

ingale

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 35 OF 2012
WITH
CIVIL APPLICATION NO. 36 OF 2012

Tukaram Koyappa Mane
Since deceased by his legal heirs
son daughters and widow
Dhondubai Tukaram Mane ... Appellant

Vs.

Santabai Akaram Jadhav and others ... Respondents

Mr.Girish R.Agarwal, Advocate for Appellant.
Mr.PG.Lad, Advocate for Respondent No.1.
Ms.Manjiri Parasnis, Advocate for Respondents No. 2 to 4, 6, 7 & 9.

CORAM : R. G. KETKAR, J.
DATE : 07th APRIL, 2015

P.C. :

. Heard Mr.Girish R.Agarwal, learned Counsel for the appellant, Mr.PG.Lad, learned Counsel for respondent No.1 and Ms.Manjiri Parasnis, learned Counsel for respondents No. 2 to 4, 6, 7 & 9 at length.

2. By this appeal under section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendant No.12 has challenged the judgment and decree dated 09/12/1998 passed by the learned Civil Judge, Junior Division, Karad in Regular Civil Suit No. 495 of 1992 as also the judgment and decree dated 23/08/2011 passed by the learned District Judge – 2, Karad in Regular Civil

Appeal No. 62 of 2004. By these orders, the Courts below decreed the suit instituted by respondent No.1- Santabai for partition and separate possession.

3. In support of this appeal, Mr.Agarwal submitted that respondent No.1 instituted suit for partition and separate possession on 15/12/1992. At the relevant time, section 23 of the Hindu Succession Act, 1956 (for short 'Act') provided that notwithstanding anything contained in the Act, the right of any female heir specified in class I of the Schedule to claim partition of a dwelling house shall not arise until the male heirs choose to divide their respective shares therein. He submitted that section 23 was omitted with effect from 09/09/2005. In other words, prior to 09/09/2005, female heirs specified in class I of the Schedule had no right to claim partition of a dwelling house until the male heirs choose to divide their respective shares. He submitted that the Courts below committed error in ignoring this aspect. In support of this submission, he relied upon decision of the Apex Court in the case of *G.Sekar Vs.Geetha*, **AIR 2009 Supreme Court 2649**.

4. Realising this position, Mr.Lad, upon taking instructions from Mr.Shivdas Akaram Jadhav, son of respondent No.1 who is present in the Court, states that he will withdraw the suit with a liberty to institute a fresh suit. He further submitted that since respondent No.1 is 70 years old, the trial Court may be directed to

dispose of the suit in a time bound manner. In view thereof, by consent of the parties, appeal is admitted on the following substantial question of law.

Whether the Courts below were justified in decreeing the suit in view of section 23 of the Act as also decision of the Apex Court in the case of **G.Sekhar** (*supra*) ?

5. At the request of learned Counsel appearing for the parties, appeal is taken up for final hearing without sending notice to the lower Court as contemplated by Order 41 Rule 11 of C.P.C. and appeal is disposed of in the following terms.

- i) By consent of the parties, respondent No.1 is permitted to withdraw the suit with a liberty to file a fresh suit.
- ii) In view thereof, the impugned orders passed by the Courts below stand dissolved.
- iii) If fresh suit is instituted by respondent No.1, the learned trial Judge is requested to decide the suit in a time bound manner and preferably within one year from the date of institution of the suit.

6. All the contentions of the parties on merits are expressly kept open.

7. In view of disposal of the Second Appeal, Civil Application No.36 of 2012 for injunction does not survive and the same is disposed of accordingly.

(R. G. KETKAR, J.)