Mahtab Devi Vs. Narayan Sao and ors.

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Court : Patna

Decided On : Jul-03-2007

Judge : S.N. Hussain, J.

Appellant : Mahtab Devi

Respondent : Narayan Sao and ors.

Disposition : Appeal allowed

Prior history : S.N. Hussain, J. 1. This second appeal has been filed by the plaintiff against the judgment and decree of reversal passed by the learned Court of appeal below. 2. This second appeal arises out of title Suit No. 113 of 1981 which was filed by the sole plaintiff-appellant with respect to the suit properties detailed in Schedule-2 of the plaint, namely 3 acres 14 decimals of land appertaining to various khesras of Khata No 151, Tauzi No. 14066, Thana No. 235, situated in village Mohiuddinpur Gee

Judgement :

S.N. Hussain, J.

1. This second appeal has been filed by the plaintiff against the judgment and decree of reversal passed by the learned Court of appeal below.

2. This second appeal arises out of title Suit No. 113 of 1981 which was filed by the sole plaintiff-appellant with respect to the suit properties detailed in Schedule-2 of the plaint, namely 3 acres 14 decimals of land appertaining to various khesras of Khata No 151, Tauzi No. 14066, Thana No. 235, situated in village Mohiuddinpur Geelani, under Asthanwa Police Station within the district of Nalanda for the following reliefs:

(i) a declaration that the plaintiff had full right, title and interest in the suit property;

(ii) cost of the suit;

(ii) any other reliefs to which the plaintiff is deemed entitled

3. The claim of the plaintiff was that she was the wife of Saudi Sao (defendant No. 4) who was resident of another place, but he settled in Mohiuddinpur Geelani under Asthanwa Police Station in the district of Nalanda. She further claimed that he had no ancestral property but his exclusive personal business flourished and out of the income of his said business he purchased several properties including the suit properties by registered deeds dated 4-8-1956 (Ext-2 series) from the admitted owner in his own name, whereafter he came in exclusive possession as absolute owner thereof and was duly recorded in the revenue records and got Government receipts on. payment of Malguzari.

4. The plaintiff also averred that the first wife of Saudi Sao, namely Dhano Devi, died much earlier leaving behind a son Narayan Sao (defendant No. 1) whereafter Saudi Sao married the plaintiff from whom he got four sons and two daughters. It is also the plaintiffs claim that about year 1949 the said Narayan Sao along with wife and children separated from his father Saudi Sao and since then Narayan Sao was doing his separate business and had been living separately.

5. The plaintiff further Claimed that Saudi Sao dealt with the purchased properties throughout as absolute owner and executed a mortgage deed (Rehan Dekhla) on 3-12-1966 which was also duly registered in favour of Jichho Devi for Rs. 1500.00 and in the said deed Narayan sao (defendant No. 1) signed as a witness. It is also averred by the plaintiff that in the aforesaid facts and circumstances the said Saudi

Sao executed deed of gift dated 15-9-1976 (Ext-3) with respect to the suit properties in favour of the plaintiff and got it registered and handed over the possession of the same to the plaintiff who since then is in exclusive possession of the gifted properties as absolute owner thereof.

6. The plaintiff also claimed that defendant No. 1 Narayan Sao and his children (defendants Nos. 2 and 3) mad no tolerance towards the plaintiff and her children and they had been harassing the plaintiff, her husband and her children and when in the year 1976 she applied for mutation of her name on the basis of registered deed of gift she learnt that defendant No. 1 has got his name recorded 'Bala Bala' without any notice of information to the plaintiff or her husband, but when the plaintiff filed an objection before the mutation authorities an inquiry was made and plaintiff was found in possession of the suit premises on the basis of which the receipt issued in favour of defendant No. 1 was cancelled and it was ordered that the name of Saudi Sao, the husband of the plaintiff, should be allowed to remain recorded as before. Further claim of the plaintiff is that after the aforesaid gift she paid the mortgage amount and got the above mentioned mortgage redeemed in her favour. The plaintiff also stated that in the aforesaid facts and circumstances, defendant No. 1 tried to cast a doubt on the right title and possession of the plaintiff over the suit properties and hence it was necessary for her to file the instant suit for declaration of her title over the suit properties.

7. Defendant No. 1 appeared in the suit and filed his written statement inter alia 'Claiming that the ancestral house of Saudi Sao was in village Kabilganj under Barbigha Police Station in the district of Munger, but he shifted to village Mohiuddinpur Geelani which was the maternal place of Saudi Sao. It was also the claim of defendant No. 1 that before start of Second World War in 1939, Saudi Sao did business in Calcutta and thereafter he left Calcutta and settled in Village Mohiuddinpur Geelani when defendant No. 1 was only 10 years old. He also averred that the properties in the said village was purchased from the joint family income of Saudi Sao, his first wife Dhano Devi, his son (defendant No. 1), but since Saudi Sao was the Karta of the family, all the properties were purchased and recorded in his name. He also averred that the purchase of the suit properties and other properties by registered deeds dated 4-8-1956 (Ext.-2 series) was made by

Saudi Sao from the aforesaid joint income of the family business, whereafter the said Dhano Devi died in the year 1958 and Saudi Sao brought the plaintiff to his house in 1959, although she was the wife of another person Ganga Sao, but since she was a woman of questionable character, she got Saudi Sao entangled in her love and started living with him without marriage. It is also averred that due to the plaintiff Saudi Sao started ignoring defendant No. 1 due to which he left his house and started doing private service in village Barbigha and subsequently on 21-7-1961 he got the family properties partitioned with Saudi Sao who executed a memorandum of partition which was signed by Badri Mahto and Chhote Sao as witnesses. It is also stated that in the aforesaid circumstances Saudi Sao had no right to execute deed of gift in favour of the plaintiff with respect to the suit properties as it had been partitioned on 21 -7-1961. He also averred that the deed of gift was forged and fabricated and on its basis the plaintiff cannot claim any right, title and interest in any of the suit properties which are in possession of the defendants.

8. The learned trial Court framed the following issues:

(i) Is the suit as framed maintainable?

(ii) Has the plaintiff got any cause of action for the suit?

(iii) Is the suit under-valued?

(iv) Whether the plaintiff has right, title and interest over the disputed properties by virtue of deed of gift dated 15-9-1976?

(v) To what other relief or reliefs, if any, the plaintiff is entitled to?

9. The said Title Suit was decreed by the learned Munsif, Biharsharif (Nalanda) on contest with cost by judgment and decree dated 20-9-1989 after arriving at the following findings:

(i) The suit is maintainable and the plaintiff had valid cause of action for the suit.

(ii) The valuation which was assessed by the plaintiff is correct and the suit property is not under-valued.

(iii) Saudi Sao became separate in 1949-50 from his son Narayan Sao who was from his first wife and not in 1961.

(iv) Since the sale deed dated 4-8-1956 was only in favour of Saudi Sao who had started his business having no nucleus of the family, the burden was on the defendants to prove that the disputed properties were purchased by joint family fund.

(v) Since there was no ancestral property, there was no question of any nucleus in the family and the defendants failed to discharge their onus.

(vi) The disputed properties were self acquired properties of Saudi Sao out of his own personal income.

(vii) The defendants did not adduce any oral or documentary evidence to disprove the deed of gift dated 15-9-1976, whereas the plaintiff had proved the same by valid evidence.

(viii) Saudi Sao had gifted the suit properties to his wife, namely the plaintiff, by registered deed dated 15-9-1976 (Ext.-3) by which she acquired right, title and interest in the suit property.

10. Against the aforesaid judgment and decree of the trial Court, the defendants filed title Appeal No. 146 of 1989 (17 of 1994) which was allowed in part by learned 3rd Additional District Judge, Nalanda at Biharsharif by his judgment and decree dated 15-5-1996 after arriving at the following findings.-

(i) The question of valuation was properly decided by the trial Court.

(ii) The defendants' claim that the plaintiff was not legally married wife of Saudi Sao is totally irrelevant in the instant matter as she is claiming on the basis of a gift.

(iii) The main question to be seen in the instant case is as to when partition took place between the father and son, namely Saudi, Sao and Narayan Sao.

(iv) D. Ws. 2, 3,5 and 7 have proved separation between Saudi Sao and Narayan Sao about the year 1961.

(v) Ext.-2 Rehan Dakhli Deed although signed by Narayan Sao also, but the same was mortgaged only by his father Saudi Sao and Narayan Sao was in no way concerned with the mortgaged property, hence the said deed cannot falsify the defendants' case of partition.

(vi) The evidence led on behalf of the defendants on the point of partition in 1961 is far superior to the evidence led by the defendants on the point of separation in 1949-50.

(vii) The partition took place between the father and the son in the year 1961 in which the suit property was allotted to Narayan Sao.

(viii) Saudi Sao had no right to transfer the land which was allotted to the share of his son.

(ix) The gift by Saudi Sao with respect to those lands which had fallen to the share of Narayan Sao cannot bind the defendants and cannot create any title in favour of the plaintiff.

(x) The joint family had no nucleus in the-shape of joint family property yet the property obtained by the plaintiff was also obtained through the joint effort of Saudi Sao-and his son Narayan Sao from his first wife.

(xi) The property acquired in the name of Saudi Sao before partition is joint family properly in which Narayan Sao also has contributions and hence the said property was joint family property.

(xii) The deed of gift of the property executed by Saudi Sao in favour of his wife Mahtab Devi (plaintiff) is partially valid and partially invalid because it also includes the land of the defendants.

(xiii) The plaintiff acquired right, title and interest over the land gifted to her by her husband Saudi Sao to the extent of his share only and she had not acquired any title over the land gifted by her husband which had fallen to the share of Narayan

Sao.

11. Against the aforesaid judgment and decree of the lower appellate Court, the plaintiff filed the instant Second Appeal No. 175 of 1996 in which the following substantial questions of law were framed by this Court at the time of hearing under Order XLI Rule 11 of the Code of Civil Procedure (hereinafter referred to as the code for the sake of brevity) on 4-5-1998:

(a) Whether Ext-B written faisala is maintainable in evidence and the learned appellate Court has committed an error as relying in Ext-B?

(b) Whether the learned appellate Court is correct in holding that gift was effected in favour of Mahtab Devi after partition between Saudi Sao and Narayan Sao. This is so even according to the defendant's own case?

(c) Whether the learned appellate Court is correct in saying that after partition it became the self acquired property of Narayan Sao at least to that extent which fell to his share he was at liberty to gift his property to any one he likes?

(d) whether the learned appellate Court is correct in saying that such property is deemed to be the joint family property which is based on misreading of evidence?

(e) Whether the judgment of the appellate Court can sustain in law. Mauzi Sao died in course of appeal and appellant/respondent did not substitute the legal heir of Mauzi Sao, so the appeal before the lower appellate Court is abated?

12. The second appeal was finally heard and allowed by this Court by judgment dated 20-4-2000 after arriving at the following findings:

(i) The lower Appellate Court gave a baseless finding that although joint family had no nucleus in the shape of joint family property yet the property obtained by Saudi Sao was obtained through the joint effort of his son Narayan Sao who also contributed for purchase of property before partition.

(ii) The lower appellate Court did not make any attempt to dislodge the cogent finding given by the learned Munsif that the disputed property was self acquired property of Saudi Sao.

(iii) There is no evidence to support the defendants' plea that the property was acquired by the effort of Narayan Sao (defendant No. 1) and his father.

(iv) The judgment and decree of the lower appellate Court is not consistent with the evidence of the case.

(v) The decree of the lower appellate Court is set aside and the decree of the trial Court is restored.

13. The aforesaid judgment of this Court was challenged by the defendants in the Hon'ble Supreme Court vide Civil Appeal No. 2870 of 2002. By judgment dated 23-4-2002 the Hon'ble Supreme Court set aside the aforesaid judgment of this Court and disposed of the Civil Appeal remitting the matter to this Court with the following observations:

We feel that it would be in the interest of justice if the matter is sent back to the High Court for disposal of the second appeal afresh in terms of the provisions of Section 100 of the CPC after framing substantial question of law keeping in mind various judgments of this Court on the relevant section including judgments in Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors. : [1999]2SCR728 and Veerayee Ammal v. Seeni Ammal : AIR 2001 SC2920 . Accordingly, the impugned judgment is set aside and the matter is remitted back to the High Court for disposal in accordance with law keeping in view the observations made in this order. The appeal is disposed of.

14. Although substantial questions of law were earlier framed by this Court on 4-5-998, but this Second Appeal was never admitted for final hearing and it was allowed at the stage of hearing under Order XLI Rule 11 of the Code itself by the aforesaid judgment of this Court dated 20-4-2000, which has been deprecated and set aside by the Hon'ble Apex Court in its above mentioned order dated 23-4-2002 remitting the Second Appeal to this Court for placing it for final hearing and deciding it on the basis of substantial questions of law. Section 100 of the Code prescribes the forum for challenging an appellate decree, whereas the various Rules under Order XLI of the Code provide procedures for conduct of an appeal from appellate decree. It is true that as per the principles of law, specifically Rules

11 and 12 of the Order XLI of the Code, an appeal from an appellate decree can be dismissed at the admission stage of hearing under Order XLI Rule 11 of the Code, if no substantial question of law is found to be involved or raised by the appellant, but if any substantial question of law is found to be involved therein, such a second appeal cannot be allowed at the admission stage of hearing under Order XLI Rule 11 of the Code, rather it has to be admitted only at that stage under the provision of Order XLI Rule 12 of the Code framing substantial question of law involved for being decided at the time of final hearing of that appeal under the provision of Rule 16 of Order XLI of the Code. In this regard, reference may be made to a decision of the Hon'ble Apex Court in case of Ramji Bhagala v. Krishnarao Karirao Bagre and Anr. reported in : AIR 1982 SC1223 , in which it has been held that at the stage of hearing under Order XLI Rule/ 11 of the Code there are only two options for the Court hearing Second Appeals namely either such appeals can be admitted as a whole or can be rejected as a whole. Thus, it is quite apparent that at the stage of hearing under Order XLI Rule 11 of the Code, an appeal from an appellate decree cannot be legally allowed unless all the respondents suo motu appear at that stage and all the parties arrive at an agreement compromise in that regard. Hence, in view of the aforesaid order of the Hon'ble Apex Court dated 23-4-2002, this Second Appeal has now been placed before this Court for final hearing.

15. In the aforesaid facts and circumstances, the applicability of the provision of Section 100 of the Code as well as of the two judgments, referred in the order of the Hon'ble Apex Court dated 23-4-2002, to the facts and circumstances of this case have to be considered by this Court now.

The provision of Section 100 of the Code after its amendment vide Amendment Act No. 104 of 1976, which came into force with effect from 1-2-1977, reads as follows:

100. Second Appeal.- (1) Save as otherwise expressly provided in the body of this Code by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of

law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question

16. It may be noted that even before the said amendment of Section 100 of the Code in 1976, the concurrent findings of facts by the Courts below could not be disturbed by the High Court in second appeals as has been held by Hon'ble Apex Court, namely in case of Paras Nath Thakur v. Smt. Mohani Dasi (deceased) reported in AIR 1959 SC 1204 and in case of Sri Sinha Ramanuja Jeer Swamigal v. Sri Ranga Ramanuja Jeer alias Emberumanar Jeet reported in : [1962]2SCR509 .

17. It may also be noted that prior to the said amendment of 1976 also the conditions specified in Section 100 of the Code were required to be strictly fulfilled and second appeals could not legally be decided on mere equitable grounds and in that view of the matter what would be the proper test for determining a substantial question of law in a second appeal was also decided by the Hon'ble Apex Court in case of Chunilal V. Mehta and Sons Ltd. v. Century Spinning and . reported in : AIR 1962 SC1314 in which it was held as follows:

We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

18. The matter was also considered by 'the Hon'ble Apex. Court in case of V. Ramachandra Ayyar v. Ramalingam Chettiar reported in : [1963]3SCR604 and in case of Madamanchi Ramappa v. Muthaluru Bojjappa reported in : [1964]2SCR673 in which it were respectively held as follows:

The question about the limits of the jurisdiction of the High Court in entertaining second appeals has been considered by several High Courts in India as well as the Privy Council on numerous occasions, and the true legal position in that behalf is not at all in doubt. In hearing a second appeal, if the High Court is satisfied that the decision is contrary to law or some usage having the force of law, or that the decision has failed to determine some material issue of law or usage having the force of law, or if there is a substantial error or defect in the procedure provided by the Code, or by any other law for the time being in force which may have produced error or defect in the decision of the case upon the merits, it can interfere with the conclusions of the lower appellate Court.

19. There fore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is

inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by Courts of fact; but on such occasions it is necessary to remember that what is administered in Courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously en-deavourjo avoid.

20. Interpreting Section 100 of the Code after its amendment of 1976, the Hon'ble 'Apex Court in its decision in case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar reported in : [1999]2SCR728 as well as in : [1999]2SCR728 , specifically held that second appeals cannot be decided merely on equitable grounds and that in a second appeal substantial question of law has to be distinguished from a substantial question of fact and concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of its powers under Section 100 of the Code. It was also held that in a second appeal the High Court cannot substitute its own opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or to the principles of law settled by the judicial pronouncement or was based upon inadmissible evidence or arrived at without any evidence.

21. In another decision of the Hon'ble 'Apex Court in case of Veerayee Atnmal v. Seeni Ammal reported in : AIR 2001 SC2920 as well as in : AIR 2001 SC2920 , it was held that the amendment of the Code In the year 1976 made it obligatory upon the High Court to entertain second appeals only when it was satisfied that the appeal involved substantial questions of law. It was also held that substantial question of law has to be precisely mentioned in the memorandum of appeal and formulated by the High Court in its judgment for decision and the appeal can be heard only on the said formulated substantial questions of law, but this aspect of the matter is ignored in some of the judgments of the High Court in which despite

amendment, the provision of Section 100 of the Code are being liberally construed and generously applied frustrating the object of the said amendment in the Code.

22. From the memorandum of the instatement second appeal it is quite apparent that the appellant had mentioned the substantial questions of law therein which she wanted to raise in the second appeal and the said questions were formulated by this Court as substantial questions of law while hearing the second appeal under Order XLI, Rule 11 of the Code on 4-5-1998. However, the said substantial questions of law stated in the memorandum of second appeal and formulated at the time of its hearing under Order XLI, Rule 11 of the Code were not specifically mentioned in the judgment dated. 20-4-2000 by which the instant second appeal was earlier decided and which was under challenge before the Hon'ble Apex Court. Hence, the matter has been remitted to this Court to reconsider the matter on the basis of the substantial questions of law as per the provision of amended Section 100 of the Code and the aforesaid two decisions of the Hon'ble Apex Court in cases of Kondiba Dagadu Kadam (supra) and Veerayee Ammal (supra).

23. It may be stated at the outset that the matter in issue is not based on any concurrent finding of fact. The main question is as to whether the suit properties were acquired by Saudi Sao by three registered sale deeds dated 4-8-1956 (Ext. 2 series) from his own, personal and exclusive income or it was purchased from the income of joint family business which included Saudi Sao, his first wife Dhano Devi and his son Narayan Sao (defendant No. 1). The trial Court held that the said property was acquired by Saudi Sao out of his own personal income his exclusive business in which defendant No. 1 or his mother had no interest, right or share. The lower appellate Court reversed the said finding and held that said Saudi Sao doing business in jointness with his first wife and son mentioned above and from that income the said purchase of the suit land was made which was joint family property. The other question was with respect to separation of defendant No. 1 Narayana Sao from his father Saudi Sao and the trial Court held that defendant No. 1 separated from his father in the year 1949-50, whereas the lower appellate Court reversed the said finding holding that partition between them took place in the year 1961. The concurrent finding of fact by both the Courts below was with respect to the marital status of the plaintiff and the deed of gift dated 15-9-1976

(Ext. 3) and both the learned lower Courts held that the said deed of gift was executed by Saudi Sao in favour of his second wife, namely the plaintiff, whereafter the said deed was registered also. It has also been found by both the Courts below that although both the plaintiff as well as defendant No. 1 tried to get their names mutated, but their petitions were rejected and the said lands are still recorded in the name of Saudi Sae.

24. With regard to the aforesaid fact the Difference between the learned Courts below is only that the learned trial Court has held that by the said deed of gift, Saudi Sao transferred the entire suit properties to his second wife, whereas the learned lower appellate Court has held that although the entire suit properties had been described in the deed of gift, but Saudi Sao cannot legally transfer the share allotted in partition of 1961 to his son Narayan Sao and hence deed of gift was valid only to the extent of share of Saudi Sao. Hence, this issue also depends upon the validity of the claim of partition with respect of separation/ partition.

25. It is admitted by both the parties that Saudi Sao had no ancestral property, nor there was any joint family property, nor even there was any nucleus of joint family. It is also an admitted fact that Saudi Sao was doing business in Calcutta while his son defendant No. 1 was minor of about ten years of age and his first wife had no income of her own. The contesting defendants had not produced any evidence to show that either the first wife of Saudi Sao had any income or defendant No. 1 in any manner contributed to the said business of Saudi Sao, nor they pleaded or proved that they had any other source of income. On the other hand, the plaintiff had specifically pleaded and proved by evidence, including the evidence of Saudi Sao (defendant No. 4) who deposed as P.W. 1, that business of Saudi Sao was his exclusive business and from the income of his said exclusive business he had purchased the properties by registered sale deeds dated 4-8-1956 (Ext. 2 series) in his own name. In the aforesaid circumstances, learned trial Court rightly held that the suit properties along with other properties were purchased by Saudi Sao by registered sale deeds dated 4-8-1956 (Ext. 2 series) out of his own income and they were his exclusive and self acquired properties. However, although the learned appellate Court itself found in paragraph 15 of its judgment that defendant Nos. 1 to 3, who were appellants in the Title Appeal, have failed to show that any

property was acquired by Saudi Sao by any joint family property income, that Saudi,. Sao had no property whatsoever prior to the said purchase and that there was no nucleus of the joint family, but even then it held that, the properties purchased by sale deeds dated 4-8-1956 would be deemed to be joint family property because the same was acquired through the efforts of the father and the son both. The said finding of the learned lower appellate Court is absolutely illegal as there was no material whatsoever on the record even to show that how and in what manner defendant No. 1 contributed or made efforts for the said purchases, specially when both the Courts below have concurrently found that neither there was any income of defendant No. 1, nor there was any joint family property, nor there was even any nucleus of the joint family from which the suit properties could have been purchased

26. In view of the aforesaid finding the question of separation/partition becomes secondary because when the properties in question were self acquired properties of Saudi Sao, who was the exclusive owner thereof, there was no question of any partition thereof between him and his first wife or his son (defendant No. 1). However, the witnesses of the plaintiff, specially her husband Saudi Sao (defendant No. 4) who deposed as P.W. 1, stated that he had solemnised second marriage with the plaintiff in the year 1947 and immediately, thereafter Narayan Sao became separate and in that separation, house hold articles and some cash were given to him and this was proved by the fact that his eldest daughter from the plaintiff was aged about 35 years. Although the said separation was oral, but the same was proved by P.W. 3, P.W. 4 (plaintiff), P.W. 5 etc. D.W. 5 although supported the defendants' claim of partition of 1961 in his deposition, but he clearly stated that Ruksati (Bidai) of the first wife of Saudi Sao took place when he attained 'Hosh' which comes to about the year 1933. He further stated that the first wife of Saudi Sao died after 12-15 years from the said Ruksati which clearly shows that the first wife of Saudi Sao, who was the mother of Narayan Sao, died sometimes in the year 1946-47 and hence the claim of defendant No. 1 regarding death of his mother in the year 1958 and she being alive at the time of purchase in the year 1956 was falsified by his own witness who supported the evidence of Saudi Sao as P.W. 1 in that regard.

27. On the other hand defendants claim of partition on 21 -7-1961 depends upon one document, namely Yadashtnama of partition dated 21-7-1961 (Ext. B). It is apparent from the said document that no details of lands, house or plot numbers, which were to be partitioned between the parties, were given therein. Furthermore, the said document is a Sada document and the date given in it is clearly an overwriting, whereas the alleged signatures of the parties are on the back of the Yadashtnama instead of being below the contents of the Yadastnama. The said document also shows that it was for distribution of grains and money and the statements with regard to lands were inserted later on. Furthermore, from the records of the mutation case after 1976, it appears that the aforesaid Yadashtnama of 1961 (Ext. B) was not produced before the authorities. Hence, it appears to have been prepared subsequently only for the purposes of the instant suit. The said Yadashtnama is not supported by any valid or reliable material. Ext. C series are report of Karmchari, circle Inspector and circle Officer, but none of them were examined by the defendants to prove the same and hence those reports cannot be legally relied upon. Ext. A, Ext. D series, Ext. F and Ext. G are with respect to mutation case which merely show that defendant No. 1 Narayan Sao had contested the case, but none of these papers of mutation case show that defendant No. 1 ever filed the Yadashtnama (Ext. B) in the said mutation case. So far witnesses of defendants are concerned, D. W. 3 of the same village sought to prove the Yadashtnama of partition, but he specifically stated that none of the parties or the Panchas signed over it. Considering the aforesaid facts and materials as well as other evidence adduced by the parties, the trial Court rightly held that the Yadashtnama (Ext. B) was not a genuine document, rather it was forged and fabricated paper prepared for the purposes of the suit. However, without considering the force of the findings of the trial Court on the aforesaid materials, the lower appellate Court passed its impugned judgment and decree on the conclusions which were erroneous being contrary to the principles of law settled by judicial pronouncements and were based on inadmissible evidence.

28. The oral and documentary evidence of the plaintiff fully proved that deed of gift dated 15-9-1976 (Ext. 3) executed by defendant No. 4 (P.W. 1) in favour of the plaintiff and to disprove the same that defendants could produce no material whatsoever and hence the trial Court rightly found that the said registered deed of

gift was a genuine document and conferred right, title and interest on the plaintiff with respect to the suit properties. The learned appellate Court also found that defendant No. 4 (P.W. 1) had executed the deed of gift in favour of his wife, namely the plaintiff, but surprisingly enough assumed that it would be valid only with respect to the share of Saudi Sao (defendant No. 4) and not with respect to the share of Narayan Sao (defendant No. 1) although there was no material at all to show that defendant No. 1 had any right, title, share, interest or possession over the suit properties which were gifted by defendant No. 4 Saudi Sao to the plaintiff by the aforesaid deed of gift. In the said circumstances, it is quite apparent that there being no evidence to prove the plea of defendant No. 1 that the property was acquired by his effort, money or share and there being ample evidence to prove that the purchase made by defendant No. 4 Saudi Sao by registered documents in the year 1956 was his exclusive purchase in his own name, the learned appellate Court has committed clear error of law in relying upon the Sada memorandum of partition (Ext. B), although it was clearly a forged and fabricated paper prepared only for the purposes of the suit as has been found above and on that basis, the learned lower appellate Court has wrongly held that the gift of 1976 by defendant No. 4 in favour of the plaintiff would be only with respect to the share of defendant No. 4 Saudi Sao and not with respect to share of defendant No. 1 Narayan Sao, although it was clearly proved that the said properties were exclusive and self acquired properties of Saudi Sao which was not disproved by the contesting defendants by any material whatsoever.

29. Considering the aforesaid facts and circumstances in terms of the provision of Section 100 of the Code and also considering the substantial questions of law framed above and also keeping in mind the decisions of Hon'ble Apex Court in case of Kondiba Dagadu Kadam (supra) as well as in case of Veerayee Animal (supra) and other decisions of the Hon'ble Court and also in view of the observations made by the Hon'ble Apex Court in its judgment dated 23-4-2002 passed in Civil Appeal No. 2870 of 2002, which have all been considered in detail above, it is found that the judgment and decree of the learned lower appellate Court as well as the conclusions and findings drawn by that Court are erroneous being contrary to the principles of law settled by various judicial pronouncements and are based upon inadmissible evidence without appreciating that the findings

and the conclusions of the trial Court were based upon specific evidence on record of the case and principles of law involved therein. Accordingly, this Second Appeal is allowed and the judgment and decree of the Court of appeal below is set asid where the judgment and decree of the trial Court is affirmed. However, in the facts and circumstances, there shall be no order as to cost.