

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

SECOND APPEAL NO. 438 OF 2012  
WITH  
CIVIL APPLICATION NO. 7531 OF 2012

Ramdas s/o Kisan Jape,  
Age 55 years, occup. Agruiculture,  
R/o Newasa Bk. Tal. Newasa,  
Dist. Ahmednagar .. Appellant

versus

- 1) Kisan s/o Bhausahab Jape,  
Age 77 years, occup. Agriculture,
- 2) Smt. Yamunabai W/o Kisan Jape,  
Age 60 years, occup. Agril.,
- 3) Shri Subhash s/o Kisan Jape,  
Age 42 years, occup. Agriculture,
- 4) Santosh s/o Subhash Jape,  
minor, through his guardian mother  
Smt. Indubai w/o Subhash Jape,  
Age 38 years, occup. Agril. &  
Household  
All R/o Newasa Bk. Tal. Newasa,  
Dist. Ahmednagar .. Respondents

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Mr. S. R. Sapkal, Advocate h/f Mr. V. D. Sapkal, Advocate for  
appellant  
Mr. V. S. Bedre, Advocate for respondents

CORAM : SUNIL P. DESHMUKH, J.  
DATE : 15th September, 2016

ORAL JUDGMENT :

1. Heard learned counsel for appellant and learned counsel for the respondents.

2. The second appeal emerges from a judgment and decree dated 30-11-2011 passed by District Judge-1, Shrirampur in regular civil appeal no. 49 of 2006 filed by original defendant no. 1, reversing the judgment and decree dated 31-07-2006 passed by Civil Judge, Junior Division, Newasa, decreeing the suit bearing regular civil suit no. 204 of 2006 filed by present respondent no. 1 - plaintiff for partition, declaration and injunction.

3. Upon hearing learned counsel, it transpires that initially, respondent no. 1- plaintiff had filed aforesaid suit seeking partition, declaration and injunction in respect of the property referred to in the plaint claiming that he is the son of defendant no. 1 begotten from his mother Kadubai who was claimed to have married to defendant no.1, further contending that after plaintiff's birth, the plaintiff, his mother kadubai and defendant no. 1 Kisan resided together for a period of four to five years.

Defendant no.1, thereafter, had driven his wife Kadubai along with plaintiff out of the house. Kadubai had died on 24-01-1981. The plaintiff had taken admission to school around 1961 as would appear from school leaving certificate issued in favour of the plaintiff which is dated 14-02-2002. The certificate also depicts his father to be 'Kisan' with surname 'Jape' and the plaintiff having born on 01-06-1955. The certificate in respect of death of his mother Kadubai which is of the same date i.e. 14-02-2002 also refers to her husband's name as 'Kisan' and surname 'Jape'. Thus, with these contentions, the plaintiff stakes claim to the properties of defendant no. 1 as his son from Kadubai.

4. Defendant no. 1 in his written statement, however, has denied contention of the plaintiff about relationship with him as contended or for that matter that Kadubai was his wife. It was contended by defendant no. 1 that he had married to one Laxmibai and not to Kadubai. His marriage with Laxmibai daughter of Namdeo Aher who was resident of Mhalas-Pimpalgaon had taken place in the year 1944. However, relations between defendant no.1 and Laxmibai were not cordial and finally Laxmibai left his home in the year 1948 and had never turned back. In the circumstances, divorce proceedings ensued at the instance of defendant no. 1 and resulted into

decree of divorce dated 17-01-1955, on the ground of continuous desertion. Defendant no.1 asserted that his wife's name was 'Laxmibai' and not 'Kadubai'.

5. After filing of written statement, the plaintiff took somersault, contending that he was not aware that his mother was also known as Laxmibai after her marriage and he persisted with the claim of being son of defendant no. 1.

6. The plaintiff adduced oral evidence through witnesses no. 2, 3 and 4. The trial court purported to rely on the evidence and considered that the documents relate to incidents which are more than thirty year old and as such presumption arises and cursorily considered that cross examination of the plaintiff's witnesses could not impeach the evidence and there is no concrete evidence in rebuttal. The court considered that since the decree of divorce is of 17-01-1955 and plaintiff was born on 01-06-1955 and thus the plaintiff can be seen to have born within 280 days after the divorce by defendant no. 1 to Kadubai alias Laxmibai and can be considered to be legitimate child of defendant no. 1 begotten from his wife Kadubai alias Laxmibai and, as such, went on to decree the suit against which defendant no. 1 had been before the appellate court under aforesaid regular civil appeal which had been allowed, dismissing the suit and thus the plaintiff is before this court.

7. The appellate court appears to have considered the evidence led by the parties in quite some details and has considered that it was not the case of the plaintiff that Kadubai was Laxmibai. The court has considered that it was the case of the plaintiff that he cohabited with his mother and defendant no. 1 for four to five years. It had emerged on record that Namdeo Aher from village Mhalas-Pimpalgaon had a daughter by name Laxmibai who is stated to be wife of defendant no.1. In said village, there is another person by name Namdeo whose surname is Kardile and Kadubai happens to be his daughter. The appellate court has scanned the oral evidence given by plaintiff's witnesses in quite minute details and appears to have considered and appreciated the same, holding that the same may not bring out any worthiness to the claim of the plaintiff that Kadubai had married to defendant no.1. In the circumstances, it was considered that presumption as is sought to be claimed by plaintiff to have existed under the certificate depicting defendant no. 1's name as father of the plaintiff would not have any significance. The appellate court has also considered other attending circumstances, such as, Kadubai during her lifetime had neither claimed herself to be Laxmibai nor had claimed any benefit for plaintiff. The appellate court has also considered that thirty year old document of which

presumption is sought to be contended by plaintiff, had not been brought before the court nor any evidence in that respect had been given by calling relevant witness in support of the same. Mere production of certificates has been held not to be sufficient to relate defendant no. 1 to paternity of plaintiff. It has been considered that Laxmibai had been divorced by defendant no. 1 in the year 1955 on the ground of continuous desertion and as such presumption, if at all is to be said to have arisen in the matter, stands sufficiently rebutted. The appellate court has also considered that it was for the first time after written statement had come on record and not any time before, plaintiff had claimed that his mother was known also as Laxmibai after her marriage with defendant no. 1. In the circumstances, in comparison of appellate court's judgment, the trial court's judgment would appear to be wanting in proper appreciation of facts and evidence and without going into minute details as have been considered by the appellate court. Neither it appears to be a case that name of Kisan Jape appearing in the certificates issued and relied on by the plaintiff are relatable to defendant no. 1 in any way.

8. Perusal of the judgments of the two court indicates that appreciation of evidence and the material on record as has been done by the appellate court is in accordance with the facts,

evidence on record and law and as such is not liable to be considered as perverse. The appellate court has considered all the authorities cited on either side and has considered their efficacy and applicability to the circumstances involved in the present matter.

9. In the circumstances, second appeal does not appear to give rise to any substantial question of law. The second appeal, as such, stands dismissed.

10. Civil application, in view of aforesaid, stands disposed of

SUNIL P. DESHMUKH,  
JUDGE

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