

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.232 OF 2015
WITH
CIVIL APPLICATION NO.490 OF 2015

Shrihari Ambaji Dornal and others ... Appellants
Vs.
Sakhubai Ambaji Dornal and others ... Respondents

Mr. N. J. Patil i/b. Mr. Amey N. Patil for Appellants.
Mr. I. M. Khairdi for Respondents No.2 and 3.

CORAM : R. G. KETKAR, J.
DATE : 28TH APRIL, 2015

P.C. :

Heard Mr. Patil, learned Counsel for appellants and Mr. Khairdi, learned Counsel for respondents No.2 and 3 at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.', the original defendants No.6 to 10 have challenged the judgment and decree dated 19.10.2012 passed by the learned 2nd Joint Civil Judge, Junior Division, Solapur in Regular Civil Suit No.382 of 2008 as also the judgment and decree dated 18.12.2014 passed by the learned Ad-hoc District Judge-2, Solapur in Civil Appeal No.374 of 2013. By these orders, the Courts below partly decreed the Suit instituted by the respondent No.1-plaintiff with proportionate costs and held that plaintiff is entitled to partition and separate possession of 1/6th share in the suit house.

3. In support of this Appeal, Mr. Patil strenuously contended that the Courts below committed serious error firstly in holding that the suit house is a self-acquired property of Somayya. He submitted that in paragraphs 25 and 28, the learned trial Judge held that the suit house

was a self-acquired property of Somayya. However in paragraphs 29 and 33, the learned trial Judge held that the suit house is joint family property. In short, he submitted that the findings recorded by the learned trial Judge in paragraphs 28 and 33 are contradictory.

4. Mr. Patil further submitted that the learned District Judge ought to have held that the suit house is a joint family property. He submitted that in view of Order XLI, Rule 33 C.P.C., the appellate Court can exercise power thereunder notwithstanding that the appeal is as to part only of the decree. In support of this proposition, he relied upon the decision of the Apex Court in the case of **S. Nazeer Ahmed Vs. State Bank of Mysore, (2007) 11 SCC 75**. Mr. Patil further submitted that in any case, the Courts below committed serious error in holding that the suit house was a self-acquired property of Somayya.

5. On the other hand, Mr. Khairdi supported the impugned orders. The plaintiff has 1/6th share in the suit house. She submitted that Somayya had first wife Lachhammabai. After the death of Lachhammabai, Somayya married Satyammabai, who is the sister of Lachhammabai. Satyammabai is the second wife of Somayya. Plaintiff died in the year 1991. His son Ambaji died in the year 1992 leaving behind respondent No.1-plaintiff and children who are defendants No.6 to 10. Satyammabai-defendant No.1 and Somayya have children who are defendants No.2 to 5. He submitted that after the death of Somayya in the year 1991, all the heirs of Somayya namely, Ambaji, Satyammabai-defendant No.1 and defendants No.2 to 5, each, will get 1/6th share. He submitted that the Courts below did not commit any error in allotting 1/6th share in the suit house to the plaintiff. He submitted that the learned trial Judge partly decreed the Suit and passed decree of partition as also held that the plaintiff has 1/6th share in the suit

house. Aggrieved by that decision, defendants No.6 to 10 preferred substantive first appeal under Section 96. Since defendants No.6 to 10 have preferred substantive first appeal, they cannot invoke provisions of Order XLI, Rule 33 C.P.C. or principles embodied therein. He further submitted that the decision of the Apex Court in the case of **S. Nazeer Ahmed** (*supra*) is not applicable in the facts of the present case. As far as the allotment of 1/6th share to the plaintiff, he relied upon Section 8 read with Schedule of Hindu Succession Act, 1956 (for short 'Act') and submitted that Ambaji, Satyammabai, and defendants No.2 to 5 are Class I heirs of deceased Somayya. He, therefore, submitted that in terms of Section 8 read with Schedule, the sons, daughters and widow of Somayya will inherit share being Class-I heirs. He, therefore, submitted that no case is made out for invocation of powers under Section 100 C.P.C. as the Courts below have rightly awarded the shares.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Section 8 of the Act reads as under:

“8. General rules of succession in the case of males - The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.”

7. It is not in dispute that Lachhambabai was the first wife of Somayya. Somayya and Lachhambabai had one son Ambaji and one daughter Somakka. Somakka predeceased Lachhambabai. After the

death of Lachhambai, plaintiff married her sister, Satyammabai (defendant No.1). Defendants No.2 to 5 are children of Somayya and Satyammabai. Somayya died in the year 1991. Ambaji died in the year 1992 leaving behind respondent No.1 Sakhubai and defendants No.6 to 10. The question is whether the Courts below were justified in awarding $1/6^{\text{th}}$ share to the plaintiff Sakhubai. Having regard to Section 8 read with Schedule of the Act, on the death of Somayya, the suit house will be distributed amongst Ambaji and defendants No.1 to 5. Thus, Ambaji will get $1/6^{\text{th}}$ share. In view thereof, I do not find that the Courts below committed any error in awarding $1/6^{\text{th}}$ share in the suit house to the plaintiff Sakhubai. The submission advanced by Mr. Patil that Ambaji will get $1/2$ share and Satyammabai will get $1/2$ share does not take into consideration Section 8 read with Schedule of the Act.

8. Mr. Patil submitted that in view of Order XLI, Rule 33 C.P.C., even if defendants No.6 to 10 did not challenge the findings recorded by the learned trial Judge that the suit house is a self-acquired property of Somayya in the first appellate Court, nonetheless, they can agitate this point in the Second Appeal. Mr. Patil relied upon the decision of this Court in the case of **S. Nazeer Ahmed** (*supra*). I do not find any merit in the submissions advanced by Mr. Patil for more than one reasons. In the first place, defendants No.6 to 10 have filed substantive first appeal against the trial Court's decree. As observed in paragraph 8 of the judgment, defendants No.6 to 10 were entitled to challenge all the findings rendered against them by the trial Court. Secondly, no recourse can be taken to Order XLI, Rule 33 C.P.C. In that case, plaintiff Bank's Suit was dismissed. The plaintiff Bank had come up in appeal. It is in that context, the Apex Court held that there was no occasion for applying Order XLI, Rule 33 C.P.C. as was wrongly applied by the High Court.

9. In the present case also, as indicated earlier, defendants No.6 to 10 had filed substantive first appeal before the District Court. Perusal of the Appeal memo shows that defendants No.6 to 10 did not challenge the finding that the suit house is a self-acquired property of Somayya. The Appeal was restricted only qua shares allotted to the plaintiff in the suit house. In view thereof, defendants No.6 to 10 cannot agitate that point for the first time, that too, in the Second Appeal. Thus, no question of law much less any substantial question of law arises in this Appeal. Second Appeal fails and the same is dismissed.

10. In view of the dismissal of the Second Appeal, nothing survives in Civil Application No.490 of 2015 for stay and the same is disposed of as such.

(R. G. KETKAR, J.)

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