

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

SECOND APPEAL NO. 155 OF 2015

Mankarnabai Santosh Bharti
& Ors.

..... APPELLANTS

V E R S U S

Niranjan s/o Santosh Bharati
& Ors.

..... RESPONDENTS

.....

Mr. Arvind S.Deshmukh, Advocate for Appellants.

Mr. S.S.Bora, Advocate for R.Nos. 1 to 3.

.....

CORAM : T.V.NALAWADE, J.

DATE : 23rd SEPTEMBER, 2015

ORDER :-

1. The Appeal is filed to challenge the Judgment and Decree of R.C.S. No. 14/2012 which was pending in the Court of the Civil Judge [Jr.Division], Degloor, district Nanded and also the Judgment and Decree of R.C.A. No. 39/2014 which was pending in the Court of the District Judge – 1, Biloli, district Nanded.

2. Heard both sides.

3. The Suit was filed by the respondents for relief of partition and separate possession in respect of five immovable properties. Plaintiff Nos. 1 and 2 are real brothers interse and they are the sons of plaintiff No. 3 and defendant No. 1. It is their case that plaintiff No. 3 is the first and legally wedded wife of defendant No. 1.

4. It is the case of the plaintiffs that even when there was a valid marriage in existence, defendant No. 1 performed second marriage with defendant No. 2. It is contended that to defeat the rights of plaintiffs, defendant No. 1 has transferred the property of joint Hindu family to defendant No. 2 and some sale deeds are executed. It is contended that sale deeds are executed in favour of defendant No. 3 also during pendency of the Suit and so the said transactions are not binding on the plaintiffs. Defendant Nos. 4 and 5 are the issues of defendant No. 2 born from defendant No. 1 and it is contended by the plaintiffs that they are illegitimate children and so they are not entitled to any share in the suit property, which is ancestral and co-parcenery property.

5. Defendant No. 1 has filed Written Statement and has contested the Suit. He contended that plaintiff No. 3 is not his first wife and defendant No. 2 is his legally wedded wife. It is contended that some property is already given by him to plaintiff No. 3 for livelihood. It is contended that the suit property was his self-acquired property. He contended that he sold some property to defendant No. 3, but that transaction was made for legal necessity.

6. On the basis of the aforesaid pleadings, Issues were framed. Both the sides adduced evidence. Both the courts below have held that plaintiff No. 3 is the legally wedded wife of defendant No. 1. The courts have also held that suit properties are joint family properties of plaintiffs and defendant No. 1. The courts have held that the sale deed executed on 08/12/2005 is hit by principle of lis-pendence. Both courts have held that the defendants have failed to prove that sale deed in respect of G.No. 61 made in favour of defendant No. 3 was made for legal necessity. Both the courts below have held that three plaintiffs and defendant No. 1 have 1/4th share each in the suit property and accordingly the Suit is decreed.

7. It appears that, in the past, there was one Suit between defendant No. 1 and the co-parceners, the descendants of the ancestors of defendant No. 1 and in the said Suit, compromise decree was given and it was admitted by defendant No. 1 that the properties from the present Suit are joint Hindu family properties. In view of this decision and as defendant No. 1 was party to that Suit, the courts below have held that nothing more needs to be considered for proof of the contention that the suit properties are joint Hindu family properties of plaintiffs and defendant No. 1.

Learned counsel for the appellants submitted that they are the self-acquired properties of defendant No. 1 and as previous decree was compromise decree and so that decision can not be considered in the present matter. This proposition is not acceptable. Once defendant No. 1 admits that it is joint Hindu family property, even if it is acquired from some income of his own, due to the admission, principle of blending applies and the property becomes joint Hindu family property. In any case, no satisfactory evidence was given by defendant No. 1 to prove that it is his self-acquired property. Only defendant Nos. 1,2,4 and 5 had challenged the decision of the trial

court and so the present matter can be considered only in respect of their claim. Both the courts below have considered the record which was created after the marriage of defendant No. 1 with plaintiff No. 3. The courts below have considered the admissions given by defendant No. 1 during his evidence in his cross examination. As per the record, name of the first wife Kondabai was entered in voters' list. Other circumstances are considered like specific admission of defendant No. 2 that she is the second wife of defendant No. 1. In view of this admission, finding is given that defendant No. 2 is not legally wedded wife of defendant No. 1.

8. In view of the aforesaid circumstances, learned counsel for the appellants placed reliance on one case reported as (2011) 11 SCC – 1 [Revanasiddappa and another Vs. Mallikarjun and others]. It is submitted that the point involved in the present matter, viz. “ whether in view of Hindu Marriage Act, 1955 [Section 16 (3)], the children of void or voidable marriages are entitled to only their parents' property or whether they are entitled to get share in both self-acquired and ancestral property of parents ”, is referred to larger

Bench and so the present matter needs to be kept pending till the point referred is decided by larger Bench.

9. It appears that the Division Bench of the Apex Court in the case cited supra has expressed that the term “parents' property” used in Section 16 (3) of Hindu Marriage Act can be interpreted in different manner than the manner in which this Section is interpreted by the Apex Court in the cases reported as (2003) 1 SCC 730 [Jinia Keotin]; (2006) 9 SCC 612 [Neelamma] and (2010) 11 SCC 483 [Bharatha Matha]. In the case cited supra for appellant, the Division Bench of the Apex Court has expressed that term “ parents' property” can be interpreted to include both self-acquired or ancestral property falling to parents' share after partition.

10. On the aforesaid point, learned counsel for the respondents placed reliance on the case reported as AIR 2013 SC 1064 [Manager, National Insurance Company Ltd. Vs. Saju P. Paul and Anr.]. The Apex Court has made observations at para No 25 as to the course which needs to be followed when the matter is referred to larger Bench for consideration. Para No. 25

reads thus,

“ The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur and Challa Bharathamamma should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compenstion so far due to stay order passed by this Court. He can not be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01/08/2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company

before this Court along with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of Challa Bharathamma ”.

11. At para No. 4 in the case reported as AIR 1988 SC 1791 [State of Orissa Vs. Dandasi Sahu], following observations are made :

“ In that view of the matter, we think that the pendency of this point before the larger Bench should not postpone the adjudication and disposal of this appeal in the facts of this case. The law as it stands today is that award without reasons are not bad per se. Indeed, an award can be set aside only on the ground of misconduct or on an error of law apparent on the face of the award. This is the state of law as it is today and in that context the contention

that the award being an unreasoned one is per se bad, has no place on this aspect as the law is now. This contention is rejected ”.

12. In the case reported as **AIR 2012 SC 1563 [Ashok Sadarangani and Anr. Vs. Union of India (UOI) and Ors.]**, the observations are made at para No. 19 as under :

“ As was indicated in Harbhajan Singh's case (supra), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field ”.

13. It is settled law that in view of the provisions of Section 16 (3) of Hindu Marriage Act, children of void marriages are entitled to only their parents' property and

not to the ancestral property held by their parents. This Court holds that in view of the settled principle of law, it is not possible to wait till larger Bench is constituted and decision of larger Bench comes on the point referred by the Apex Court in Revanasiddappa's case cited supra.

14. Learned counsel for the appellant placed reliance on one more case reported as **AIR 2012 SC 2728 [U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Ors.]** and by referring the observations made by the Apex Court about the judicial decision which needs to be followed in respect of the precedents and procedure, learned counsel submitted that the present matter needs to be kept pending. There can not be any dispute about the proposition that when the court of higher judiciary wants to take different view than the view already expressed on the legal point and when there is no decision of larger Bench available of that court or of Apex Court, the matter needs to be referred to the larger Bench. However, in the case of U.P. Power Corporation Ltd. (supra), it is laid down that the Court can use its discretion when there is declared principle available, which can be safely accepted, the Court can use that principle. The cases of National

Insurance Company and Ashok Sadarangani cited supra were decided subsequent to the case of Revanasiddappa (supra) and the law is settled on the point involved in many cases decided by the Apex Court.

15. This Court holds that it is not possible to formulate substantial questions of law on the points raised. No other point was argued. Further other findings are finding on facts and they are concurrent.

16. In the result, present Second Appeal stands dismissed.

[T.V.NALAWADE, J.]