

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 263 OF 2012
WITH
CIVIL APPLICATION NOS. 5198, 9473 OF 2012

Jaibai Shivram Pacharne **....Appellant.**

Versus

Indubai Deorao Pacharne
and others **....Respondents.**

Mr. Abhey Rathod, Advocate for appellant.

Mr. K.B. Autade, Advocate for respondent Nos. 1 and 3.

CORAM : T.V. NALAWADE, J.
DATED : 9th September, 2015.

ORDER :

1. The appeal is filed against judgment and decree of Regular Civil Suit No. 336/2001, which was pending in the Court of Civil Judge, Junior Division, Parner, District Ahmednagar and also against the judgment and order of Regular Civil Appeal No. 350/2005, which was pending in District Court, Ahmednagar. The suit filed by respondent No. 1 - Indubai Pacharne is decided in her favour. Both the sides are heard.

2. The suit was filed for relief of declaration that defendant No. 2 - Jaibai, present appellant, has no right or interest in the suit property and the sale deed made by her in

favour of defendant No. 9 - Suryabhan is null and void and no right or title has passed to defendant No. 9 under the sale deed. The relief of partition and separate possession of 3/14th share was also claimed on the basis of sale deed executed by defendant No. 1 - Smt. Sonabai in favour of plaintiff. The suit was filed in respect of two agricultural lands like Gat Nos. 495 and 564.

3. As per the submissions made by both the sides, one Sagaji was the owner of these two lands and he had two wives like Sitabai and Sheubai. Sitabai had left behind two issues like Shivram and Yamunabai, a daughter and a son. Sagaji had married Sheubai after the death of Sitabai and so, there is no dispute about the legality of marriage of Sagaji with Sheubai. Defendant No. 3 is daughter of Sitabai, Shivram, the son is dead. The heirs of Sheubai are other defendants.

4. Defendant No. 1 was the first wife of Shivram. It is the case of present appellant that during the lifetime of defendant No. 1, Shivram married with the appellant as defendant No. 1 had no issue from Shivram. It is contended that there was partition amongst the heirs of Sitabai and in the partition, 1/4 portion of the suit property was given to Shivram.

It is contended that the marriage of present appellant, original defendant No. 2 with Shivram had taken place on 9.6.1971 and so, she is legal heir of deceased Shivram. It is her case that after the death of Shivram, the names of both the wives like Sonabai and Jaibai were entered in revenue record in place of Shivram. It is her case that partition took place between her and defendant No. 1, the two wives of Shivram, in the year 1996.

5. Sagaji's other wife Sheubai is survived by sons and daughters. Plaintiff - Indubai is also the relative and she is the wife of defendant - Devram.

6. It is the case of plaintiff - Indubai that defendant No. 2 - Jaibai, appellant, cannot be treated as legal heir of Shivram. It is her case that partition had not taken place amongst the heirs of Sagaji. It is her case that the names of successors of Sagaji were entered in the revenue record, but there was no partition amongst them. It is her case that defendant No. 1, legally wedded wife of Shivram, sold her share, the share in the property to which she was entitled after the death of Shivram (3/14th share) under registered sale deed dated 26.7.1996 for the consideration of Rs. 2.5 lakh. It is her case that after this transaction, nothing was left with defendant No. 1 and further,

there was no right in the suit property in favour of defendant No. 2, present appellant, but she transferred the so called share of Shivram to defendant No. 9 - Suryabhan under registered sale deed dated 21.6.2001.

7. From the rival contentions and the written statement filed by defendants, it can be said that defendant No. 2 - Jaibai, appellant wanted to show that though she married when the marriage tie between Shivram and defendant No.1 was in existence, she is entitled to succeed to the property of Shivram. Defendant No. 9, the purchaser from defendant No. 2 wanted to prove that he is bonafide purchaser and he has become the owner of the property sold by defendant No. 2 in his favour in 2001.

8. On the basis of aforesaid pleadings, the issues were framed. Both the sides gave evidence. The trial Court held that defendant No. 2 was not legally wedded wife of Shivram and so, she cannot be treated as heir of Shivram. The trial Court also held that defendant No. 2, appellant failed to prove that there was partition between two wives of Sagaji viz. Sitabai and Sheubai. The trial Court held that defendant No. 9 failed to prove that he is bonafide purchaser of some portion, 3 R. portion which

is shown to be sold to him. In view of these findings, relief of partition and separate possession is given in favour of plaintiff and it is held that she is entitled to 3/14th share in the suit property in view of the sale deed executed in her favour by defendant No. 1. The shares of the remaining defendants are also determined. It is declared that the sale deed executed by defendant No. 2 in favour of defendant No. 9 is null and void and no title has passed in favour of defendant No. 9. This decision is confirmed in the appeal filed by the present appellant in District Court. The other defendants did not challenge the decision of the trial Court and only defendant No. 2 has come up to this Court.

9. The learned counsel for appellant submitted that substantial questions of law need to be formulated on the basis of grounds mentioned in appeal memo. He submitted that following substantial questions of law can be formulated.

(i) Whether the Courts below have failed to consider the material like oral evidence and revenue record and whether on the basis of that evidence, inference was possible that partition had taken place amongst the successors of Sagaji in the year 1972 ?

(ii) Whether the Courts below have committed

error in holding that the defendant No. 2, appellant, is not legally wedded wife and so, she cannot succeed to the property of Shivram ?

(iii) Whether the alleged will executed by defendant No. 1 in favour of defendant No. 2 could have been considered in favour of defendant No.2, appellant ?

10. Though the aforesaid grounds are mentioned in the appeal memo, it needs to be observed here only that the so called alleged will was not produced by the appellant, defendant No. 2 on record. Submission was made by the learned counsel for defendant No. 2, appellant that separate proceeding is started by defendant No. 2 on the basis of will. In any case, there is the evidence to show that defendant No. 1 - Sonabai, the wife of Shivram, had sold the property in the year 1996 under the registered sale deed. Then there was no question of consideration of will, if at all it was in existence, even if it was executed prior to the transaction or subsequent to the transaction. The said sale deed is duly proved.

11. From the pleadings, it can be said that defendant No. 2, appellant, has not disputed that during the lifetime of

defendant No. 1, the first wife of Shivram, she married with Shivram. This marriage is hit by section 5 of Hindu Marriage Act. The contention that defendant No. 1 had consented for this marriage, cannot be accepted in view of the provisions of Hindu Marriage Act. Thus, unless some property was given to her by Shivram, she could not have claimed any right in the property of Shivram.

12. The evidence discussed by the Courts below and the revenue record show that after the death of Sagaji, the names of his successors were entered in revenue record, but the specific shares were not defined. There is no evidence at all on the partition amongst the successors of Sagaji. In view of these circumstances, the Courts below have held that there was no partition. Defendant No. 1, the widow of Shivram, sold 3/14th share in the two properties to the plaintiff and the Courts below have held that Shivram was entitled to get this much share in the suit property. This decision of the trial Court is not challenged by other co-sharers and there is no dispute on the extent of share which Shivram could have got in partition.

13. Defendant No. 9 did not challenge the decision of the trial Court and so there is no question of considering his case

that he is bonafide purchaser. Both the Courts below have referred the provisions of law and some reported cases are also considered. In the present proceeding, the learned counsel for appellant placed reliance on the decision of the Apex Court given in **Civil Appeal No. 3410/2007 (between Dhannulal and Ors. Vs. Ganeshram and Anr.) dated 8.4.2015**. This case was altogether on different points and the facts were also totally different. The observations made by the Apex Court are of no help to the present appellant to get the decision in her favour. Thus, no substantial question of law as such is involved in the present matter.

14. In the result, the appeal stands dismissed. Civil Applications are disposed of.

[T.V. NALAWADE, J.]

ssc/