

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Second Appeal No.794 of 2010
With
Civil Application No.1359 of 1990**

Gangadhar s/o Sambhaji Zare
And Others.

.. Appellants.

Versus

Kamlabai w/o Sheshrao
deceased, through her
legal representatives
And Others.

.. Respondents.

Shri. M.M. Patil (Beedkar), Advocate, for appellants.

Shri. Amol Gandhi, Advocate, for respondent Nos.1-A to 1-C.

Shri. P.V. Mandlik, Senior Counsel, for respondent Nos.2 and 3.

CORAM: T.V. NALAWADE, J.

DATE : 29th OCTOBER 2015

ORDER:

1) The appeal is filed against the judgment and decree of Regular Civil Appeal No.209 of 1983 which was pending in the Court of the Additional District Judge,

Nanded. The appeal filed by the respondent, Kamlabai, original plaintiff, is decided in her favour and the judgment and decree of the trial Court by which the suit filed for relief of partition and separate possession was dismissed, is set aside. One-third share in the property is given to this respondent. Heard both the sides.

2) The suit was filed in respect of agricultural land bearing Survey No.61/B having area of 3 H 27 R. The plaintiff is daughter of defendant No.1 and defendant No.2 is sister of plaintiff. Defendant No.3 is a nephew of defendant No.1.

3) It is the case of the plaintiff that the aforesaid agricultural land was owned by the father of the plaintiff who died 15 years prior to the date of suit. It is contended that the property was the ancestral property of her father. It is contended that as per Hindu Law, after death of the father she has equal share with the mother and other sister and so she is entitled to get 1/3rd share of this land.

4) It is the case of the plaintiff that she is married and when about 3 years prior to the date of suit she demanded partition, defendant No.1 avoided to do so. It is contended that when she started collecting the record she realised that a sale deed of the property was executed in favour of defendant No.3 by defendant No.1 and the thumb impression of defendant No.2 was obtained on the sale deed as consenting party. Sale deed was executed on 24-4-1974. It is contended that said sale deed is not binding on her share.

5) Defendant Nos.1 to 3 appeared in the matter but written statement was filed only by defendant No.3 and he contested the suit. He contended that the property was owned by Narayan, father of the plaintiff. But he denied that Narayan had died only 15 years prior to the date of suit. He contended that Narayan died on 2-5-1948 i.e. prior to 1956. It is contended that as per Hindu Law, defendant No.1 became owner of this property and so sale deed executed by defendant No.1 in his favour cannot be challenged by plaintiff. It is contended that the land was sold for legal necessity as marriage of defendant No.2 was

to be performed.

6) On the basis of the aforesaid contentions issues were framed by the trial Court. The Trial Court held that Narayan had died on 2-5-1948 and the property was owned by defendant No.1 on the date of the sale deed. The First Appellate Court held that Narayan died after 1956 and so defendant No.1 could not have sold the shares of both plaintiff and defendant No.2. Decree of possession of 1/3rd share is given in favour of the plaintiff.

7) The learned counsel for the appellant submitted that the First Appellate Court has committed error in not giving necessary importance to record of Khasara Patrak in which name of defendant No.1, Chandrakalabai, was entered in the year 1953-54. He submitted that on the basis of this record inference ought to have been drawn by the First Appellate Court that Narayan died before 1956 and due to the approach of the Court to give more importance to the oral evidence, there is perversity in the decision and on this ground substantial question of law needs to be formulated. He submitted that in view of the

provisions of the Hindu Women's Right to Property Act, 1937 defendant No.1 became owner after death of Narayan and that happened before 1956 and further the provision of Hindu Succession Act as amended by Central Act in 2005 cannot be applied in favour of the plaintiff or defendant No.2 and so substantial question of law needs to be formulated on this legal point.

8) This Court has carefully gone through the oral evidence. Learned counsel for the appellant supplied copy of paper book prepared by the District Court in the first appeal. In the plaint itself plaintiff Kamlabai had given her age as 21 years and the age of Tejabai was given as 19 years. The age of Chandrakalabai was given as 40 years. Defendant No.3 has contended that the age of plaintiff is falsely shown and real age is more. On this point the plaintiff was cross examined for defendant No.3. Nothing could be brought on record to create probability that age of the appellant was more than the age 21 years shown on the date of suit i.e. 3-2-1979. There is vital admission given by defendant No.3 in his cross examination and which is to the effect that on the date of sale deed of 1974

when defendant No.2 put her thumb impression as consenting party, she was aged about 10 years, she was minor. In view of this circumstance, the First Appellate Court has drawn inference that father of plaintiff and defendant No.2 was alive even after the year 1960. Defendant No.3 is a close relative of plaintiff and defendant Nos.1 and 2. He tried to produce some record on which date of death of Narayan was shown. But this document was not bearing signature or stamp of the office and so this document was not exhibited even by the trial Court. The defendant No.3 did not take steps to call the record or to produce certified copy of death certificate from the concerned register which is generally maintained in village panchayat or by Police Patil. Defendant No.1 has given evidence in support of the case of the plaintiff on this point.

9) The record of *Khasara Patrak* of 1953-54 and the record like *Khata Wahi* is produced by defendant No.3 and it shows that in that year Chandrakalabai, defendant No.1 was shown as owner of the property. However no record of mutation by which name of Narayan was deleted

and name of Chandrakalabai was entered was produced. In absence of such record, inference is not possible that only after death of Narayan the name of Chandrakalabai was entered in the revenue record. The circumstance that plaintiff gave admission that after the death of Narayan name of Chandrakalabai was mutated in the revenue record cannot make much difference as it is a matter of record and this fact ought to have been proved by producing the mutation entry. This aspect is rightly considered by the First Appellate Court. On preponderance of probability, plaintiff has proved her case that Narayan had died after 1956. It is a finding of fact and the finding is given by the fact finding Court, the District Court and so this Court is not expected to interfere in such finding.

10) There is one more circumstance like obtaining of thumb impression of defendant No.2 on the sale deed by defendant No.3. If defendant No.2 had no right whatsoever in this property, there was no need of obtaining thumb impression of defendant No.2 as consenting party. Thumb impression was obtained when

she was minor and it can be said that there was something fishy. It is the case of the plaintiff and even Chandrakalabai, that defendant No.3 had deceived Chandrakalabai by using the close relationship and also the circumstance that there was no male member living with Chandrakalabai at the relevant time. If defendant No.3 wanted to avoid any problem he ought to have involved the plaintiff also in the matter as she was married at that time. But he avoided to do so. Though the trial Court and the First Appellate Court have held that fraud is not proved, the fact remains that there are aforesaid circumstances which can be used for proving the case of the plaintiff.

11) In view of the provisions of the Hindu Succession Act, 1956, particularly, sections 6 and 8 (pre-State and Central Amendment), the plaintiff and defendant Nos.1 and 2 were entitled to have equal share in the property. Thus, no error is committed by the First Appellate Court in holding that plaintiff has 1/3rd share in the suit property and the sale deed made by defendant No.1 is not binding on the shares of plaintiff and

defendant No.2. Defendant No.2 was minor and so without following procedure like obtaining permission from the District Court, defendant No.1 could not have sold the property of defendant No.2.

12) One more point was raised like provision of Hindu Women's Rights to Property Act, 1937 and the right given to the defendant No.1 under the said Act. Firstly whether the said Act was applicable or not needs to be decided. This is because the property is from Nanded. Only after the proof of contention that Narayan had died after 1956 it was possible to consider the provision of this Act. Under this Act it was provided that the widow is entitled to succeed to the property of her husband if no son is left by her husband. This interpretation is in accordance with the object behind the provision of section 6 of the Hindu Succession Act, 1956 (the provision before amendment of 2005 and the State Amendment of 1994). Thus, it was not open to defendant No.1 to sell 2/3rd portion of the property. The law is settled on this point. In view of these circumstances, this Court holds that it is not possible to formulate substantial question of law on the

aforesaid ground argued by the learned counsel for the appellant.

13) On the point of scope for second appeal, learned counsel for the appellant placed reliance on the case reported as **2014 AIR SCW 2058 (Rajasthan State TPT Corpn. v. Bajrang Lal)**. On the other hand learned counsel for the respondent placed reliance on a case reported as **2009 (0) BCI 382 (SC) (Koppisetty Venkat Ratnam v. Parmarti Venkayamma)**. The finding of the first appellate Court on the point "whether Narayan died before 1956 or after 1956" is a question of fact and so this Court is not expected to interfere in this finding. There is also vital admission of defendant No.3 on this point which cannot be ignored. On the other hand there is no such admission of the plaintiff or defendant No.1 on this point.

14) Learned counsel for the appellant placed reliance on a case reported as **AIR 1968 Tripura 5 (Smt. Prafulla Nalini v. Sri Dajendra Garoo)** and he submitted that the initial burden of proof was on the plaintiff under section 102 of the Evidence Act but the approach of the

First Appellate Court was totally opposite. There cannot be any dispute over the principle laid down in section 102 of the Evidence Act that initial burden is always on the party who wants to get decision in his or her favour. However, in the present case when the property was admittedly the ancestral property of Narayan and the property was sold in the year 1974 by defendant No.1 even when there were 2 daughters of Narayan, burden was on the purchaser to show that the defendant No.1 was absolute owner of the property. So, this case is of no help to the defendant No.3.

15) Reliance was placed on one more case reported as **AIR 2008 Bombay 183 (Devidas v. Vithabai)** (Nagpur Bench). In this case, this Court has discussed Shastrik Hindu Law which existed prior to 1956. The rights of the widow and daughter are discussed. There cannot be any dispute over the proposition made in that case. This case is of no help to defendant No.3. In view of the circumstances of the case discussed by this Court it is not possible to admit the appeal as there is nothing on the basis of which substantial question of law can be

formulated. So the appeal stands dismissed. Civil Application stands disposed of. Interim relief, if any, stands vacated.

Sd/-
(T.V. NALAWADE, J.)

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