Shankar Ramchandra Iparkar since deceased by his heirs Vs Bhanudas Shankar Iparkar and Others

Court: Bombay High Court

Date of Decision: June 24, 1986

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 103
Evidence Act, 1872 â€" Section 101, 114

Citation: (1987) 1 BomCR 434

Hon'ble Judges: Sharad Manohar, J

Bench: Single Bench

Advocate: M.V. Paranjape and V.D. Govilkar, for the Appellant; C.A. Phadkar, for respondent No. 327 and M.B. Baadkar, for the Respondent

Final Decision: Allowed

Judgement

Sharad Manohar, J.
The appellants before me are the heirs and legal representatives of original defendant No.1, who has filed this appeal

against the decree for partition passed by the trial Court in flavour of plaintiffs and defendant No. 4. The original plaintiffs are respondents

Nos,1and 2 and original defendant No. 1 is respondent No. 3 before me. Original defendants Nos. 4 to 7 are respondents Nos. 5 to 8 before me.

Original defendants Nos. 2 and 3 appear in this appeal is two-fold capacity (i) their individuals capacity (ii) in their capacity of heirs of deceased

defendant Nos. 1.

For the sake of convenience, the parties will be referred to as plaintiffs and defendants.

2. For understanding the claim of plaintiffs, it is useful referring to the genealogy which is as follow :

Ramchandra Hanmanta Laxman

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Shankar Vishwanath

(Deft.No. 1) (Deft.No. 3)

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Bhanudas Nivrutti Ganpat Bhaskar |

(Plff. 1) (Plff. 2) (Deft,2) (Deft,3) |

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Ramchandra Vasant Ramesh Madhukar

(Deft. No. 5) (Deft. 6) (Deft. 7) (Deft. 8)

One Ramchandra had two brother, Hanmanta and Laxman, reference to Hanmanta and Laxman is only for the purpose of understanding the

relationship between the parties and the witnesses. Hanmanta''s son Bajirao has been examined by the plaintiffs as witness No. 2. This bajirao also

happens to be the brother-in-law of defendant No. 4 (wife''s sister''s husband). Laxman had a son Ranganath. He also figures , through remotely in

this litigation.

However, we are concerned mainly with the branch of Ramchandra because, admittedly, a partition had taken place amongst Ramchandra,

Hanmanta and Laxman and the suit property, it is alleged by the plaintiffs, was joint family property in the hands of defendant No. 1 who is the son

of Ramchandra.

Ramchandra had to wives Rambai and Krishnabai. From Ramabai, he got one son Shankar, defendant No. 1. From Krishnabai, he got a son

Vishwanath, who is defendant No. 4. Shankar also had two wives one Chandrabhaga who died in the year 1942 and the other Manjulabai who

died in the year 1952. Ramchandra himself died sometime between 1912 and 1914 . The plaintiffs have stated in the plaint that he died in 1912-

13. In the evidence, one of the plaintiffs stated that he died in the year 1914. Shankar got two sons from Chandrabhaga; one Ganpat who is

defendant No. 2, born in the year 1929 and other Bhaskar who is defendant No. 3 born in the year 1939.

From Manjulabai, Shankar got two other sons Bhanudas who is plaintiff No. 1 and who was born in the year 1920 and Nivrutti who is plaintiff

No. 2 who was born in the year 1922. Ramchandra''s other son Vishwanath who is defendant No. 4 has four sons, Ramchandra, defendant No. 5

Vasant defendant No. 6 , Ramesh defendant No. 7 and Madhukar defendant No. 8

3. The plaintiffs filed a suit for partition and possession of the properties mentioned in the plaint, reference to which will be presently as and when

required. Contention of the plaintiffs was that Ramchandra died sometime in the year 1912-13 leaving behind his two sons as stated above. It was

contended that Ramchandra left behind him some lands, a house and some moveable properties such as bullocks and agricultural implements as

also some mango trees. It is this mango trees which played a significant and interesting role in this entire litigation and in a sense, the plaintiffs are

trying to reap the fruits of this mango trees by claiming share in this properties because according to the case of the plaintiffs sought to be made out

in evidence, it is from the income of these mango trees that all these properties were purchased by defendant No. 1. The pleadings show that there

existed no mango trees, the income of which could have been used by the 1st defendant for purchase of any the suit lands. Hence, it is useful

setting out at this stage itself the averments made by the plaintiffs in the plaint vis-a-vis these mango trees and other properties inherited by

defendant No. 1 and defendant No. 4 From their father Ramchandra as ancestral properties.

4. This is what is stated by the plaintiffs in paragraph 1 of their claim after setting out the relevant portion of the genealogy :

I am setting out the translation of the averments in the plaint verbatim:

Their was a joint Hindu family at Chichondi Shiral, Taluka: Pathardi, Dist. Nagar consisting of Ramchandra as the manager of the family and two

sons Shankar defendant No. 1 and Vishwanath defendant No. 4. This joint family has ancestral property consisting a agricultural lands, house,

bullocks agricultural implements, utensils, etc., and Ramchandra was the ''karta'' of the joint family of which defendant No. 1 and defendant No. 4

where the other members. Ramchandra died at Chinchondi, Shiral sometime in the year 1912-13 and defendants Nos. 1 and 4 became the owner

of the said properties as his survivors. The said joint Hindu family had incurred debts and in repayment of the said debts the ''karta'' of the joint

family of defendant Nos. 1 and 4 i.e., defendant No. 1 sold all the joint family lands. Ancestral house, the mango trees of the joint ownership and

the moveable properties such as bullocks, agricultural implements, utensils etc., remained in the custody of the joint family consisting of defendant

No. 1 and defendant No. 4 and defendant No. 1 and defendant No. 4 enjoyed the said properties. Out of the moveable properties belonging to

the joint family, the family enjoyed the moveable properties such as bullocks and agricultural implements for about 5 to 6 years and thereafter the

bullocks and the agricultural implements were sold after the said period of 5 to 6 years and the proceeds were enjoyed by the joint Hindu family.

The house at Chinchodi Shiral was enjoyed by the joint Hindu family till the year 1951. In the year 1951, the said house was sold the sale

proceeds were enjoyed by the joint Hindu family. Similarly, the income the fruits of the mango trees owned by joint family jointly was enjoyed by

the joint family for about 10 to 12 years after the death of Ramchandra. Later on, these trees withered away and fell off. In this manner, the joint

family took benefit of the ancestral properties and with the help thereof and by making contributions to the same, the following properties

mentioned in paragraph 3 (of the plaint) were purchased by the joint Hindu family and the income of the said joint family property is being enjoyed

by the members of the Joint Hindu Family.

It will does be seen that even according to the plaintiffs, the mango trees had fallen of some time in or about the year 1923-24 which meant that

from the mango trees, there could be no income for the joint family in any subsequent period. This fact has a great bearing upon the main question

involved in this appeal.

5. Items of the joint family''s Immovable properties have been mentioned in the plaint which consist of various lands. The plaintiffs contend that the

said lands were purchased by defendant No. 1 in his own name during the period between 1936 and 1954. Item No. 1 is Survey No. 22/1

admeasuring 4 acres and 33 gunthas. Contention is that defendant No. 1 purchased this land with the help of this joint family and the sale deed

(Exhibit 121) dated 9-4-1936 has been taken by defendant No. 1 in that behalf for the consideration of Rs. 200/-. The Survey numbers mentioned

in the sale deed do not tally with the survey numbers of the land mentioned in the plaint, but it was common ground before me that the description

made in the sale deed has been taken by all the party to be correct. The second item of the property is purchased by defendant No. 1 by the sale

deed dated 2-6-1939 (Exhibit 120). The description of the property made in the sale deed does not tally with the description made in the plaint

but the parties agree that the description in the sale deed is the correct description. The area of this land is 6 acres and 23 gunthas and the

consideration is Rs. 400/-. The third property purchased by the defendant No. 1 in his name by the sale deed (Exhibit 119) dated 20-2-1942 and

the price of the same is Rs. 200/-. It is correctly described in the plaint at Item No. 3 at Survey No. 21/1-B. The fourth property appears to have

been purchased by defendant No. 1 by a sale deed (Exhibit 163) dated 23-4-1954. It relates to Survey No. 7/2 and the price paid for the same is

Rs. 2,000/-. All these lands are situated at village Shirala, Taluka: Yeola, District: Nasik. So far as the piece of the land, Survey No. 7/2, is

concerned, there is a tripartite dispute as regard the ownership of the land. The plaintiffs claims the same to be the joint family property. Defendant

No. 1 claims it to be its own self-acquired property whereas defendant No. 4 claims to be the same to be its own self-acquired property

purchased in the name of defendant No. 1 as the benamidar.

6. The contention of the plaintiffs in the plaint was that these properties were joint family properties purchased by defendant No. 1 with the joint

family funds, and that, hence the plaintiffs claims one-fifth share in the same.

7. Defendant No. 1 filed his written statement and contended that all the suit properties were his self-acquired property. Defendants Nos. 2 and 3

supported him though defendants No. 2 did not file any written statement whereas defendant No. 3 did not even appear in the trial Court and had

to be proceeded against ex parte.

8. Defendant No. 4 filed his written statement and was supported by defendants Nos. 5 to 8. All of them contended that the suit properties were

the joint family property in the hands of the defendant No. 1 excepting the land at the item No. 4 viz., Survey No. 7/2. They contended that

defendants Nos. 4 to 8 were having their joint one-half share in the said suit properties item 1,2 and 3. So far as the Item No. 4, Survey No. 7/2,

was concerned, it was the contention of these defendants that these property were purchased by defendant No. 4 with the help of his own funds,

but in the name of defendant No. 1. In other words, the contention was that defendant No. 1 was a benamidar for defendant No. 4 at the time of

the execution of the sale deed (Exhibit 163) in his favour.

9. On these pleadings, issues were framed by the learned Judge and parties led evidence. Save and except the sale deeds, Exhibits 119, 120, 121

and 163, next to no documentary evidence was led by the plaintiffs or defendant No. 4. On behalf of defendant No. 1, also no documentary

evidence was adduced save and except the notice received by him from defendant No. 4 dated 4-7-1968 (Exhibit 136). No doubts, this notice

has quite same bearing upon the question to be decided in this litigation, but so far as documentary evidence is concerned, these are the only

document of any relevance filed by the parties.

10. For the reasons which will be presently mentioned, I will have occasion to examine the entire evidence led by the parties even though this

matter comes up before me in second appeal. At this stage, it may be stated only this much, viz., that the trial Court accepted the plea of the

plaintiffs that all the suit lands excepting land Survey No. 7/2 were joint family lands. The Court held that there existed a nucleus on the strength of

which the suit properties could be said to have been acquired by defendant No. 1. In this view of the matter, it passed a decree for partition and

separate possession in favour of the plaintiffs and defendants Nos. 4 to 8.

However, so far as Survey No. 7/2 is concerned, the learned Judge held that defendant No. 4 has made good his plea viz., that it was his own

self-acquired property purchased benami in the name of defendant No. 1. A rather strange decree was, therefore, passed by him viz. that in the

suit filed by the plaintiffs for partition and possession, a decree for possession in respect of Survey No. 7/2 was passed in favour of defendant No.

4 and against defendant No. 1 even though defendant No. 1 had not made even a counter-claim in the suit (assuming that such counter-claim could

be made by the defendant No. 4 against defendant No. 1 in a suit filed not by defendant No. 1 but by the plaintiffs against defendant No. 1) and

had paid no Court fee for the relief of possession.

11. In appeal filed by defendant No. 1, the decree passed by the trial Court holding that the lands other than the Survey No. 7/2 were joint family

lands is, confirmed by the Appellate Court. However, on behalf of the plaintiffs cross-objections were filed against the part of the trial Court''s

decree holding that Survey No. 7/2 was self-acquired property of defendant No. 4 purchased benami in the name of the defendant No. 1 and the

cross-objections were allowed by the Appeal Court holding that even the said land Survey No. 7/2 was joint family property, the same having

been purchased by defendant No. 1 with the help of funds belonging to the joint family. It will thus be seen that the plaintiffs entire suit has been

decreed by the appeal Court.

12. In this Second Appeal, the decree passed by the original defendant No. 1 and defendant No. 4 has filed cross-objections contending that the

appeal Court was not justified in setting aside the decree of the trial Court, declaring that Survey No. 7/2 was the property belonging to defendant

No. 4 purchased by him benami in the name of defendant No. 1.

13. Prima facie, it might appear that the question decided by the lower Appellate Court is more or less one of appreciation of evidence, a

concurrent finding of fact to the effect that there existed a nucleus in the hands of defendant No. 1 out of which the suit properties must have been

purchased by defendant No. 1.

But upon perusal of the judgment of both the courts below, it becomes clear that whereas the trial Court had arrived at the finding relating to the

existence of nucleus without reading the pleadings of the parties, just on the basis of the mechanical and unnatural evidence that was led on behalf

of the plaintiffs, the appeal Court has just proceeded upon the assumption that there did exist some nucleus with the help of which the suit property

could be purchased. As has been already pointed out and as will be pointed out presently, the pleadings of not only of plaintiffs but even of

defendant No. 4 militate against the findings that their did exist some kind of nucleus in the hands of defendant No. 1 with the help of which the suit

properties could be acquired by defendant No. 1. But the point to be considered at this stage is that the Appeal Court has not only totally ignored

the pleadings between the parties but has failed to examine even the evidence led by the parties on that point. All that the Appeal Court has done is

that it has proceed to hold that there existed a nucleus in the hands of defendant No. 1 without applying its mind in any manner whatsoever to the

evidence on record which, I can see, is worthless for providing the existence of any nucleus at the relevant time. After going through the judgment

of the lower Appellate Court, it can be seen that the lower Appellate Court has not applied its mind to the evidence on record at all far less to the

pleadings of the parties. Beyond putting a Rubber Stamp upon the view taken by the trial Court to the effect that there must have existed some

kind of nucleus with the help of which defendant No. 1 could purchase the suit properties, the Appellate Court can be said to have done mighty

nothing to appreciate even the evidence led by the parties. This is, therefore, precisely the case which must be held to be governed by the

provisions of section 103 of the Code of Civil Procedure. If the Appeal Court does not apply its mind to the evidence on record and just arrives at

a finding about the existence of nucleus in an arbitrary manner, following blind-fold the view taken by the trial Court, it cannot be said that the issue

relating to existence of nucleus has been ""determined by the lower Appellate Court."" In fact, this can be said to be a case where neither of the

courts have applied their minds to the question of nucleus because it was not open for them to ignore the pleadings and decide the question by such

ignorance of pleadings.

14. In these circumstance, there are two courses open for me (a) to send the matter once again to the trial Court or to the lower Appellate Court

for a finding on the question as to whether the nucleus could be said to have been established by examining both, the pleadings between the parties

and also the evidence led by the parties and to determine the question and certify such findings to this Court and, (b) to decide the question here

itself by examining the pleadings and the evidence of the parties.

I may mention here that both the learned Counsel Mr. Paranjape as well as Mr. Phadkar stated before the Court that it would be in the fitness of

things that the entire question is decided here itself rather than sending the matter to the trial Court or to the lower Appellate Court for the findings

on the issue. The plaintiff''s suit is of the year 1969. Nearly 17 years have elapsed from the date of the institution of the suit and still the litigation is

hanging fire. It is not as if that the issue is sent for to the District Court for being certified to this Court, this Court will, in no case, be required to

examine the finding once again. Having regard to all the circumstances, I am of opinion that it would be in the fitness of things if I decide and

dispose of the appeal after examination of the evidence myself as per the provision of section 103 of the Code of Civil Procedure.

15. I will first refer to the pleading between the parties and examine the question as to whether there was really any contention that defendant No.

1 purchased the suit properties out of the income of the joint family properties; in other words, whether according to the plaintiffs or even

according to defendant No. 4, there did exist some nucleus in the hands of defendant No. 1 with the help of which the suit property could be

acquired by him.

In this connection, I have already set out, in extenso, the relevant portion of the plaint which clearly shows that according to the plaintiffs, after the

year 1925 at latest, defendant No. 1 could not have had any such joint family property in his hand from the income of which he could have

purchased any of the suit lands. It is common ground before me that so far as the suit house is concerned, none of the suit lands excepting land

Survey No. 7/2 could be purchased with the sale proceeds of the same. It is common that the house did not fetch any income as such. When it

was sold in the year 1951, all that it fetched was the price of Rs. 475/-. Evidently, these monies could not have been utilised for the purpose of the

purchase of the three parcels of lands purchased in and before the year 1942. Even the land item No. 4 could not have been purchased from out

of the sale proceeds of the said house, firstly because the price paid for the land Item No. 4 was Rs. 2,000/- and secondly because the plaintiff''s

own evidence shows that the sale proceeds of the house were utilised by the family for domestic expenses. It is, therefore, clear that the existence

of the house was not considered by any of the parties, including the plaintiffs themselves in the plaint that the house constituted a nucleus. Even a

cursory look at the plaint is enough to show that there is no other property mentioned as constituting any such nucleus. In the plaint it is stated

unequivocally that the mango tree which, it is claimed in the evidence, brought income in the family, had withered away and fallen down about 12

years after the death of Ramchandra i.e., latest by the year 1946, if not earlier. The first item of the suit land, which is the subject matter of the sale

deed (Exhibit 121) was purchased in 1936. No income from the mango trees could, therefore, be the wherewithal for the purchase of the said

land. It follows that the position could not be different vis-a-vis the other two lands which are the subject matters of the sale deeds Exhibit 120 and

119 dated 2-6-1939 and 20-2-1942, item Nos. 2 and 3 respectively.

16. What is pertinent to note in this connection is not only the absence of pleadings relating to nucleus in the form of mango trees and the income

therefrom. What is important is that there is a positive averment giving rise to the inference that there existed no nucleus. If a positive assertion is

made by the plaintiffs that the mango trees in question had withered away by the year 1926, it would not be open for the plaintiffs subsequently to

contend that they got income from the said mango trees in the year 1935 or 1936. The pleading in this behalf rules out a case of existence of such

income in the year 1935-36. Even if the pleadings are construed with utmost liberty, still according to the plaintiffs themselves, there existed no

nucleus with the help of which the suit properties could be purchased by defendant No. 1.

17. Prima facie, this is a suit for partition and normally in a partition suit all parties who are members of joint family or persons claiming through

them are plaintiffs. Hence, prima facie, I would have had no difficulty in taking the view that the averment made by the plaintiff would not be

binding on defendant No. 4 as such. But in the instance case, defendant No. 4''s pleadings is peculiar. He has controverted a number of averments

made by the plaintiffs; but the averment about the withering away and falling off of the mango trees has not been denied by him even by him

anywhere in his written statement. Moreover, this is not a case in which existence of joint family property is admitted. It was, therefore, incumbent

upon defendant No. 4 to deny the positive assertions made by the plaintiffs in the plaint that the mango trees in question had withered away and

fallen down in the year 1926 by the latest. I have pointed out above that this in effect in the assertion of the plaintiffs in their plaint. Such an

assertion must be very much adverse to the claim of defendant No. 4 which is to the effect that the suit lands item Nos. 1 to 3 were joint family

properties on the ground that they were purchased out of some nucleus. But that assertion has not at all been traversed a controverted by

defendant No. 4. That part of the assertion must, therefore, be deemed to have been agreed to or acquiesced in or admitted by defendant No. 4.

So far as defendant No. 1 is concerned, he has no occasion or necessity to refute the contention that the mango trees in question had withered

away by the year 1926 because it is his very case that there existed no nucleus.

It, therefore, follows that on the question that the mango trees had ceased to exist by the year 1926, all the three contesting parties were added

and, hence, no issue arose between the parties on that point. This meant that according to the parties themselves, there existed no nucleus with the

help of which the suit properties could be purchased by defendant No. 1. This is the logical inference stemming directly from the very pleadings of

the parties.

18. Before going to the evidence led by the parties, it is very much worthwhile referring to certain admitted positions, facts and incidents. The fact

which is not in dispute at this stage, or was not so even in the lower Appellate Court for that matter of fact, is that defendant No. 4 was a Tahsildar

with capacity to purchase properties. But it was not as if that defendant No. 1 was having no financial capacity for spending monies for purchases

of properties at least by the year 1954-55. There is no dispute about the fact the defendant No. 4 had purchased certain lands at Mhasarul near

the Nasik City. But they were purchased by him in the year 1955-56 in the name of the defendant No. 1. That was so because out of the total

consideration, a sum of Rs. 1100/- was advanced by defendant No. 1 from his own monies. It is further not in dispute that defendant No. 4 repaid

those monies to defendant No. 1 and thereupon, defendant No. 1 reconveyed those lands at Mhasarul to defendant No. 4. This fact has quite

some bearing upon the question as to whether the transaction relating to Survey No. 7/2 was a benami transaction.

The further significant incident is the notice given by defendant No. 4 to defendant No. 1 which is dated 1-7-1968. That relates to the payment

made by defendant No. 4 to defendant No. 1 for his one-half share in 1st three items of the suit lands and for the income from the same. In this

connection, it must be noted that defendant No. 4 had occupied the position of a Tahsildar and hence, it may be safely assumed that he was not as

ignorant of law as the other parties could have been. In his said notice, which is produced at Exhibit 136 in these proceedings, he has specifically

stated that whatever property was inherited by the sons of Ramchandra, excepting the ancestral house were required to be sold away for the

purpose of payment of the ancestral debts. In the notice, it is specifically stated that the ancestral house brought no income. It is further stated that

for the first six or seven years after the death of Ramchandra, defendant No. 1 got income from agricultural as also from labour. It is further stated

that the mothers of both the step-brothers and defendant No. 1 and defendant No. 4 were manual labourers and maintained the families. It is also

further stated in the said notice that by about the year 1920, there existed no means of income for the family and hence defendant No. 1 went to

Kopargoan and started working as a "hamal" till about the year 1953-54 and that, later on he went to Sheoge, Taluka Yeola and followed

agricultural connection. It is further stated in the said notice that the lands purchased by defendant No. 1 in the year 1936, 1939 and 1942 has

been purchased from out of his own income and also with the contributions made by defendant No. 4. The statement made in the notice is to the

effect that these three parcels of lands had been purchased jointly by defendant No. 1 and defendant No. 4 with their own monies. There is not a

whisper of assertion any where in the said notice that these lands were the joint family lands in the hands of defendant No. 1. No doubt, he has

stated that the lands were made to stand in the name of defendant No. 1 because he was the ''karta'' of the family, but it is not stated that there

existed any joint Hindu family property. It is stated that he was the head of the family and hence even though both of them had one-half share in the

lands purchased by both of them together, the lands were allowed to be purchased in this name.

There is not as much as murmur in the said notice that there existed fruit giving mango trees and that from out of the income of those trees

properties could be purchased by the defendant No. 1.

So far as Survey No. 7/2 was concerned, the allegation made in the notice was that the land was his personal acquisition and that it was purchased

by the defendant No. 1 as a benamidar for defendant No. 4. It was further stated in the said notice that the said land had been sold by defendant

No. 1 to one Laxman Tatya Muley and that when defendant No. 4 got the information about the sale-deed, he, defendant No. 4, got it

reconveyed in the name of the defendant No. 1 once again. It was further stated in the said notice, that for the last about three to four years,

defendant No. 1, had not been paying the income in respect of the land jointly owned by both of them and that for the period of three or four

years, he had stopped giving income in respect of land Survey No. 7/2.

It was on this basis that one-half share in all the lands excepting Survey No. 7/2 and possession of the land Survey No. 7/2 was demanded by

defendant No. 4 from defendant No. 1 by the said notice.

It will be thus seen that till the year 1968, it was never the case of defendant No. 4 that there existed any nucleus in the form of the mango trees,

the income of which formed the nucleus for purchased of the parcels of the lands in the years 1936, 1939 and 1942 respectively.

19. As stated above, the plaintiffs have adduced practically no documentary evidence in support of their contention that the suit properties were

purchased out of the income of an already existing joint family property. Only oral evidence is led. Plaintiff examined himself and one more witness,

witness No. 2 for the plaintiff, Bajirao, son of Hanmanta who was the brother of Ramchandra. He also happens to be the brother-in-law-wife''s

sister''s husband (sadu) of defendant No. 4.

The plaintiff stated in his evidence that the family had one-third share in the fruit of the mango trees, that defendant No. 1 sold his one-third share of

the fruits of the mango trees to Bajirao, Hanmanta Ipparkar for a sum of Rs. 150/- for the year 1936 and that in the same year, defendant No. 1

purchased the lands which were the subject matter of the sale deed Exhibit 121 for a sum of Rs. 200/- from the money which he obtained by

selling his share in the fruits of one year viz., 1936. He stated further that in the year 1938, the mango trees were uprooted and damaged due to

flood water of the stream and that defendant No. 1 sold his one third share in the mango trees that is to say, its timber and received Rs. 300/- from

one Bhagoji Carpenter. He stated that Bhagoji dies about 10 to 15 years ago. He stated that the second parcel of the land which was purchased

under the sale-deed (Exhibit 120) dated 2-6-1939 were purchased for the a sum of Rs. 400/- and the above-mentioned of Rs. 300/- received in

the year 1938 from Bhagoji Carpenter was utilised by defendant No. 1 for making the said purchased. He further stated that in the year 1942,

defendant No. 1 purchased the third parcel of the land which is the subject matter of the third sale-deed (Exhibit 119) dated 20-2-1942 and the

purchase price of the land was paid out of the income of the two parcels of the lands purchased in 1936 and 1939 respectively. As regards Survey

No. 7/2 which is the subject matter of the fourth sale-deed (Exhibit 163) dated 29-4-1959, he stated that the consideration of Rs. 2000/- was

paid from out of the income derived from the lands purchased earlier as also from the sale proceeds of the ancestral house. He stated that the

information relating to the suit was received by him from his mother Manjulabai who died in the year 1952 but denied the suggestion that the suit

was filed by the plaintiff at the instigation of defendant No. 4.

In cross-examination by defendants Nos. 4 to 8, he however, stated that sale proceeds of the ancestral house sold in the year 1951, viz., Rs.

475/-, were utilised for meeting household expenses. He admitted specifically that defendants Nos. 1 to 4 sold the said house for the purpose of

the payment of the debt incurred at the time of the marriage of his step-sister Manubai. He admitted that land Survey No. 7/2 was sold by

defendant No. 1 to one Maruti Narayan Ingle, husband of Krishna. He denied the suggestion that a sum of Rs. 2,000/- paid in connection with the

sale-deed (Exhibit 163) dated 29-4-1954 for purchase of Survey No. 7/2 came from the pocket of defendant No. 4. He denied the benami

character of the transaction. In paragraph 6 of his disposition, he stated that prior to the year 1954, the 16 acres of land which he claimed to have

belonged to the joint family fetched Rs. 50/- per year as rent.

The value of his evidence is only in connection to his statement relating to the source of the monies paid by defendant No. 1 for purchase of the suit

lands and particularly in relation to the income from the mango fruits and price of the mango trees. But before commenting upon his evidence of this

point, I would like to examine the evidence of his own witness Bajirao. This witness Bajirao states that the family owned lands, mango trees and

house at village Chinchondi Shiral. He stated there were six mango trees in their land-meaning in the lands of the plaintiffs and the defendants. After

stating that the mango trees were on the land belonging to the plaintiffs and the defendants, he has stated that he had one-third share in the mango

trees and that defendant No. 1 had one-third share in the mango trees and that defendant No. 4 also had one-third share in the mango trees. He

further stated that prior to 1936, defendant No. 1 sold the mango of his share and the share of defendant No. 4 to him for Rs. 150 as defendant

No. 1 wanted to purchase the land at village Sheodi. He further stated that he paid Rs. 150/- to defendant No. 1 in cash. He further stated that

two years thereafter, the trees were uprooted and fell down because of the floods and that the six mango trees were sold to one Bajirao Carpenter

for Rs. 900/- and that defendant No. 4 took his share of Rs. 300/-.

It is unnecessary to go into the cross-examination of this witness because the cross-examination contains all suggestions which he has denied, but it

will be seen that the evidence of this witness in examination-in-chief itself belies the case of the plaintiffs. It is stated that the joint family had one-

third share in the fruits of the six mango trees and that Bajirao had paid the price of Rs. 150/- for one-third share of the family. Plaintiff No. 4 was

of 16 years of age at that time, but I am prepared to assume that he could be at that time knowledgeable enough to know the exact nature of

transaction. But the point is that his evidence is belied by his own witness Bajirao. Bajirao states that defendant No. 1 had one-third share and

defendant No. 4 had another one-third share. As to how these two defendants could have claimed one-third share in the mango trees is a mystery.

The evidence of defendant No. 4 in this connection may be referred to at this stage itself. He has stated that Ramchandra got one-third share in the

said mango trees because the said six mango trees were standing on the boundary of the land called Matha land near the stream. As is pointed out

above, his pleadings and the statements in his notice make out an entirely different case. But the point is that his statement is belief by plaintiff''s

own witness Bajirao, because if Ramchandra had only one-third share in the trees, defendant No. 1 and defendant No. 4 would together have

one-third share, not one-third for each.

20. But was is equally important is the mechanical character of the evidence of these three witnesses relating to the income allegedly had by the

joint family from these mango trees. After having made an unmistakable statement in the pleadings that the mango trees ceased to exist after the

year 1925, plaintiffs stated in his evidence that there was an income of Rs. 150/- from the mango trees in the year 1935 so that in the year 1936,

defendant No. 1 could purchase the land which is the subject matter of the first sale-deed of the year 1935. You required money in 1936 and you

got Rs. 150/- from the income of mango fruits in the year 1935. It is as simple as that it is not? Identical phenomenon occurred in 1936. You

required monies, Rs. 400/- for the second sale- deed. And presto: The trees got uprooted in 1938 and up comes Bajirao Carpenter and pays Rs.

300/- of the best and bright out to defendant No. 1 as his share of the purchase price! Where is Bhagoji? Dead and gone. Seven years before the

recording of the evidence! Everything very convenient!

But this witness belied the plaintiff also in another way; whereas the plaintiff stated that the sum of Rs. 150/- was received in the year 1936, this

witness Bajirao stated that he paid the monies in the year 1935. Normally speaking, this contradiction would not be very material because the

witness is disposing to some incident which took place about 40 years ago. But in cross-examination, this witness had to admit that he could not

remember the income from his property 10 years ago and still he came to Court to dispose to the fact from his own memory that about 40 years

ago, in the year 1935, he could and did shell out Rs. 150/- to defendant No. 1 as his share of the mango fruits. The fact that he was disposing to a

falsehood is also evident from the fact that according to him, he and defendant No. 1 had one-third share each and defendant No. 4 had another

one-third share in the mango crop. If defendant No. 1 had received his own share of Rs. 150/- defendant No. 4 could not claim any share in the

suit lands because the original suit lands purchased in the year 1936 was the one from out of which the other lands are said to have been purchased

and according to Bajirao, it was not purchased from the common funds of defendant No. 1 and defendant No. 4, because defendant No. 4 was

paid Rs. 150/- separately by this witness. To my mind, all this confusion is not from the loss of memory, but from the fact that plaintiffs witnesses

are disposing to a blatant falsehold.

The mechanical character of the evidence may be stressed once again. When hard-pressed for explaining as to from where the consideration Rs.

400/- was paid for the second sale-deed of the year 1939, these witnesses have stated that in the year 1938, there was a flood in which the trees

were uprooted and the timber of the same was purchased by one Bajirao Carpenter for Rs. 900/-. Witness Bajirao has stated that Rs. 300/- was

received by defendant No. 1 as his share. It will thus be seen that when in 1939 the amount is required for the second sale deed (Exhibit 120),

these witnesses make the trees fall in the year 1938 again conveniently as it were. The purchaser has chosen in one who conveniently died about

10 years ago.

It will be further seen that witness Bajirao is closely related to plaintiff and defendant No. 4. He is the cousin of the plaintiff; but more importantly,

he is the "sadu" of defendant No. 4. As will be presently pointed out, there are indications in this litigation to the effect that the plaintiff and

defendant No. 4 are had in glove with each other. No doubt, plaintiffs have made an adverse claim against defendant No. 4 in relation to Survey

No. 7/2 but as will be presently pointed out, beyond making out that claim, no effort is made by plaintiffs even to cross-examine defendant No. 4

to prove the falsity of the case. Admittedly, the plaintiffs had been staying with defendant No. 4. It is, therefore, evident that this witness Bajirao

has come to the Court to oblige both, the plaintiffs and the defendant No. 4, by stating that the purchased the mango crops of the share of

defendant No. 1 for a sum of Rs. 150/- in the year 1935. As to how he could remember that fact 40 years later could not be explained by him

when he admits that he could not remember similar facts of 10 years ago. The evidence of plaintiff No. 1 of P.W. 2 Bajirao and of defendant No.

4 does not inspire confidence at all.

21. I will now turn to the evidence of defendant No. 4 in somewhat more details. As stated earlier, the evidence of this witness assumes

importanceÃ¯Â¿Â½s because he was occupying the position of a Tahsildar at one time and in fact he would be able to give correct instructions to the

lawyers for preparation of the pleadings as also for cross-examination of the relevant witnesses. In his evidence, he has deposed to the partition

that had taken place in the year 1930 amongst Ramchandra, Laxman and Hanmanta. He stated that land Survey No. 74/1 and 74/3 commonly

called as Nimen Mala went to the share of Ramchandra, that the land known as Metha land went to the share of Laxman and the land known as

Law as land went to the share of Hanmanta that all these lands were standing on the boundary of the land called Metha land. He stated further that

the entire record relating to this land has been burnt during the Freedom Movement in the year 1942. He further stated that he joined as a clerk in

the Revenue Department in the year 1943 and retired as Mamlatdar in the year 1967.

But this significance of the evidence of this witness is that this witness has not even came out with a whisper about the nucleus. No doubt, he has

stated that the joint family had one-third share in the six mango trees and that these mango trees were standing on the boundary of matha land

(belonging to Bajirao''s branch). But he has not uttered one word that the mango trees were in existence in the year 1935 or 1936 or till the year

1938. He has not even come out with a murmur that there used to be any income from the mango trees which was being enjoyed by the joint

family even after the year 1925. He was the person who should have known these facts. He has not deposed to them in his evidence! He has not

made any averment in that behalf in his written statement!

22. As appointed out by Mr. Paranjape, the evidence of this witness revolves almost exclusively around the ownership of Survey No. 7/2. He has

given evidence in support of his case that the monies for the purchase of land Survey No. 7/2 in fact came from his own pocket. I will examine that

evidence separately. What is necessary here to note is that he has not even stated that he made any contribution for purchase of these other three

suit lands. It will be recalled that as per his notice dated 1-7-1968 (Exhibit 136), it was his positive case that these three suit lands were purchased

not by the joint family, but jointly by defendant No. 1 and defendant No. 4, from out of their own earnings, not from any of the earnings of the joint

family. In other words, his case in the notice was that he made contributions for purchase of these three suit lands and that three lands were the

joint properties of himself and defendant No. 1, not the joint family properties of plaintiffs and defendants. In his evidence, he has not as much as

made a whisper about this position. Not even one word is to be found in his evidence from which it can be gathered that he made any contributions

for the purchase of any of these three lands. The inference, therefore, flows from his evidence inevitably that this witness has not deposed to the

joint family character of these lands; this witness has not deposed to even his one-half share of the lands on account of the contributions made by

him.

23. Coming to the evidence of his witness in relation to Survey No. 7/2, no doubt he has stated that the land was purchased by him with his own

funds, but the reason given by him for purchasing the land in the name of benamidar is extremely unconvincing. To my mind, this part of the

evidence of defendant No. 4, was correctly appreciated by the lower Appellate Court. This witness has stated that because he was in the

Government service, it could not be possible for him to purchase the land unless he had taken permission from the Government. He wanted the

Court to believe that if he had made application for the permission, it would have taken him six months for getting such permission and that in the

meantime, the vendor of the land Survey No. 7/2 would have to wait all that time or would have to sell it to somebody else. He wants the Court to

believe that it was on this ground that he purchased the land benami in the name of defendant No. 1. But this witness has to admit that he had

purchased some other lands with his own monies not in the name of defendant No. 1 but in the name of his wife Laxmibai. The lower Appellate

Court rightly posed the question as to why if the other lands were purchased in the name of his wife, the land Survey No. 7/2 was purchased by

him in the name of defendant No. 1. Further it is to be noted that it was not as if that in every case when defendant No. 1 was his benamidar, he

falsely caused loss to defendant No. 4 by denying the benami character of the transaction. Defendant No. 1 has stated in his examination-in-chief

itself that the land at Mhasarul was purchased by defendant No. 4 and that defendant No. 1 had advanced a sum of Rs. 1,100/- to him and on that

account, the land was purchased in the name of defendant No. 1 by defendant No. 4. Defendant No. 1 candidly admitted that the transaction was

of a benami character and stated further that the moment he got his own monies, Rs. 1,100/-, from defendant No. 4, he reconveyed the land to

defendant No. 1 The past conduct of defendant No. 1, therefore, is that of a straightforward, fair and honest man. If he reconveyed one land on

repayment of the monies advances by him, there is no reason why he would not have reconveyed the land Survey No. 7/2 if that too was a benami

transaction.

24. Moreover, the most amazing thing is that there is not one word uttered by defendant No. 4 of ever having received any income from any of the

suit property at any time. In his notice dated 1-7-1968, he has stated more or less by implication, that he received some income of the suit

properties some time in the past but in his deposition he has not uttered one word about the receipt of any amount.

The overall position, therefore, is as follows :

(a) Defendant No. 4 purchased one land at Mhasarul banami in the name of defendant No. 1 because defendant No. 1 had advanced Rs. 1,100/-

to defendant No. 4 for that purpose. Immediately when that amount was received by him, he reconveyed that land to defendant No. 4, Insofar as

the suit land Survey No. 7/2 is concerned, it is the allegation of defendant No. 4 that it was purchased by himself but in the name of defendant No.

1 and that it was a benami transaction. There is no evidence that he was ever in possession of the suit land. There is no evidence that he ever

received any income of the suit land. The land is allowed to be treated by defendant No. 1 as his own land. Moreover, it is an admitted fact that in

the year 1956, this very land Survey No. 7/2 was sold by defendant No. 1 to one Ingle, husband of Krishnabai but he got it reconveyed. The

significant fact is that re-conveyance is not in the name of defendant No. 4; it was in the name of defendant No. 1 himself. Defendant No. 4 stated

that it was he who was instrumental to having that land reconveyed but he threw no light upon the question as to why even on the second occasion,

at the time of the re-conveyance, the deed of conveyance was not taken in the name of defendant No. 4 but continues to be taken in the name of

defendant No. 1. It is against this back-drop of the evidence that the evidence of the witness of defendant No. 4 Baburao Yeshwant Patil has to

be examined.

25. This witness Baburao (D.W. 2), witness for defendants Nos. 2 to 8 had attested the sale deed (Exhibit 163). He stated in his examination-in-

chief that a sum of Rs. 1,800/- was paid by defendant No. 4 to defendant No. 1 on 29-4-1954 in this witness''s presence. That is the date of the

said deed (Exhibit 163). The witness states that defendant No. 1 paid the said amount of Rs. 1800/- to Maruti Narayan, the vendor of the land

Survey No. 7/2 in the witness''s presence before the Sub-Registrar, Yeola. In cross-examination, he initially stated that attesting of documents was

his business, but he changed his version and stated that attestation of documents was not his business. He stated that defendant No. 4 was a circle

inspector at Yeola till he retired. This is obviously an erroneous statement because admittedly, defendant No. 4., was a Tahsildar when he retired.

Significant enough, this witness is not cross-examined by the plaintiffs at all. It would be noticed that even defendant No. 4 has not been seriously

cross-examined by the plaintiffs. In fact there is next to no cross-examination of defendant No. 4 by the plaintiffs.

This witness Baburao has been deposing to the fact of payment of Rs. 1,800/- to defendant No. 1 on 25-4-1954, nearly 20 years after the event.

Having regard to the entire nature of the evidence led by defendant No. 4, it is difficult to hod that the evidence of this witness Baburao can be

taken seriously. In any event, it will be difficult to accept defendant No. 4''s, case of benami transaction on the strength of the evidence of this

witness. It is quite possible that defendant No. 4 was won over the person who was an attesting witness of the sale deed (Exhibit 163). The

witness has tried to belittle the position of defendant No. 4 when he says that he retired as a circle inspector when in fact defendant No. 4 retired

as a Tahsildar.

I may state here further that in addition to the evidence of this witness, there is one more circumstance which must be said to be in favour of

defendant No. 4 when he states that the transaction was a benami transaction. The circumstance is that the sale deed (Exhibit 163) has been

produced by defendant No. 4 himself and not by defendant No. 1 although the sale deed is in the name of the latter. But pitted against this

circumstance are the several circumstances mentioned above which militate against the plea of any benami transaction.

26. I will now summarise the tentative conclusions relating to the evidence in respect of the first three parcels of land as also in respect of the land

Survey No. 7/2.

(a) On the basis of the pleadings of the plaintiffs as well as defendant No. 4, it must be held that it is not open to plaintiffs or to defendant No. 4 to

contend that there existed any nucleus in the hands of defendant No. 1 with the help of which defendant No. 1 could have purchased the suit lands.

(b) The trial Court was in error in allowing the plaintiffs even to lead evidence for proving the nucleus when their positive case in the pleadings was

to the effect that there did not exist any nucleus.

(c) It, therefore, followed that the evidence relating to income from the mango trees being used for the purpose of, lands purchase of parcels Nos.

1 and 2 is irrelevant and cannot be relied upon at all. The evidence cannot be said to be even admissible.

(d) Even assuming that the evidence was admissible, it must be held that the evidence of none of the witnesses inspires confidence. Reading

between the lines, no room is left for doubt that Bajirao has come to the Court only to oblige the plaintiffs and defendant No. 4, that his evidence is

manifestly contradictory with the evidence of plaintiffs and defendant No. 4 and it is so inherently incredible that it is impossible to rely upon the

evidence for coming to the conclusion that the plaintiffs have established the case of nucleous. The plaintiffs" evidence is manifestly of a mechanical

and unnatural character, brought into existence to suit the case sought to be made out by the plaintiffs during the course of evidence.

(e) This being the position all the three lands; Items Nos. 1 to 3, must be held to be the properties of defendant No. 1 exclusively and not the joint

family properties.

(f) So far as Survey No. 7/2 is concerned, that too must be held to be the property belonging to defendant No. 1 and the case of defendant No. 1

in that behalf cannot be said to have been made good by him by the evidence on record, particularly because the possession of the land always

was with defendant No. 1 and because it was he who was enjoying the income of the land right from the date of the purchase till the date of the

suit.

(g) The suit is filed by the plaintiffs evidently by the instigation of defendant No. 4. This is clear from the fact that though the plaintiffs have set up

claim to land survey No. 7/2 next to no attempt is made by them to controvert the claim of defendant No. 4. The plaintiffs have been living with

defendant No. 4 from their childhood and presumably even on the date of the suit. The fact that neither defendant No. 4 nor his witness Baburao

has been cross-examined by the plaintiffs to prove their case of joint family character of land Survey No. 7/2 has its own significance.

I say these are my tentative conclusions. I have yet to examine the arguments advanced by Mr. Baadkar and Mr. Phadkar in respect of the lower

Court"s judgments.

27. I will first deal with the arguments of Mr. Phadkar. His first submission was that these lands must be deemed to be joint family properties

because as the evidence stands on record, defendant No. 1 could not have purchased them out of his funds at all. He pointed out to me that

defendant No. 1 was earning only about Rs. 20/- per day and he had quite large family to maintain, including his mother, his wife and atleast two

sons, if not more.

His second contention was that even it in a particular case there was nucleus, still if a co-parcener says that the property is personal property, he

must himself prove that fact and the existence of nucleus is immaterial in that case.

Thirdly, he contended that defendant No. 1 was admittedly the manager of the joint family. His fourth contention was based upon this third

contention.

His fourth contention was that whenever there was a purchase in the name of the manager of the joint family, there is a presumption that the

property in question was purchased by him, though in his personal name, for the benefit of the joint family unless he showed that the purchase was

from his separate funds.

Fifthly, he contended that there did exist a nucleus.

28. I will deal with each of the arguments briefly.

(i) As regards the first argument viz., that defendant No. 1 did not have funds with him to purchase the suit properties with, to my mind, the

approach to the question is somewhat topsturvy, almost in the nature of putting the cart before the horse. It is the plaintiffs who have come to the

Court to establish their title to the suit lands. They can do so only if they prove that the suit lands were properties of the joint family of which joint

family they were members. For that purpose, they have to show that though the properties were purchased by defendant No. 1 in his own name,

he purchased them with the funds belonging to the joint family property with the help of which the suit lands could be purchased. Point is that the

onus of proving of these facts is squarely upon the plaintiffs. If they failed to do so, they are out of Court and whether defendant No. 1 had been

successful in establishing his capacity to purchase the land or not is immaterial in that case. In the present case, not only that the plaintiffs have not

succeeded in establishing the nucleus, but really speaking, they have not even pleaded the nucleus. Their own case made out in the plaint digs the

grave of that plea. Even the evidence led by the plaintiffs and defendant No. 4 does not carry their case any further. The question as to whether

defendant No. 4 had the financial capacity to purchase the land is, therefore, immaterial.

But that apart, it is really not correct to say that defendant No. 1 was all that impecunious when he purchased the lands in 1936, 1939, 1942 and

1954. In the first place, it is not a fact that defendant No. 1 was the only earning member in his family. It is the evidence led by defendant No. 1

not contradicted by cross-examination, that defendant No. 1''s wife and mother were also earning members. Mr. Phadkar contended that the

income received by defendant No. 1 from his earnings must have been required for the maintenance of his family and there may be no earnings for

purchase of the suits lands. Even taking this argument at its face value, it will have to be held that if the income of defendant No. 1 was required for

the maintenance of his family, the income of his mother and wife would have been salted away as savings and those savings could as well have

been the source for the purchase of the first two lands. The third land could have been purchased in the year 1942 with the income of the lands

Item Nos. 1 and 2 and the fourth land in the year 1954 with the income of the earlier three parcels of lands.

Mr. Baadkar, appearing for the plaintiffs pointed out that according to defendant No. 1, the suit lands were purchased by him out of his own

income. Even taking that to be true, it would mean that the income of the mother and wife could have been used for house-hold expenses and

atleast part of income of defendant No. 1 could be the defendant''s savings. Whichever way you take, it can be held that there should have been

no difficulty for this family to raise a sum of Rs. 200/- as late as the year 1936 for the purposes of purchasing the suit land item No. 1. The income

that would be received from that land plus the further savings would be sufficient for the purchase of the purchase of the second land, item No. 2

and the income of the two lands would be sufficient for the third land Item No. 3. Similarly, the income of all the three parcels of lands for all the

years from 1942 till the year 1954 would be enough for the purpose of purchase of the fourth land Survey No. 7/2, the price of which was Rs.

2,000/-. It will be thus seen that the evidence of defendant No. 1 was quite consistent with the theory that the could and did purchase the lands out

of his own savings.

But as stated above, this is really putting the cart before the house. It is for the plaintiffs to prove in the first instance that the lands in question were

purchased with the aid of joint family funds. It is only if they succeeded in proving that fact that the onus to prove that he purchased the lands out of

his own funds would shift to defendant No. 1. The plaintiffs having failed to prove their case, the question whether the defendant No. 1 has proved

his capacity to purchase or not is really irrelevant.

(ii) The second submission of Mr. Phadkar is somewhat anomalous. His contention is that even if there is no nucleus, still if a co-parcener says that

a property is his personal property, he must prove that fact. I plainly fail to see the principle upon which the proposition of law could be based. No

authority is cited in support of this proposition. Once it is found that there is no nucleus existing, there is no presumption that the property

purchased by co-parcener is a joint family property. There is no such presumption as urged Mr. Phadkar that any property purchased by any co-

parcener is presumed to be joint family property even though the joint family as such had no funds to purchase the property with.

What is being confused is the joint family with the joint family property. It may be true that the sheer fact that defendant No. 1 and 4 are the sons

of Ramchandra would make them members of the joint family but the fact that they are members of joint family would not mean that the joint family

owned any property. If it was proved that Ramchandra had left any property, the property became joint family property in the hands of defendant

Nos. 1 and 4. But, admittedly, all the properties left by Ramchandra were sold away; the joint family therefore, continued to have no joint family

property with the aid of which the suit properties could be purchased by defendant No. 1. The further contention that defendant No. 1 was the

manager of the joint family is neither here nor there. The concept of manager has relevance in the context of the joint family property because it is

the property which he manages. In the absence of any joint family property, the managerial position is of no relevance or significance.

(iii) The correctness of the next submissions of Mr. Phadkar can be tested in the light of this position of law. The submission is that whenever a

manager purchased any property, there is a presumption that it was for the benefit of the joint family. I see no basis for this proposition. It is not

shown that the joint family had any property, there is no such presumption because there was no property with the manger to ""manage"" with the

help of which he could acquire the other properties. If a person is in the conventional sense the ""manager"" because he happens to be the eldest

brother and if he has no joint family property or funds in hands with the help of which he could purchase any other property, no question of any

property purchased by him ensuring automatically to the benefit of the joint family would arise at all; the manager can purchase property and

contend legitimately that it is his own personal property and unless the nucleus is proved. His contention shall have to be upheld. There is,

therefore, no substance even in this submission of Mr. Phadkar.

(iv) As regards existence of nucleus, no special argument was advanced by Mr. Phadkar apart from that relating to the mango trees. I have already

dealt with the point.

29. I may refer to some other submissions made by Mr. Phadkar, Firstly, he contended that the statement made by the plaintiffs in the plaint

amounting to veritable, admission about the existence of nucleus is not binding upon defendant No. 4 and that it was open for defendant No. 4, in

spite of any such statement on the part of the plaintiffs to contend and prove that there existed nucleus with the help of which defendant No. 4

could purchase the suit properties.

As a general proposition, Mr. Phadkar''s statement need not be quarrelled with. The statement made by the plaintiffs may not be binding upon

defendant No. 4, but the position in this case is that there were various statements made by the plaintiffs some of them were denied by defendant

No. 4, but the statement that there existed no nucleus was not denied by him. Moreover, he did not come out with any case in his written statement

that any particular property constituted the nucleus with the help of which defendant No. 1 could have purchased the suit lands. This being the

position, defendant No. 4 fails in the same boat as the plaintiffs.

30. Nextly, it was contended that the existence of nucleus was the concurrent finding of fact and hence this Court should not interfere with the

same unless this Court finds anything is perverse.

To my mind, this argument is fallacious. I have already referred to the position of the law viz., that in so far as the question relating to the existence

of nucleus was concerned there is, in law, no finding recorded by the Appellate Court. It may be that if any particular finding is perverse this Court

may have the power to interfere with the same. I wish to express no opinion on that point. But the point here is that there exists no legal finding.

The word ""finding"" has got a peculiar legal connotation. It must be after the appreciation of evidence in a reasonable manner. The finding is not the

same thing as crash-landing. What the learned Judge has done in this case is that he has crash-landed upon the conclusion that there existed a

nucleus, without examining the evidence on that point. As pointed out earlier, this is a case where the learned Judge has failed to appreciate the

evidence and has failed to record a judicial finding. The case is directly and squarely governed by section 103 of the CPC and hence this Court has

jurisdiction not only to interfere with the finding but even to reappreciate the entire evidence and to arrive at its own finding; nay; it will be the duty

of this Court in the circumstances, as the present one to do so. The bogie of the concurrent finding of fact, therefore, need not impede this Court in

arriving at a correct finding after appreciation of the evidence.

31. Mr. Phadkar thereafter referred to some kind of averment made by defendant No. 1 in a previous suit filed and withdrawn by defendant No. 4

for partition of the land. It is agreed that defendant No. 1 had averred therein that there was previous partition. Mr. Phadkar contended that there

could have been no partition unless there was joint family property available for partition.

I do not think that it is proper for Mr. Phadkar to raise this contention at this stage. No such case was put to defendant No. 1 in cross-

examination. We do not know the circumstances in which any such statement was made by defendant No. 1 and whether the statement really was

proved"" or not.

32. It was nextly contended that it was not open for this Court to reappreciate the evidence and that even if it was open for this Court to

reappreciate the evidence, this Court should not exercise that jurisdiction especially when there did exist some evidence to support the findings

recorded by the courts below.

This submission is devoid of any force for the reasons which are already mentioned above. The provisions of section 103 of the CPC give full

jurisdiction to this Court even to re-appreciate the evidence in a case where a particular issue has been left by the lower Court judicially undecided.

Morever, it is a fallacy to contend that there existed any legal evidence to support the so-called concurrent finding of fact relating to existence of

nucleus. As stated above, the evidence, is, in fact, not even admissible but even assuming that there existed any such evidence, that evidence had to

be re-appreciated by the lower Court. The failure on the part of the lower Court to appreciate the evidence gives jurisdiction and justification to

this Court to re-appreciate the evidence by itself.

33. This takes me to the arguments advanced by Mr. Baadkar, appearing for the plaintiffs.

He contended initially that there existed pleadings on the part of the plaintiffs in respects of the existence of the nucleus but he was unable to invite

the attention of the Court to any such pleading and he was unable to wriggle out of the admission given by the plaintiffs about the complete absence

of nucleus.

As regards the evidence of the plaintiffs and their witness Bajirao as also of defendant No. 4, the learned Counsel tried his best to explain the

mechanical and unnatural character of the evidence led by the plaintiffs and their witness but I was not at all satisfied by any of the explanations

sought to be given by him. It was pointed out to him that if mango trees existed till the year 1936, not a word was uttered by the plaintiffs or their

witness Bajirao that any income from the trees was received by defendant No. 1 or any of the parties in the previous years. It was pointed out that

only the income from the year 1935 or 1936 was shown and that too, when in the year 1936, the first parcel of the suit land was purchased. The

Counsel submitted that 1935 was the only relevant year and that was the reason why reference was made to the income of only of that year. To

my mind, the entire story is unnatural and artificial. If there really existed mango trees till the year 1936, some evidence would have been on record

that defendant No. 4 or other members of the family received the income till the year 1936 ass also in the year 1937 and 1938, before the trees fell

down. There is not as much as a murmur of such evidence anywhere. The income of the mango trees crops-up when the sale deed is to take place

in 1936. The price of the timber also crops-up only when the sale deed took place in 1939. All these make it a mechanical and artificial story. The

learned Counsel was unable to support the finding of the lower Court based upon such evidence.

34. Moreover, the learned Counsel was wholly unable to explain as to why defendant No. 4 led no evidence on the joint family character of these

properties. He was also unable to explain as to why the plaintiffs have not cross examined defendant No. 4 or his witness. This gesture of the

plaintiffs does go some way to give credence to the case of defendant No. 1 that they were instigated by defendant No. 4 himself.

35. Only one more question may be referred to here. The trial Court not only held that Survey No. 7/2 was the property purchased by defendant

No. 1 as a benamidar for defendant No. 4 but the trial Court even granted a decree for possession in favour of defendant No. 4 Mr. Phadkar was

candid enough to state before this Court that this part of the decree of the trial Court could not be supported. He stated that his client, defendant

No. 4, was entitled to a declaration from the Court that Survey No. 7/2 was his own self-acquired property; but he conceded that no decree for

possession could be passed in defendant No. 4''s favour in the suit filed by the plaintiffs for partition, particularly when no counter-claim was made

by defendant No. 4 nor had he paid the Court fees for the relief claimed given to him.

To my mind, the latter part of the submission of Mr. Phadkar is quite correct. Without going into the question as to whether defendant No. 4 was

entitled to any such declaration in this suit or not, it must be held that the decree passed by the trial Court for possession of Survey No. 7/2 was a

decree wholly without jurisdiction. By my present order, I propose to set aside even that decree. I am told that defendant No. 4 has executed that

decree and has even obtained possession of the said land Survey No. 7/2. If so heirs of defendant No. 1 shall be entitled to institute appropriate

proceedings u/s 144 of the CPC or other-wise and recover back possession of the said land Survey No. 7/2.

36. The appellants, the heirs and legal representatives of original defendant No. 1, have also made Civil Application No. 2259 of 1978 for leading

additional evidence for proving the sale-deed dated 12th December, 1929. By this sale deed, defendant No. 1 appears to have purchased certain

other lands for a sum of Rs. 200/-. It is contended that there is no dispute about the land which was the subject matter of that sale deed. This sale

deed is sought to be produced as additional evidence only with a view to satisfy the Court that defendant No. 1 had capacity to purchase the land

even as early as the year 1929. I heard Mr. Paranjape and Mr. Phadkar on this question. However, I wish to express no opinion on this question

because to my mind, the heirs of defendant No. 1 must succeed even if such an additional evidence is not taken on record. The Civil Application,

therefore, stands disposed of.

37. Having regard to all these circumstances, I am of the opinion that the decree passed by the trial Court as well as by the lower Appellate court

cannot be sustained. The appeal is, therefore, allowed. The decree passed by both the Courts below is set aside and the plaintiffs'' suit is hereby

dismissed. The respondents shall pay the costs of this litigation through-out.