of the co-owners of the said property, the said transaction in favour of the second defendant was not binding on her. The case of

the plaintiff is that she had undivided one fifth share in the said property along with Vishnu and third to fifth defendants. According to the case of the

plaintiff as Vishnu had no right to sell one half portion of the said property to the second defendant, the sale deed in favour of the second defendant

was null and void. A suit for administration of the estate of deceased Gangaram was filed by the plaintiff. Prayer Clauses (a) to (c) in the plaint read

thus:

a) Estate and life of the deceased be ascertained and thereafter the same be administered by and under the direction of this Hon"ble Court;

b) that the share of the plaintiff and the original defendant Nos. 1 and 3 to 5 in the estate of the said deceased be ascertained and declared;

c) that it be declared that the said sale deed dated 10th January, 1969 by the original 1st defendant in favour of the 2nd defendant is null and void

and not binding on the estate of the said deceased and/or plaintiffs share therein and that the 2nd defendant be decreed and ordered to deliver

possession of 1/2 portion of the said property comprised in the said sale deed of the estate of the said deceased.

5. The suit was mainly contested by the second defendant by filing a written statement. In the said written statement a contention was raised by the

second defendant that suit for administration against the said defendant will not lie. It was contended that in a suit for administration of the estate of

deceased Gangaram, the plaintiff had no cause of action against the said defendant. According to the second defendant, the suit was not

maintainable and the same was not properly valued. In the written statement the second defendant further contended that the said property was

mortgaged by deceased Gangaram to one Khimji Pasoo for the sum of Rs. 6,500/-. According to the second respondent, the deceased Vishnu

got the said property released from mortgage by taking loan from the second defendant. It was contended in the written statement that the plaintiff

and third to fifth defendants had no right, title and interest in respect of the suit property as they had relinquished their share in the property in

favour of the deceased Vishnu. He submitted that as deceased Vishnu was the exclusive owner of the said property, he had a right to deal with the

same and to dispose of the same.

6. The learned Trial Judge framed following issues:

ISSUES:

1. Is the suit bad for misjoinder of parties and causes of action?

2. Does the plaintiff prove that the property sold under the Sale Deed dated 10th January, 1969 by the original 1st defendant to the 2nd defendant

form part of the estate of the deceased Gangaram Thakoji Shelar?

3. Does the plaintiff prove that the sale deed dated 10th January, 1969 is not binding upon the plaintiff?

4. Does the plaintiff prove that the sale deed dated 10th January, 1969 is null and void and illegal?

5. Costs?

6. What Order?

The issues have been answered in the following manner:

20. My findings on the above issues are as under:

Issue No. 1 - Considered unnecessary, for the reasons

indicated hereinbelow.

Issue No. 2 - Yes.

Issue No. 3 and - Yes.

Issue No. 4 jointly

Issue No. 5 and - As per order.

Issue No. 6

7. The learned Trial Judge held that admittedly seven children of deceased Vishnu were not brought on record. The learned Judge held that as far

as ascertainment and administration of the estate and determination of the share and income etc. is concerned, no issues have been raised and no

data is available. The learned Judge held that though the prayer for administration of the estate made by the plaintiff may not be maintainable, the

suit has been filed mainly for challenging the transfer in favour of the second defendant. The learned Judge held that the transfer in favour of the

second defendant was null and void and was not binding on the plaintiff. The learned Trial Judge decreed the suit by declaring that the Sale Deed

dated 10th January, 1969 executed by Vishnu in favour of the second defendant was null and void and was not binding on the estate of the

deceased. The learned Judge passed a decree for possession directing the second defendant to handover possession of one half portion of the said

property which was subject-matter of the Sale Deed. The learned Judge granted liberty to the plaintiff to claim the other reliefs prayed in the suit

separately.

8. The learned Counsel appearing for the appellant-second defendant as well as the learned Counsel appearing for the plaintiff have made

extensive submissions. The learned Counsel appearing for the appellant-second defendant submitted that prayer Clause (c) in the plaint was

incorporated by way of a consequential or incidental relief to the main relief of administration of the estate of the deceased. He submitted that as

the learned Trial Judge has held that the prayer for grant of administration of estate was not maintainable, the consequential relief in terms of prayer

Clause (c) could not have been granted. He submitted that in the suit for administration of the estate of the deceased, the appellant-defendant No.

2 was neither a necessary nor a proper party as alienation made by Vishnu could not have been subject-matter of challenge in a suit for

administration of the estate of the deceased Gangaram. He submitted that five daughters and two sons of the deceased Vishnu were not impleaded

as parties though the alienation made by the deceased Vishnu was sought to be challenged in the suit. He submitted that even to the original suit,

the widow of Gangaram who was entitled to one sixth share in the suit property on the date of institution of the suit was not impleaded as a party.

He submitted that assuming that suit for administration was maintainable, all legal representatives of deceased Vishnu were necessary and proper

parties to the suit as they admittedly had an undivided share in the suit property. He submitted that in any event even assuming that Vishnu had only

one fifth share in the said property, he was entitled to transfer and sell his one fifth share. He submitted that the sisters of Vishnu had relinquished or

renounced their interest in the said property in favour of Vishnu as reflected in their statement dated 11th December, 1967 recorded by the City

Survey Officer. He submitted that in view of clear relinquishment in the form of the said statement which was duly proved, Vishnu became

exclusive owner of the said property. He submitted that Vishnu had redeemed the mortgage and he had become the exclusively entitled to the

entire said property to exclusion of his sisters. He has placed reliance on several decisions, a reference to which is made in the later part of this

judgment. He submitted that in any event Vishnu had every right to sell his individual share. Hence, the Sale Deed was not at all void and that it

was valid to the extent of the said share.

9. The learned Counsel appearing for the original plaintiff submitted that there was no relinquishment of the share by the sisters of Vishnu and the

so called statement allegedly recorded by the City Survey Officer was not at all duly proved in accordance with law of evidence. She submitted

that Vishnu played fraud and purported to sell one half of the said property by claiming to be the exclusive owner of the said property. She

submitted that Vishnu could not have sold the property by claiming that he was the exclusive owner of the said property. She submitted that as

Vishnu admittedly had only one fifth share, he could not have sold one half of the property. She submitted that the trial Court has rightly held that

the Sale Deed was null and void. She submitted that so far as prayer for grant of decree for administration is concerned, the learned Trial Judge

was right in not dealing with the said prayer. She submitted that under Rule 6 of Order II of the Code of Civil Procedure, 1908, the trial Court had

a power to order separate trial where the Court found that joinder of the causes of action in one suit may embarrass or delay the trial.

10. She submitted that the estate of Vishnu was sufficiently represented in the suit as his widow was impleaded as a party. She contended that the

widow of Vishnu was representing the estate and share of the deceased Vishnu. She submitted that the widow of Gangaram died within two years

after the institution of the suit and her heirs viz. her daughter and her daughter-in-law were already on record and therefore, by no stretch of

imagination non-joinder of widow of deceased Gangaram is fatal to the suit. She submitted that as Vishnu has purported to execute the Sale Deed

on the footing that he is the sole owner, the sale transaction in favour of the second defendant was rightly held to be null and void and not binding

on the plaintiff. The learned Counsel for the appellant has placed reliance on various decisions of this Court. She submitted that there was

absolutely no surrender or relinquishment on the part of the sisters of their share in the said property which was held by their father.

11. By way of rejoinder, counsel for the appellant submitted that there was no plea that any fraud was played by Vishnu. He submitted that there is

enough evidence on record to prove relinquishment of the right, title and interest and share by the plaintiff and third to fifth defendants in favour of

Vishnu.

12. The first issue which will have to be considered is what was the extent of the share of Vishnu, the plaintiff and third to fifth defendants

respectively in the suit property and whether the plaintiff and her sisters relinquished their share in favour of their brother Vishnu.

13. It is not in dispute that the deceased Gangaram was the exclusive owner of the said property. Deceased Gangaram died after coming into force

of the Hindu Succession Act, 1956. He admittedly died intestate. He was survived by widow Sunderabai, son Vishnu and four daughters. Thus, on

his demise, the said six heirs acquired one sixth undivided share in the said property. Vishnu died in the year 1971. The share of Vishnu devolved

on his widow and seven children. Thus the widow and every child of Vishnu had 1/48th share each. Sunderabai died thereafter. Therefore, in

accordance with Clause (a) of subsection (1) of Section 15 of the Hindu Succession Act, 1956, the 1/6th share of Sunderabai devolved equally on

the plaintiff, 3rd to 5th respondent and the children of Vishnu. Thus, on the demise of Sunderabai, the plaintiff and the 3rd to 5th defendants

became entitled to 1/5th ($1/6\text{th} + 1/30\text{th}$) share each in the estate of the deceased Gangaram. The sons and daughters of Vishnu became entitled to

additional 1/210th share each in addition 1/48th share acquired on demise of Vishnu. The share of widow of Vishnu i.e. the first defendant

continued to be 1/48th. Thus, the legal representatives of deceased Vishnu together became entitled to total one fifth share in the said property and

same was the share of the plaintiff and third to fifth defendants.

14. The case of relinquishment or surrender of the share by the plaintiff and third to fifth defendants is based on a statement in writing dated 11th

December, 1967 allegedly recorded by the City Survey Officer. The first question to be considered on this aspect is whether the document dated

11th December, 1967 is duly proved to have been executed by the plaintiff and third to fifth defendants. The second question is even assuming that

the said document is proved, whether it can be said that by virtue of the said document, the plaintiff and third to fifth defendants have relinquished

their share in the property of Gangaram in favour of their brother Vishnu.

15. It appears that Gangaram died on 10th May, 1967. On 11th December, 1967 deceased Vishnu made a declaration on oath stating therein that

his father Gangaram had died leaving behind Vishnu himself and four sisters as his only heirs. He merely stated that his sisters were married and

they were living apart and they do not claim anything in the said property. On 11th December, 1967, Maintenance Surveyor, Bandra, allegedly

recorded the statements of the plaintiff and third to fifth defendants. In the said alleged statement it is stated by the plaintiff and first to third

defendants that Vishnu was the sole owner of the said property and that they had given up their rights. Therefore, no objection was recorded in the

alleged statement for transferring the said property in revenue record only in the name of deceased Vishnu.

16. As stated earlier, the case made out by the plaintiff is that Vishnu was managing the said property after demise of their father and the plaintiff

and third to fifth defendants had signed certain documents as a representation was made by the said Vishnu that their signatures were required for

transferring the said property in the joint names of all of them. It will be necessary to refer to the relevant part of the evidence of the plaintiff. In

examination-in-chief she has stated that she never had any intention of relinquishing her share. She admitted that her relationship with her brother

Vishnu during her lifetime was cordial. She stated that she did not object to her brother managing and looking after the said property as at any time

earlier nothing objectionable was done by her brother Vishnu. During the cross-examination the plaintiff was confronted with the original file

produced by the City Survey Officer. Her attention was invited to one letter in the file on page No. 17. She admitted her thumb impression as well

as thumb impression of Ladubai (third defendant). She stated that her said thumb impression was obtained by her brother Vishnu by telling her to

do so below a writing. She stated that she was not present when her sister Ladubai affixed her thumb impression. In the cross-examination she

admitted that after demise of father Gangaram, Vishnu looked after and managed the suit property. She denied that along with her sisters and

brother had visited office of the surveyor at Bandra some time in December 1967.

17. Shantabai Ayare, the fourth defendant was also examined as a witness. She also admitted that after demise of father Gangaram, deceased

Vishnu looked after the said property. She denied that in December, 1967 she had gone to the office of the City Surveyor, Bandra along with her

other sisters. She stated that she put her signature on the same paper already identified earlier by her in cross examination. She stated that there

was some written matter thereon but not to the extent as seen now. She stated that said her brother took her signature saying that the property of

the father was to be transferred in the name of Vishnu and four sisters. She stated that she came to know about the contents of the said writing as

the same were read over to her in the Court. Ladubai Mahadev Rane (third defendant) also stepped into witness box. She stated that she had

cordial relations with her sister-in-law and she had cordial relationship with her brother Vishnu till his death. She denied the suggestion that she

along with her sisters had visited office of City Surveyor at Bandra. She was shown in the evidence the alleged statement dated 11th December,

1967. She denied to have put any thumb impression on the paper.

18. When she was questioned on the writing dated 11th December, 1967 stated that she was unable to say whether first thumb impression was

her thumb impression. She stated that if her sister Gangubai had admitted the said thumb impression to be her thumb impression, then the same will

be an incorrect statement. She denied the thumb impression. She denied the suggestion that she had relinquished her share in favour of brother

Vishnu. The other defendant Taj Shankar Pawar was also examined. She also deposed that she had very cordial relationship with deceased

Vishnu during his lifetime. When she was shown the statement dated 11th December, 1967, she stated that she cannot sign and she has not signed

anytime. She denied the suggestion that she along with her sisters had gone to the office of surveyor near Bandra Railway Station.

19. It will be also necessary to refer to Sale Deed dated 10th January, 1969 executed by Vishnu in favour of the second defendant. In the said

Sale Deed there is a recital that Gangaram was the owner of the property and that after his demise, his heir Vishnu has become entitled to the said

property. Another recital in the document is that Gangaram had purchased the property from his own earnings. There is no reference in the recitals

to any relinquishment made by Vishnu's sisters.

20. In her evidence the plaintiff has disputed the execution and correctness of the statement dated 11th December, 1967 allegedly recorded before

the maintenance surveyor. Same is the case with other sisters. The second defendant has obviously no personal knowledge about the alleged

thumb impressions/signatures of the sisters on the documents. The second defendant has examined Shri Bhaskar Kunte who was working in

December, 1967 as a maintenance surveyor in the office of the City Survey at Bandra. He stated that the writing dated 11th December, 1967 was

in his handwriting. He stated that he had written the contents on a blank paper and there were no thumb impressions on the blank paper. He stated

that before taking thumb impressions and signatures of the persons, he had explained the said writing to the said persons. In the cross-examination

he stated that the said statement was written by him on the basis of Application made by Vishnu. In the cross-examination he stated that there was

no co-relation with the said statement and the application made by Vishnu. He stated that the writing was taken for twin purposes namely for

transferring and making an entry of the legal heirs.

21. Perusal of the evidence, both oral and documentary, shows that the existence of intention on the part of the plaintiff and the second to fifth

respondents of relinquishing their share in the property of their father has not been established. The plaintiff and fourth defendant have admitted

their thumb impression and signature respectively on the document. However, they have denied the contents and the fact that they attended City

Survey Office. The other two sisters have not even admitted the execution of document. The witness Kunte has at highest proved that the writing is

prepared by him. However, he has not proved that the document is executed by the sisters. Hence, the alleged writing is not at all proved in

accordance with law of evidence.

22. The submission of the learned Counsel appearing for the original plaintiff was that the alleged relinquishment was in respect of an immovable

property which was certainly worth more than Rs. 100/- and therefore, in view of Section 17 of the Indian Registration Act, 1908, the document

was a compulsorily registerable document. The submission of the learned Counsel for the second defendant was based on the decision of the

Division Bench of this Court reported in Mahalingayya Basappayya Ullagaddimath Vs. Sangayya Chennayya Ullagaddimath, . Relying upon the

said decision, he submitted that there was no necessity of executing any writing recording the surrender or relinquishment and even registration was

not mandatory. The Division Bench in the said decision has held that the renunciation of interest in the family property can be effected by

coparceners by an expression of intention to that effect and no formality is necessary. The Division Bench was dealing with a case where

renunciation was by a coparcener. In case of a Hindu coparcenery, the shares of coparceners are always fluctuating and they take shares by

survivorship. In the present case we are dealing with share acquired by the daughters in the self acquired property of their father by intestate

succession. Therefore, the said decision will have no application to the facts of the case and Section 17(1) of the said Act of 1988 will certainly

apply. I have already held that there is nothing on record to prove that the plaintiff and third to fifth defendants intended to relinquish or surrender

their shares in the father's property in favour of Vishnu. As pointed out earlier, even in the recitals in the Sale Deed executed by the said Vishnu,

there is no reference to any such relinquishment. Reliance is placed on the entries made in the City Survey Record in which the relinquishment is

recorded. The City Survey Record is nothing but a record of rights and therefore entries in the City Survey Record will not by itself effect the

relinquishment. Therefore, the plaintiff and third to fifth defendants had one sixth undivided share each in the property after the demise of their

father and one fifth share each on the demise of their mother. Similarly, Vishnu had one sixth share in the property after demise of the father. One

more aspect of the case is very important. The alleged relinquishment even according to the case of the 2nd defendant was made in 1967 when

Sunderabai was alive. Therefore, even assuming that there was a valid relinquishment by the sisters, Vishnu did not acquire share of his mother and

therefore after demise of the mother, the sisters acquired a share in the undivided share of the mother. Therefore, Vishnu never became full owner

of the suit property. On the date of execution of the Sale Deed in favour of the second defendant, Vishnu was not the full owner as his mother was

alive at that time who was holding 1/6th share.

23. That takes me to the main dispute regarding maintainability of the suit and the tenability of the prayer which has been granted by the impugned

decree. Perusal of the plaint and the frame of the suit shows that it was a suit filed for the administration of the estate of the deceased Gangaram.

The first two prayers in the suit are for administration of the estate of the deceased and the third prayer is for declaration that the alienation made

by the Vishnu in favour of the 2nd defendant was null and void. The learned Trial Judge has not granted decree for administration by holding that

no issues have been raised insofar as the administration of estate and determination of share and income is concerned and the suit is mainly for

challenging the alienation. The learned Trial Judge has granted liberty to the plaintiff to make a separate claim insofar as prayer for administration of

the estate of the deceased is concerned. The plaintiff has made no grievance about this part of the decree.

24. It will be, therefore, necessary to ascertain as to what is the nature of a suit for administration of the estate of the deceased. The learned single

Judge of this Court in a decision in case of Sebastian Antonio Texeira v. Rudolf Minguel Texeira 1961 NLJ 454 : 63 BLR 552 has considered the

nature of a true administration suit. The learned Judge held that a true administration suit, when filed by an heir, does not restrict itself only to the

share which he claims in the property and in the income of that property when held by another of the heirs. In an administration suit it will be

necessary to claim that the estate of the deceased may be collected from wherever it is and the debts due by the deceased be ascertained, that the

outstandings due to the deceased may be ascertained and collected, that the parties entitled to share in estate after payment of the debts, be

ascertained with their respective shares and that eventually whatever remains out of the estate after the payment of the debts due by the deceased

might be distributed among the heirs or persons entitled thereof in proportion to their share. In another decision of this Court in the case of N.

Abdul Rahim v. Lingappa Vijayappa Angol reported in 65 BLR 34 the learned single Judge of this Court has held that an administration suit is in

essence a suit for an account and application of the estate of a deceased debtor for the satisfaction of the dues of all his creditors.

25. In such a suit, the entire administration and settlement of the estate are assumed by the Court and assets are marshalled and a decree is made

for benefit of all creditors. In the present case, in a suit which is essentially filed for administration of the estate of deceased Gangaram, the

challenge is to alienation made by the deceased Vishnu who had at that time of alienation one sixth share in the property. The learned Counsel for

the second defendant has relied upon a decision of the Division Bench"" of Punjab High Court reported in AIR 1950 Pun 276 in the case of Mt.

Shafi-ul-Nisa v. Mt. Fazal-ul-Nisa. The view taken by the Division Bench of Punjab High Court is consistent with the view taken by this Court that

a suit for administration in its essence is one for account and application of the estate of the deceased for satisfaction of debts of all the creditors,

and for benefit of all others who are entitled and the Court marshals the assets and makes such a decree. The Division Bench held that if the main

object of the suit is to administer the estate and if the Court in the suit has to decide as to the existence or otherwise of alienation, an administration

suit will lie. But where the main object of the suit is to have the alienation allegedly made by the deceased set aside or to obtain possession of

property illegally withheld by one of the heirs, an administration suit is not a proper remedy. The reason for the said view is that the scope for suit

for administration of estate is completely different. As stated earlier, it is essentially a suit for an account. In such a suit for the purposes of

ascertaining what was the estate held by the deceased at the time of his death, it may be possible to make investigation as regards alienation made

by the deceased himself to find out whether the alienation is legal or illegal to enable the Court to decide whether the property affected by the

alienation is available for applying to the debts payable by the deceased. In a recent decision in the case of Balkisan D. Sanghvi Vs. Kiron D.

Sanghvi and Others, the learned single Judge of this Court held that in an administration suit, validity of transactions allegedly entered into by or on

the behalf of deceased whose estate is sought to be administered can be enquired into. This Court held that ancillary to the relief claimed in the suit

for administration, adjudication of questions regarding validity of alienations by the deceased can be gone into. In the present case, the Court is not

dealing with alienation made by the deceased Gangaram, but the Court is called upon to decide an issue regarding illegality of alienation made by

one of the heirs of the deceased who was entitled to an undivided share in the property of the deceased. The first and substantive prayer in the suit

is for administration of the estate of the deceased Gangaram. There is no merit in the contention raised in the cross objection of the plaintiff that in a

suit for administration of estate of the deceased Gangaram, the validity of alienation by Vishnu can be impeached.

26. In a suit for general partition, this issue can be certainly gone into. If the Court finds that the alienation is valid insofar as the undivided share of

the concerned defendant-transferor is concerned, while effecting partition, equities can be always adjusted by directing that the property sold by

that particular defendant should be preferably allotted to his share. In a proper suit for partition, equities can be always adjusted. In my view,

prayer Clause (c) of the plaint which challenges the alienation by one of the heirs of the deceased whose property was sought to be administered is

beyond the scope of suit for administration.

27. The learned Trial Judge has held that the relief of setting aside alienation is also a substantive relief. This finding cannot be upheld at all if the

frame of the suit is considered. As pointed out earlier, in essence the suit is for administration of the estate of the deceased and prayer (c) is

incorporated as a consequential relief to the main prayer of administration of estate of the deceased. The learned trial Judge has held that the main

prayer for administration of the estate cannot be granted. There is no challenge to the said finding by the plaintiff. Therefore, prayer (c), which is by

way of a consequential relief could not have been granted.

28. However, as extensive submissions are made, it will be necessary to consider whether treating the suit as a substantive suit for challenging

alienation, the relief which is claimed in prayer Clause (c) could have been granted. It is true that Vishnu while executing the Sale Deed has claimed

to be the exclusive owner of the entire property. It is well settled law that undivided share in Hindu Joint Family Property can be transferred for

valuable consideration by way of sale. In this behalf, it will be necessary to refer to a decision of the Division Bench of this Court in the case of

Pandu Vithoji Ladke v. Goma Ramji Marwadi 21 BLR 213. The Division Bench held that under the mitakshara law as obtaining in the Bombay

Presidency, a coparcener can sell his own interest in joint family property, provided there is valuable consideration for the sale. The Division Bench

further held that the coparcener can sell such interest even though the Sale Deed takes the form, not of sale of his interest, but, a sale of the whole

property. The Division Bench held that the sale effected by the Sale Deed is good even though the Sale Deed provided that the entire property

was being sold. The Division Bench held that:

But we think that it would be unreasonable to hold that though a coparcener can sell his own interest, such a sale becomes void by reason of the

fact that the deed incorrectly describes that which is sold as the entire property instead of describing it as such interest as the vendor possessed. If

objection can be taken to a sale of this kind it lies with the purchaser and not with the seller to take objection.

(Emphasis supplied)

In the present case on the date on which the sale was executed by Vishnu he had one sixth undivided share in the property of the deceased.

Though he has professed to sell one half of the entire property, the Sale Deed will not become void or illegal only on that ground. The purchaser

under the Sale Deed will certainly get what Vishnu was entitled to transfer, namely, his undivided share in the property. Therefore, in view of what

is held by the Division Bench, the Sale Deed dated 10th January, 1969 will be valid to the extent of the undivided share of Vishnu. The finding of

the trial Court is that the Sale Deed is null and void. The said finding is obviously contrary to law. It will have to be held that the Sale Deed is valid

only to the extent of one sixth undivided share of Vishnu.

29. The trial Court has passed a decree for possession against the second defendant-purchaser. The submission of the learned Counsel for the

plaintiff is that the plaintiff has filed the suit on behalf of her three sisters and therefore, the plaintiff is entitled to possession of one half share in the

property. The third to fifth defendants have not filed any suit and they have not paid any Court fees on their claim regards possession of their share.

Share of the plaintiff was only to the extent of one fifth when the suit was filed. Therefore, by no stretch of imagination the plaintiff could have

obtained possession of one half portion of the entire property. Moreover, the relief of grant for possession of one fifth separate share could have

been granted only in a properly instituted partition suit. If the plaintiff was desirous of having possession of the one fifth share in the property, the

only recourse available to the plaintiff was to file a suit for general partition. Even while effecting general partition, it is not necessary that the half of

the property which is sold to the second defendant will be allotted to the share of the plaintiff. The plaintiff may get a share in the other part of the

property which is not purportedly sold to the 2nd defendant.

30. There is another aspect of the matter. The alienation made by Vishnu was sought to be challenged. Vishnu was survived by a widow and seven

children. Thus, on demise of Vishnu his daughters and sons were entitled to one eighth undivided share each in one sixth share of Vishnu.

Therefore, they were certainly necessary and proper parties to the suit. The contention of the learned Counsel for the plaintiff based on the certain

decisions of the Apex Court is that there was no abatement of the suit as one of the heirs of the deceased Vishnu was already on record.

However, the said legal representative had only one eighth share in the undivided one sixth share of Vishnu. Assuming that suit simpliciter for

challenging alienation without claiming partition was maintainable, surely all the legal representatives of the deceased Vishnu ought to have been

impleaded as parties as each one of them is entitled to undivided share in the said property. Thus, even assuming that a suit simpliciter for

challenging alienation is maintainable and the prayer (c) in the plaint can be read as a substantive relief, the trial Court could not have granted the

declaration that Sale Deed in favour of the second defendant was illegal and void. The trial Court could not even have granted the declaration that

the Sale Deed is not binding on the share of the plaintiff and her other sisters inasmuch as more efficacious remedy of filing a suit for general

partition was available to the plaintiff.

31. The trial Court has granted liberty to take out separate proceedings for relief of administration of the estate of the deceased. The said order

was sought to be justified by the learned Advocate for the plaintiff by relying upon Rule 6 of Order II of the said Code. Rule 6 gives power to the

Court to order separate trials or to make such other order as may be expedient in the interest of justice where it appears to the Court that joinder

of causes of action may embarrass or delay the trial or is otherwise inconvenient. The plaintiff had come to the Court by making a prayer for

administration of the estate of the deceased. The said prayer was found as not maintainable. Therefore, the learned trial Judge by exercising the

power under said Rule 6 of Order II could not have granted a liberty to the plaintiff to take out separate proceedings for the said prayer.

Therefore, Rule 6 or Order II cannot be pressed into service for defending that part of the decree passed by the trial Court.

32. It must be noted here that while deciding the Notice of Motion for interim relief taken out by the plaintiff, the second defendant had raised an

objection regarding maintainability of the suit. By order dated 17th September, 1974 a prima facie finding was recorded by the trial Court while

dismissing the Notice of Motion that a suit for administration is a special type of suit in which only the heirs of the deceased and creditors of the

deceased are proper or necessary parties and the cause of action against the transferee of a co-sharer was to file a suit for partition. In spite of the

said Order, no steps were taken for amendment of the plaint.

33. The net result of the discussion is that the plaintiff and the third to fifth defendants had one fifth undivided share in the immovable property of

deceased Gangaram on the date of the institution of the suit. The Sale Deed executed by Vishnu will not bind the shares of the plaintiff and third to

fifth defendants. However, once the trial Court found that the suit for administration of estate of the deceased was not maintainable, the trial Court

could not have granted prayer (c) which is in the nature of a consequential relief. Even assuming that prayer (c) was a substantive relief sought in

the plaint, for reasons which are recorded earlier, the relief which is prayed in prayer (c) could not have been granted considering the frame of the

suit. Thus, the decree passed by the trial Court cannot be sustained and the same will have to be set aside.

34. Hence, I pass the following order:

(i) The impugned Judgment and Decree dated 19th September, 1987 is quashed and set aside and the Suit No. 2060 of 1970 is dismissed. There

will be no orders as to costs. The appeal is accordingly allowed.

(ii) The cross-objection is dismissed.

(iii) On the prayer made by the learned Counsel appearing for the original plaintiff, the appellant is directed to keep alive bank guarantee submitted

in terms of order passed in Letters Patent Appeal No. 40 of 1988 for a period of twelve weeks from today. If the appellant fails to renew the bank

guarantee, the Registrar (Judicial I) will call upon the concerned bank to deposit guarantee amount in this Court.

(iv) There will be no order as to costs.

(v) Certified copy is expedited.