



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO.19 OF 2024

Smt. Ujwala w/o Sheshraoji Guddhe
Aged about 46 years,
Occupation-Nil,
R/o. Hanumanti Ward, Pandhurna,
Tahsil-Pandhurna,
Dist. Chhindwara (M.P.)

.. **Appellant**
(Ori. Defendant No.4)

.. **Versus** ..

1. Prakash s/o Govindrao Dharmadhikari,
Aged 65 years, Occupation-Service,
R/o. MSEB Power House Colony, Paras,
Akola. (Original Plaintiff)
2. Govind Krishnarao Dharmadhikari,
(Since Deceased through L.Rs) (Ori. Deft.No.1)
- 2-a) Sau. Alka w/o Vijay Deshpande,
(Since Deceased through L.Rs)
- 2-a-1) Vijay s/o Krishnarao Deshpande,
Aged 76 years, Occupation-Retired.
- 2-a-2) Amit s/o Vijay Deshpande,
Aged 43 years, Occupation-Service.
- 2-a-3) Nikhil s/o Vijay Deshpande,
Aged 39 years, Occupation-Service.
- 2-a-4) Ku. Soujanya d/o Vijay Deshpande,
Aged 36 years, Occupation-Nil,

(All R/o. Sahayog, Welcome Co-operative
Housing Society, Sonegaon, Nagpur)

3. Ashok s/o Govindrao Dharmadhikari,
Aged 66 years, Occupation-Business,
R/o. A.K. Tambe, Near Mati Ganpati Temple,
Narayanpeth, Pune.
4. Anant s/o Govindrao Dharmadhikari,
Aged 51 years, Occupation-Service.
R/o. Plot No.C-92, Kunjilal Parate Nagar,
Near Sonegaon Tank,
Nagpur. (Org. Deft. No.3)
5. Shri Choubey, Aged Major,
Occupation-Business,
R/o. Dharmadhikari's House,
Hanumanti Ward, Pandhurna,
District-Chhindwara (M.P.) (Org. Deft. No.5)
.. **Respondents**

.....
Mrs. Shiba Thakur, Advocate for Appellant.
Mr. U.A. Gosavi, Advocate for Respondents.
.....

CORAM : SANJAY A. DESHMUKH, J.
RESERVED ON : 25.10.2024.
PRONOUNCED ON : 20.12.2024.

JUDGMENT :

1. This appeal is preferred against the judgment
and decree passed by the learned District Judge-1, Nagpur
in Regular Civil Appeal No.792/2022, dated 26.06.2023.
The first appeal was preferred against the judgment and

decree passed by the learned Civil Judge, Senior Division, Nagpur in Special Civil Suit No.357/2000 dated 27.02.2007. The suit and appeal both were dismissed. The appellant-defendant no.4 has preferred this appeal.

THE PLAINTIFF'S CLAIM :

2. Brief facts of the case are that the plaintiff Prakash s/o Govindrao Dharmadhikari filed suit for partition and separate possession, declaration and perpetual injunction against the defendants of the following properties. These were the subject matter of the suit; (i) House No.234, Ward No.22, situated at Hanumant Ward, Pandhurna, Tahsil-Pandhurna, District-Chindwara (M.P) and (ii) Plot No.C-92, ad-measuring 96 Sq. Meters out of Khasra No.25/2k situated at Ward No.95, Nagpur.

3. The plaintiff contended that his father defendant no.1 Govind having three sons Prakash-Plaintiff, Ashok, the defendant no.2, Anant and the defendant no.3 daughter Ulka. The defendant No.4/Appellant is purchaser of the suit property situated at Pandhurna. During the

pendency of the first appeal, defendant no.1 Govind died. The plaintiff contended that the suit properties are the coparcenary properties of Hindu Joint Family of the plaintiff and defendant nos.1 to 3. However, the house property situated at Pandhurna was illegally sold by the defendant no.1, Govind to the defendant no.4 for total consideration of Rs.3,50,000/- by executing a sale deed dated 24.09.1998. On 01.05.2000, he came to know about that sale deed. He requested defendant nos.4 and 5 to cancel the said sale deed, but they refused. The defendant no.4 was the tenant of the some part of the house at Pandhurna. She purchased that property illegally. It is prayed to declare that said sale deed is null and void and not binding on plaintiff. The partition of suit properties is also claimed.

DEFENCE OF DEFENDANT

4. The defendant no.1 is the father of the plaintiff, admitted that, it is ancestral joint Hindu family property. However, he denied the execution of sale deed in favour of the defendant no.4. It is further contended by the

defendant no.1 in his written statement that in the month of December, 1995, he suffered by the illness, therefore, he came to Nagpur to reside with the plaintiff.

5. The defendant no.4 strongly opposed the suit and contended that the sale deed regarding the house property at Pandhurna is legal. The defendant no.1 was absolute owner of the suit property at Pandhurna. She has paid consideration of Rs.3,50,000/- to the defendant no.1. She is a bonafide purchaser for valuable consideration paid to the defendant no.1 without notice.

6. It is further contended by the defendant no.4 that the Court of Civil Judge, Senior Division at Nagpur has no jurisdiction to try the suit. It is lastly prayed to dismiss the suit as the defendants have engaged in mischief regarding the territorial jurisdiction.

7. The learned Trial Court held that the plaintiff had proved his case for partition. The defendant no.4 has fraudulently got executed the sale deed and caused loss to

the plaintiff. The defendant no.4 failed to prove that, she is a bonafide purchaser of the suit property. The Civil Court has jurisdiction to try the suit and the suit was dismissed.

8. The first Appellate Court dismissed the appeal filed by the defendant no.4 and held that the sale deed executed in favour of the defendants by the defendant no.1 was not for legal necessity. The plaintiff has 1/4th share in the suit property. The Civil Court at Nagpur has territorial jurisdiction and therefore the appeal was dismissed.

9. This court formed the following substantial questions of law :

- (i) *Whether the Courts below erred in concluding that the property situated at Nagpur is an ancestral property without there being any documentary evidence to prove that the father of respondent no.4 purchased the said property from sale proceeds of ancestral agricultural land.?*
- (ii) *Does it amount to waiver of defence of bonafide purchaser for value without notice when ground about the same was not raised in the First Appeal.?*

10. The learned advocate for the defendant no.4 Mrs. Shiba Thakur submitted that though the plaintiff came with the case that the house property situated at Nagpur was purchased with the consideration of sale of the ancestral property of joint family. The plaintiff had taken a loan for it. Moreover, after the decision of the first appeal, the suit property situated at Nagpur is sold by plaintiff. The suit property at Nagpur is not joint family property as asserted by plaintiff in the plaint. There is collusion between the plaintiff and defendant nos.1 to 3 and they have filed the suit in order to drag the defendant no.4 in the territorial jurisdiction of Nagpur Court by falsely contending that suit property situated at Nagpur is purchased out of funds of the joint family. For fraud and collusion, pleading is not necessary as it fraud on court. However no such documentary evidence has been produced on record by the planitiff.

11. The learned advocate for the defendant no.4 further submitted that the plaintiff pleaded that there is Hindu coparcenery family. The plaintiff has not adduced

any documentary evidence to show that there were three generations of common male ancestors of that family and the partition of their coparcenary properties did not take place for three generations, which is basic requirement for claiming coparcenary rights as pleaded by plaintiff. The documentary evidences of paying of taxes to the Municipal Council, Pandhurna are only filed on record to show that it is the ancestral property. All these documents were maintained by Municipal Council, Pandhurna for fiscal purposes of getting taxes etc. from the owner of the house. The city survey record like city survey map, property card etc. is not produced by the plaintiff regarding property at Pandhurna deliberately. It is not coparcenary property. Although some documentary evidence of payment of taxes etc. is produced, legal evidence of title of earlier three generations to prove existence of coparcenary property is not produced. It is not coparcenary property. Therefore, the sale deed executed in favour of the defendant no.4 by the defendant no.1 is legal and valid. The defendant no.4 is in possession of the suit property at Pandhurna.

12. The learned advocate for the defendant no.4 further submitted that to the extent of share of defendant no.4, her sale deed was not held valid by both the courts and about the repayment of the consideration of the suit property at Pandhurna nothing was held by both the courts. It is lastly prayed to allow the appeal and set aside impugned judgment of both the courts.

13. The learned advocate for the plaintiff and defendant nos.1, 2(a) (2 and 3) and 4 Mr. U.A. Gosavi, submitted that there are concurrent findings against the defendant no.4 regarding the nature of the suit properties. The defendant no.4 did not raise ground of objection in the first appeal that she is bonafide purchaser of the suit property for value without notice situated at Pandhurna. No search report of paper publication for inviting objection for its sale was done by defendant no.4. Therefore, she is not bonafide purchaser for value without notice. Furthermore, the defendant no.4 did not plead alleged collusion and fraud as contemplated by Rule 4 of Order VI of the Code of Civil Procedure, 1908 (for short, 'CPC').

The nature of the suit property situated at Nagpur is admitted by the defendant, therefore, it is necessary to prove that it is property of joint family. It is lastly prayed to dismiss the appeal, as there are concurrent findings of both the courts on facts and law. He had relied upon the following precedential law :

Government of Kerala and another .vs. Joseph and others, reported in 2023 SCC OnLine SC 961, in which law is laid down that plea fraud and collusion must be properly raised in the pleading.

14. Perused the impugned judgments, record and proceedings.

15. From the matter before this court, it appears that though the plaintiff contended and deposed that the suit property situated at Nagpur was purchased in his name out of the funds of their ancestral property, no such documentary evidence of sale deed of ancestral property to corroborate said contention has been produced by the plaintiff to show that particular ancestral property of Hindu joint family was sold and that its sale proceeds were used

to purchase the suit property situated at Nagpur as asserted in the plaint by plaintiff. The burden lies upon the plaintiff to prove that the suit properties are coparcenary properties and there is existence of coparcenary of Hindu joint family as pleaded by him.

16. The learned advocate Mr. U.A. Gosavi for the plaintiff and other defendants submitted that the defendant no.4 in her written statement stated that, she had nothing to say about the property situated at Nagpur which is clear admission and, therefore, the burden of proof does not lie upon the plaintiff to prove that suit property at Nagpur was purchased by using the sale proceeds of the ancestral property of their joint family. This argument is not legal and acceptable because in the written statement of defendant no.4 in para no.4 it is denied that it is joint family property. The tenor of cross-examination of the plaintiff also shows that nature of the property at Nagpur that it was purchased out of sale proceeds of joint family property is challenged and denied. The admission must be clear and conclusive as held by Hon'ble Supreme Court in

the precedential law of **Chikkam Koreswara Rao .vs. Chikkam Subbarao and others, AIR 1971 SC 1542**. As per Section 31 of the Indian Evidence Act, 1872 an admission is not conclusive proof. The Section 58 of the said Act provides that an admitted fact need not be proved, but proviso of Section 58 provides that even though the fact is admitted, court may, in its discretion, require that facts admitted to be proved, otherwise than by such admissions. In this case, it is bounden duty of plaintiff to prove that ancestral property was in existence and it was sold with the help of its sale proceeds suit property at Nagpur was purchased. The burden lies upon the plaintiff to prove that the suit property was purchased by him after sale of the ancestral property. In this regard, the plaintiff's mere pleading and oral evidences are not sufficient as it lacks material corroboration of alleged sale deed of ancestral property. It is against the principle of civil trial "that first plead and then prove". Thus, best possible evidence of sale deed of alleged ancestral property is not produced by the plaintiff. Therefore, legitimate adverse inference can be drawn against the plaintiff that there is no such evidence

in existence, hence it is not produced on record as per Section 114 illustration (g) of the Indian Evidence Act, 1872. It is settled law that the plaintiff must stand on his own feet and cannot take disadvantage of weakness of the defence of the defendants. Though defendant no.4 stated in her written statement that she has no concern with the suit property at Nagpur, it is not conclusive admission as she had denied the nature of suit property that it is not purchased out of funds of sale of property of joint family.

17. To prove the subsequent conduct under Section 8 of Indian Evidence Act, 1872 of the plaintiff, the learned advocate for the defendant no.4 filed an application for producing an additional evidence of sale deed of suit property at Nagpur sold by the plaintiff during pendency of this litigation. It is submitted to allow additional evidence as per Order 41, Rule 27 of the CPC for just decision of this appeal as it is subsequent event which this court can take into consideration. The learned advocate for the defendant no.4 pointed out that from recitals of said sale deed it reveals that the suit property at Nagpur was purchased

with the loan from Union Bank of India, Civil Lines, Nagpur. She submitted that the sale deed of the suit property at Nagpur is concrete evidence to show that it is not joint family acquired with the funds of ancestral joint family property.

18. The said application for the production of additional evidence is strongly opposed on behalf of plaintiff. The learned advocate Mr. U.A. Gosavi for the plaintiff and other defendants though strongly objected for producing the sale deeds on record fairly conceded that the suit property at Nagpur has been sold by the plaintiff. He submitted that defendant no.4 has no *locus standi* as to the said sale deed.

19. The plaintiff asserted that there is coparcenary joint family and these two suit properties are coparcenary properties. The burden of proof lies upon the plaintiff to prove the existence of coparcenary Hindu family and its coparcenary property, which is basis of the suit of the plaintiff which goes to the root of this case. Though

plaintiff pleaded that suit property at Nagpur is purchased with sale proceeds of the ancestral property of joint family, there is no such independent evidence of it and mere pleading is not sufficient. Therefore, as held above an adverse inference under Section 114 illustration (g) of Indian Evidence Act can be safely drawn against the plaintiff that no such evidence of sale deed of the ancestral properties is in existence, hence it is not produced on record and property at Nagpur is not coparcenary property. This leads to draw a legitimate inference that the plaintiff and defendant nos.1 to 3 have by practicing fraud upon courts and in collusion with each other filed the suit at Nagpur by making false contention that suit property at Nagpur is joint family property and it is purchased out of sale proceeds of joint family by selling their ancestral property.

20. The learned advocate for plaintiff submitted precedential law of **Bhushan Narain .vs. Seogeni Rai, 1951 SCC 447**, in which law is laid down that fraud and collusion must be pleaded. It has not been pleaded by the

defendant no.1. Also Rule 4 of Order VI of the CPC requires that fraud must be specifically pleaded. Nobody will dispute the ratio laid down in the above precedential law. However, if the entire evidence is considered together, it is very difficult to accept the plaintiff's case that the suit property at Nagpur is joint family property without there being any documentary evidence to corroborate the plaintiff's evidence. The plaintiff by practicing fraud illegally dragged the jurisdiction at Nagpur Court. If such is the case then territorial jurisdiction to file the suit at Nagpur does not lie to the Court of Civil Judge, Senior Division at Nagpur. This important legal aspect was not considered by both the courts properly and legally.

21. The substantial question of law no.1 is therefore answered that the plaintiff failed to prove by cogent evidence that the suit property at Nagpur is ancestral joint family property and there is no any documentary evidence to prove that the plaintiff purchased it from the sale proceeds of ancestral agricultural land as pleaded by him in the plaint. Both the courts erred in

appreciating and concluding that it is ancestral property even though no such evidence on record.

22. From the pleading and oral evidence of the plaintiff, it is crystal clear that the legal mischief has been played by him and defendant nos.1 to 3 to drag the jurisdiction of the civil court at Nagpur. They committed fraud upon the court and defendant no.4. For that pleading of fraud and collusion is not necessary as contemplated by Section 44 of the Indian Evidence Act. The decree obtained by fraud is nullity.

23. Thus territorial jurisdiction to try the suit does not lie to the Civil Judge, Senior Division Court at Nagpur as per Section 17 of CPC. but by false pleading it was filed at Nagpur. There is no necessity to plead collusion and fraud if it is practiced upon court in. In peculiar set of facts of this case, it would be proper and relevant to refer following two precedential laws in this regard which are squarely applicable to this case in hand.

(i) **IN RE : Perry Kansagra..Alleged Contemnor,**
reported in 2022 LiveLaw (SC) 576, Ho'ble Supreme Court
observed as follows :

“A person who makes a false statement before the Court and makes an attempt to deceive the Court, interferes with the administration of justice and is guilty of contempt of Court. The Court not only has the inherent power but it would be failing in its duty if the alleged contemnor is not dealt with in contempt jurisdiction for abusing the process of the Court.”

The Hon'ble Supreme Court also directed to lodge a report. The CBI inquiry was directed heavy costs was also awarded.

(ii) **S.P. Chengalvaraya Naidu (Dead) by L.Rs. .vs. Jagannath (Dead) by Lrs. and others, (1994) 1 Supreme Court Cases 1,** in which it is held that non disclosure of the release deed amounts to fraud on court and hence decree is liable to be set aside.

24. As per reasons stated above and law laid down in above two precedential laws, it is found that it is very

serious criminal as well as civil mischief which are committed by the plaintiff and defendant nos.1 to 3, for which heavy cost must be saddled upon the plaintiff as his fraud flouted the stream of justice.

25. The second substantial question of law is answered as to whether the defence of bonafide purchaser for value without notice is waived by the defendant no.4. No doubt, the said defence was not raised by the defendant no.4 as grounds of objections in the first appeal. As per law laid down in the case of **Dr. Mahesh Chandra Sharma .vs. Rajkumari Sharma, (1996) 8 SCC 128** relied upon by the plaintiff, it is waived by defendant no.4. However, in view of the finding given above on substantial question of law no.1 that fraud is practiced upon the court the waiver of defence by defendant no.4 becomes redundant, especially when both the impugned judgments were obtained by the plaintiff fraudulently by illegally dragging jurisdiction of civil court at Nagpur. It were passed without having territorial jurisdiction. The substantial question of law no.2 is therefore answered that

waiver as it does not arise for consideration and determination in view of the above reasons and findings on substantial question of law no.1 which goes to the root of the case.

26. The judgments and decrees of both the Courts obtained by collusion and fraud practiced on court without territorial jurisdiction, therefore, those are liable to be set aside. The appeal deserves to be allowed. The suit deserves to be dismissed with respect to the defendant no.4 and her property at Pandhurna (M.P.).

27. The impugned judgments and decrees of both the courts deserve to be set aside. Therefore, the argument of the learned advocate for the plaintiff is not acceptable in this regard. Considering the reasons stated above and different facts of the case in hand, the precedential laws submitted by the plaintiff supra are not useful for the plaintiff, hence those are not relied upon.

28. As held above, the fraud is practiced upon the court and both the impugned judgments are obtained illegally by fraud and collusion, the appellant-defendant no.4 had been unnecessarily compelled to face the suit and these two appeals without any justification either on law and fact. She was compelled to file this appeal and first appeal. The defendant no.4 must have incurred huge amount to face these litigation for years together. Therefore, it would be just and proper to award heavy costs of Rs.25,000/- (Rs. Twenty Five Thousand only) to be paid by the plaintiff to the defendant no.4.

29. It is clarified that prayer for additional evidence is not allowed in view of the above reasons that it is relevant but not necessary. The appeal deserves to be allowed. The suit deserves to be dismissed. Therefore, precedential laws submitted by both sides regarding production of additional evidence is not discussed here.

30. The appeal deserves to be allowed. The suit deserves to be dismissed. Hence, the following order :

ORDER

1. The appeal is allowed. The impugned judgments and decrees of both the courts are set aside in respect of suit property of defendant no.4 situated at Pandhurna. The suit is dismissed against defendant no.4.
2. The plaintiff to pay costs of Rs.25,000/- to defendant no.4 within three months. If it is not paid within three months, he has to pay 9% interest on it from today.
3. Pending applications, if any, are disposed of.

(Sanjay A. Deshmukh, J.)

(i) After pronouncement of the judgment, Mr. U.A. Gosavi, learned advocate for the plaintiff submitted to stay the execution and operation of this judgment for two months.

(ii) Mrs. Shiba Thakur, the learned advocate for the appellant-defendant no.4 strongly objected for granting a stay to the execution of the judgment.

(iii) Considering peculiar set of facts and ensuing Christmas Vacation, it would be proper to grant stay to the execution of this judgment for two months.

(Sanjay A. Deshmukh, J.)