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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.77 OF 1992

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| 1. | Saheba s/o Ganpati
Age - 51 years, Occ - Agriculture
R/o Domalgaon, Taluka - Ambad
District - Jalna | APPELLANTS |
| 2. | Ambadas s/o Ganpati Gulajkar
(since deceased, through LRs) | |
| 2A. | Godawari w/o Ambadas Gulajkar
Age - 75 years, Occ - Household
R/o Domalgaon, Taluka - Ambad
District - Jalna | |
| 2B. | Eknath s/o Ambadas Gulajkar
Age - 60 years, Occ - Agriculture
R/o As above | |
| 2C. | Mahadeo s/o Ambadas Gulajkar
Age - 50 years, Occ - Agriculture
R/o As above | |
| 2D. | Shahadeo s/o Ambadas Gulajkar
Age - 46 years, Occ - Agriculture
R/o As above | |
| 2E. | Nilabai w/o Mitthu Kharad
Age - 55 years, Occ - Household
R/o As above | |
| 3. | Malanbai w/o Trimbak Kale
Age - 54 years, Occ - Agriculture
R/o Majalgaon, District - Beed | |
| 4. | Sulochanabai w/o Eknath Kharad
Age - 44 years, Occ - Agriculture
R/o Shahagad, Taluka - Ambad
District - Jalna | |

VERSUS

1. Sarubai w/o Natha (Appeal Abated) RESPONDENTS
2. Kasabai Namdeo Kharad
Age - 50 years, Occ - Agriculture
R/o Shahagad, Taluka - Ambad
District - Jalna
3. Kausabai w/o Kondiba Kharad,
Age - 39 years, Occ - Agriculture
R/o Domalgaon, Taluka - Ambad
District - Jalna

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Mr. B. A. Darak, Advocate for the appellants
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 16th NOVEMBER, 2016

ORAL JUDGMENT :

1. Heard Mr. Darak, learned advocate appearing for the appellants quite at some length.
2. In the present second appeal, this court, under its order dated 2nd March, 1992 had been pleased to observe that ground No.I in memorandum of second appeal as filed by appellants involves substantial question of law, which reads thus -

“I. That, it is not disputed by anybody that Ganpati was the original holder of the suit property. Nobody claimed that Ganpati was the sole surviving co-parcener or sole owner of the suit property. Presumption under the Hindu Law in respect of the nature of the property being the joint family property was readily available in the present case. At any

rate there was no case or pleading that the property belonged personally and exclusively to Ganpati. This aspect of the matter gives rise to the substantial question of law in this Second Appeal.”

3. In the ground as has been referred to above, in the memorandum of appeal, albeit it has been referred to that it was not a case that property belonged personally and exclusively to Ganpati, there is no contest on that the property was of deceased Ganpati. There is no serious dispute about that property concerned was the property of deceased Ganpati. The matter has been treated accordingly by the parties. As such, character of the property would be that of ancestral / joint family property in the hands of heirs of deceased Ganpati.

4. Ganpati had three sons and two daughters. Natha - one of the sons of Ganpati died around 1951 leaving behind wife - Sarubai and two daughters - Kasabai and Kausabai. Thereafter, Ganpati too expired. There is some dispute about exact period of death of Ganpati as to whether Ganpati died before or after 1956. It is an admitted position that during lifetime of Ganpati marriages of Kasabai and Kausabai - daughters of deceased Natha had been performed under his aegis.

5. Regular Civil Suit No.94 of 1981 had been instituted by Sarubai - widow of Natha and her two daughters - Kasabai and

Kausabai for partition of properties of Ganpati claiming entitlement to shares in the same.

6. The defendants - appellants in second appeal admitted in the defence that the suit lands have been the lands of Ganpati and further that Natha died around 1951, however, claimed that Ganpati died within five years after death of Natha. The defendants further accepted that daughters of Natha were got married by Ganpati, however, purported to deny that some portion of land had been given in possession of Sarubai and her daughters. They, as such, purported to deny the right of Sarubai and her daughters to any share in the suit lands and much less one third share as claimed by them.

7. The trial court framed issues *viz.*, as to what would be the share of the plaintiffs - Sarubai and her daughters and whether the land had been put in possession of plaintiffs - Sarubai and her daughters for maintenance, giving finding that the plaintiffs have been able to prove that they jointly have thirty paise share in each of the suit properties and not one third share. The trial court further found that the plaintiffs have been able to prove that Ganpati had been alive for about sixteen years after death of Natha and further that some portion of lands had been given

in their possession.

8. In Regular Civil Appeal No.119 of 1984 carried therefrom by the defendants, the appellate court has partly allowed the appeal granting one fifteenth share each to the plaintiffs in the suit properties and giving one fifth share each to the appellants - original defendants, directing partition to be effected by Collector.

9. Crucial question, as such, which had been in dispute is about the period of death of Ganpati and further whether it can be said that there is any error committed by courts hitherto in decreeing the suit for partition and the extent of shares as granted by the appellate court.

10. The trial as well as appellate courts have scanned evidence as has been adduced. The appellate court has very pertinently observed in paragraph No.7 and 9, reading thus -

“7. It may be noted that, admittedly, marriages of Kasabai and Kaushabai, who are respondents nos. 2 and 3, were performed by Ganpati. On the basis of this admission, it is argued before me that in 1983 while filing suit respondent no.2 Kasabai was 39 years of age and respondent no.3 Kausabai was 35 years of age. It is argued before me that at least these girls must be 15 years of age when their marriages were performed. Even, in that case Ganpati must have died after 1980. Moreover, Natha died 32 years before

filing of the suit on 16.8.1983. In other words, he died in about 1951. Thereafter, as per written statement Ganpati survived for 5 years. Hindu Succession Act came into force on 17th June, 1956. It is case of respondents that Ganpati survived for 16 years after the death of Natha. The only question that is disputed before me is whether Ganpati died after 17th June, 1956 or prior to that. The respondent no.1 Sarubai is examined at Ex.40 and she stated on 6.6.1984 that her husband died 30 years ago and her father-in-law died 18 years ago. So, according to Sarubai, Ganpati died in about 1966. it is true that respondents did not produce death certificates which could have been good evidence, but the appellants could have also produced death certificates to show the exact date of death. There is no dispute that Ganpati died. So, only question is when he died.

9. *At Ex.41 witness Baburao was examined and he stated that Ganpati died 12-13 years prior to his statement on 6.6.1984. He also spoke that 5 acre land from Limbache Shet was given to respondent no.1 Sarubai. It may be noted that in this case the appellants have not come with a case of prior partition. They did not deny that if any land was given it was given for maintenance and not as a share in partition. Witness Sheshrao, examined at Ex.42, stated that Ganpati died 17-18 years prior to his statement. He further stated that he was 11 years old when Ganpati died. At the time of his statement, he was 25 years of age. It was suggested that Ganpati died prior to his birth. At Ex.45 there is evidence of Kondiba the husband of respondent no.3. He stated that his marriage with respondent no.3 took place 22 years prior to 15.6.1984. It was performed by Ganpati. Ganpati died three years after his marriage. A person can remember these circumstances without much error and therefore, evidence of person like Kondiba can be believed, when admittedly at the time of his marriage*

Ganpati was alive. As against this at Ex.47 there is evidence of appellant Ambadas. He stated that 40 years ago Natha died and 5-6 years thereafter his father Ganpati died. His cross-examination shows that 12 years prior to his statement, he had given 5 acres land out of Limbache Shet to respondent no.1. He stated that respondent no.1 Sarubai has no share in land called 'patti' block no.45. He could not tell exact age of respondents nos.2 and 3 in their marriages. So, on preponderance of probabilities the respondents proved that Ganpati died after coming into operation of Hindu Succession Act. So, they would be entitled to shares."

11. In view of the findings about period of death of Ganpati having been given by the appellate court and the one as has been given by the trial court on that, position clearly emerges that Ganpati in any case has died after 1956. It is not the case of the defendants at all that there had been any partition in respect of the properties left behind by Ganpati at any point of time. Neither there are pleadings to that effect nor any evidence had been adduced. Relationship among the parties is not at all in dispute.

12. The decisions hitherto appear to have taken care of the question that has been framed by this court while admitting the second appeal. In the circumstances, the decisions given by the courts hitherto about entitlement of plaintiffs - Sarubai and her daughters - wife and daughters respectively of Natha - son of

Ganpati, would hardly be amenable to any further discussion and investigation.

13. Resultantly, decisions of both the courts below cannot be faulted with, holding plaintiffs to be entitled to share in deceased Ganpati's properties. As far as the extent of share granted in the face of situation that deceased Ganpati had five children, share calculation by the appellate court appears to be in accordance with the provisions of law. Even there is no appeal by the plaintiffs for maintaining shares in the lands as had been granted by the trial court under its decree.

14. In respect of ground referred to above earlier, it will have to be said that the trial as well as appellate courts have not committed any error in holding the plaintiffs to be entitled to partition and to shares in the suit properties left behind by deceased Ganpati as determined by appellate court by virtue of their admitted relationship with the defendants, as heirs of their brother Natha.

15. Second appeal, as such, on merits is not sustainable.

16. Another facet which may have to be noted is that appellant No.1 Saheba has died long before and attempt to bring his legal

heirs on record has also failed. In the circumstances, nothing survives in the second appeal.

17. Second appeal, as such, stands dismissed.

[SUNIL P. DESHMUKH, J.]

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