

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

Second Appeal No. 525 of 1992

- 1) Vaijayantabai w/ Dangal Patil.
- 2) Bansi s/o Daga Patil. **.. Appellants.**

Versus

- 1) Bhilabai w/o Megharaj Patil.
- 2) Manjurabai w/o Ramdas Patil.
- 3) Chhababai w/o Waman Patil
deceased through her legal
representatives:
 - 3-A) Bhikan s/o Waman Patil,
Age 40 years,
Occupation : Agriculture,
R/o Bamhan, Taluka Sindkheda,
District Dhule.
 - 3-B) Ravindra s/o Waman Patil,
Age 45 years,
Occupation : Agriculture,
R/o Mudi, Taluka Amalner,
District Jalgaon.
 - 3-C) Sakubai w/o Himmat Patil,
Age 56 years,,
Occupation: Household,
R/o C/o Himmat Harchand Patil,
At Post Kajipure,
Taluka Chopada, Dist. Jalgaon
 - 3-D) Janyabai W/o Bhimrao Patil,
Age 43 years,
Occupation : Household,
R/o C/o Bhimrao Fakira Patil,

.. Respondents.

Shri. K.B. Autade, Advocate, for respondents 3-A to 3-D.

Second Appeal No. 160 of 1998

.. Appellant.

.. Respondents.

Shri. V.T. Chaudhari, Advocate, for appellants.

CORAM: T.V. NALAWADE, J.

DATE : 28th OCTOBER 2015

JUDGMENT:

1) Second Appeal No.525 of 1992 is filed against judgment and decree of Regular Civil Suit No.56/1980 which was pending in the Court of the Civil Judge, Junior Division, Amalner, District Jalgaon and against the judgment and order of Regular Civil Appeal No.349 of 1989 (Old No.58/1985) which was pending in the Court of the Additional District Judge, Amalner. The suit filed by the present respondents for relief of declaration is decided in their favour and it is declared that original defendant No.1, appellant No.1, is not legally wedded wife of Dangal Patil, brother of the plaintiffs.

2) Second Appeal No.160/1998 is filed against the judgment and decree of Regular Civil suit No.120/1985 which was pending in the Court of the Civil Judge, Junior Division, Amalner and also against the judgment and order of Regular Civil Appeal No.493/1989 which was

pending in the Court of the Additional District Judge, Amalner. The suit filed for relief of possession of immovable properties is decided in favour of the present respondents by the trial Court.

3) Both the sides are heard. Regular Civil suit No.56/1980 was filed for relief of both declaration and injunction. It is the case of the plaintiffs that deceased Dangal was their real brother and he had married with one Hirkani. It is their case that during lifetime of Hirkani, Dangal brought defendant No.1 to his house as his second wife. It is contended that defendant No.1 is not legally wedded wife of Dangal and so she is not entitled to succeed to the properties of Dangal. Hirkani died on 2-6-1979 and Dangal died on 15-10-1979. It is contended that after the death of Dangal and behind the back of plaintiffs, sisters of Dangal, defendant No.1, got entered her name in the record of assessment of the properties and she is claiming ownership over the properties of Dangal. Defendant No.2 is real brother of defendant No.1 and it is contended that defendant No.2 is helping defendant No.1 in obstructing the possession of the plaintiffs over the suit

property. Relief of declaration was claimed that defendant No.1 is not legally wedded wife of Dungal and relief of injunction was claimed by contending that plaintiffs are in possession of the property.

4) Defendant No.1 filed written statement and contested the matter. She contended that Dungal had divorced Hirkani on or about 5-3-1977 and after that he had married with her. It is her case that all the rites and ceremonies of marriage were performed and her marriage with Dungal was legal and so she is entitled to succeed to the properties of Dungal. It is her case that all the properties are in her possession and mutation in that regard is effected and she is enjoying the properties. It is her case that as she is the heir from Class I, the plaintiffs are not entitled to get any relief in respect of the properties.

5) In the trial Court both the sides gave evidence. As the marriage of Dungal with Hirkani was not disputed and as she was alive on 5-3-1977 the burden was heavy on defendant No.1 to prove that divorce had taken place

between Dangal and Hirkani. The parties are Hindus. Further, it is not specific case of defendant No.1 that there is custom in their community or caste of taking divorce by following some procedure. Defendant No.1 tried to say that one document was prepared but this document could not be produced. Further no evidence at all was given on such custom of divorce. In view of these circumstances, there was no other alternative for the Courts below than to hold that defendant No.1 is not legally wedded wife of Dangal.

6) While admitting the appeal against the decision of Regular Civil Suit No.56/1980 and Regular Civil Appeal No.349/1989 this Court had formulated substantial question of law on the point of legal marriage and right of the parties in the suit properties.

7) Learned counsel for the appellant submitted that the relief of only declaration is claimed and in view of the provision of Section 34 of the Specific Relief Act such suit was not tenable. On this point he placed reliance on some reported cases. He further submitted that as relief

of declaration is in respect of legality of the marriage, in view of provision of section 11 of the Hindu Marriage Act the suit was not tenable and the suit for such declaration can be filed only by spouse, party to the marriage, and third party cannot get declaration that marriage was void. Reliance was placed on the cases reported as (1) **AIR 1981 Allahabad 42 (Sheel Wati v. Ram Nandani)**; (2) **AIR 1960 Madras 6 (Lakshmi Ammal v. Ramaswami Naicker)**; (3) **AIR 1972 SC 2685 (Ram Saran v. Ganga Devi)**; and (4) **1997(1) Bom. C.R. 457 (Jagdishsingh Deonandansingh v. Feku Jamnaprasad Yadav)**. This Court has carefully gone through the observations made by the High Courts and the Apex Court. At the first instance, it can be said that the suit was not filed only for relief of declaration but the plaintiffs had come with the case that they were in possession of the suit properties and they wanted relief of injunction also. They could not prove the case of possession over suit property on the date of the suit. They had come to the Court for declaration in respect of legality of marriage of defendant No.1 as their civil rights were likely to be affected by the status which defendant No.1 was claiming. It is not disputed that they are sisters

of Dungal and so they were entitled to get such declaration. Thus, in view of the peculiar facts and circumstances of the present case it cannot be said that suit for declaration was not maintainable in view of section 11 of the Hindu Marriage Act and the suit was not tenable in view of section 34 of the Specific Reliefs Act.

8) In view of the aforesaid material which was available with defendant No.1 and her case that divorce was given by Dungal to his wife, which she could not prove, it is not possible to interfere in the decision given by the Courts below and there is concurrent finding on this question of fact.

9) Regular Civil Suit No.120/1985 was filed by the plaintiffs of aforesaid suit for relief of possession of the property which was left behind by Dungal. In this suit they contended that during pendency of aforesaid suit, Suit No.556/1980, they were dispossessed from the property and further the suit for injunction was decided against them. In this suit defendant No.1 took again same defence and she contended that she was legally wedded

wife of Dungal and she is entitled to succeed to the property of Dungal. In view of the decision on previous suit the trial Court held that defendant No.1, present appellant, was not entitled to keep possession of the property as she has no title, right in respect of the properties as plaintiffs who are sister of deceased Dungal are the only legal representatives and decree of possession is given in their favour.

10) While admitting Second Appeal No.160/1998 this Court (other Hon'ble Judge) had decided to formulate substantial questions of law on Ground Nos.2,5 and 6 mentioned in the appeal memo. They are as follows :-

(i) *Whether the Courts ought to have considered the case of defendant No.1 that Dungal had divorced his first wife Hirkani on 5-3-1977 and after that he had married with defendant No.1 and due to that defendant No.1 was entitled to the property of Dungal ?*

(ii) *Whether the Courts below committed error in giving decree of possession when separate relief of declaration of ownership was not claimed by the plaintiffs ?*

(iii) *Whether the Courts below have committed error in decreeing the suit for possession when the second appeal filed by defendant No.1 challenging the decisions given by the trial Court and first appellate Court was pending in High Court ?*

11) Learned counsel for the appellant argued on one more ground. He submitted that in the previous suit relief of possession was not claimed and as such relief ought to have been claimed, in view of provision of Order 2 rule 2(2) and (3) of the Civil Procedure Code, the subsequent suit was not tenable and this point ought to have been considered by the Courts below. He placed reliance on a case reported as **(2013) 1 SCC 625 (Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd.)**. In view of the facts of that case the Apex Court had held that subsequent suit was not permissible as the cause of action which was raised in the subsequent suit was the same as was mentioned in the first suit.

12) This Court has carefully gone through the pleadings of both the sides and the reliefs given by the Courts below. In the first suit, as already observed, the

present respondents, plaintiffs, had contended that they were in possession. The Courts below held that defendant No.1 was in possession on the date of the suit. Thus, the relief of injunction was not given by the Courts below when the plaintiffs were unable to prove their possession. This finding had given cause of action to the plaintiffs for subsequent suit. Further, in the subsequent suit they contended that they were dispossessed during pendency of the previous suit and so there was separate cause of action. It is already observed that in the previous suit declaration was claimed regarding the status of defendant which was affecting the right of plaintiffs and such suit was tenable. In view of this position of law and aforesaid circumstances, this Court holds that the subsequent suit was not barred due to provision of Order 2 Rules 2(2) and (3) of the Civil Procedure Code.

13) When in the previous suit, declaration was given regarding the legal status of defendant No.1 it was not open to defendant No.1 again to prove that she was legally wedded wife of Dangal. Only because second appeal was pending it was not necessary for the Courts

below to stop hearing of the subsequent suit. In view of the observations already made, there was separate cause of action and different relief was claimed in the subsequently instituted suit. Thus, the aforesaid points from Second Appeal No.160/1998 also needs to be answered against the appellant.

14) In the result, both the appeals stand dismissed.

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

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