

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

SECOND APPEAL NO. 362 OF 2000

1. Shankar /o Bapuji Tawade
Age : 61 Yrs., Occ. Agril.,
R/o : Talani, Tq. Hadgaon
Dist. : Nanded.
2. Kamalabai W/o Shankar Tawade
Age : 52 Yrs., Occ. Agril.,
R/o : Talani, Tq. Hadgaon
Dist. : Nanded.
3. Digambar S/o Shankar Tawade
Age : 27 Yrs., Occ. Agril.,
R/o : Talani, Tq. Hadgaon
Dist. : Nanded.
4. Punjab S/o Shankar Tawade
Age : 28 Yrs., Occ. Agril.,
R/o : Talani, Tq. Hadgaon
Dist. : Nanded.
5. Datta S/o Shankar Tawade
Age : 28 Yrs., Occ. Agril.,
R/o : Talani, Tq. Hadgaon
Dist. : Nanded.

6. Manjulabai W/o Bapuji Tawade
died, Thr. L.Rs. Appellant **APPELLANTS/**
No.1]. **[ORI. DEFENDANTS]**

V E R S U S

1. Sow. Kevalabai W/o Shankar Tawade
(Died Thr. L.Rs. - R – 2 & 3)
2. Maroti S/o Shankar
Age : 20 Yrs., Occ.
R/o : Pawdewadi, Tq. and
Dist. Nanded.
3. Bapuji S/o Shankar
Age : 12 Yrs., u/g of his
real brother R.No. 2 -
Maroti S/o Shankar
Age : 20 Yrs., Occ.
R/o : Pawdewadi, Tq. and **RESPONDENTS/**
Dist. Nanded. **[ORI. PLAINTIFFS]**
4. Baby D/o Shankar Tawade } **RESPONDENT**
Age : 16 Yrs., Minor, } **[Added as per order**
u/g of real uncle } **passed by the**
Haribhau S/o Tulshiram } **Hon'ble Court on**
Tawade, Age : 60 Yrs., Occ. } **04/09/2008 in**
Agril., R/o : Pawade Wadi, } **C.A. No. 4004 of**
Tq. & Dist. : Nanded. } **2002].**

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Mr. M.V.Deshpande, Advocate for Appellants.

Mr. V.D.Patnoorkar, Advocate for R – 2 & 3.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 07/07/2016

JUDGMENT :

1. The Appeal is filed against the Judgment and Decree of Spl. Civil Suit No. 117/1991 which was pending in the Court of the Civil Judge [Sr. Division], Nanded and also the decision of R.C.A. No. 8/1994 which was pending in the Court of the 3rd Additional District Judge, Nanded. The Suit filed by the respondents for relief of partition and separate possession was decided by the trial Court in their favour and 1/5th share was given to each of the plaintiff and also to each of defendant No. 1 and defendant No. 6. During pendency of the Appeal, plaintiff No. 1 and defendant No. 6 died and so the first appellate Court has altered the shares to make it 1/3rd for each of the 2 plaintiffs and remaining 1/3rd for defendant No. 1. Heard both sides.

2. Plaintiff No. 1 Kevalabai was the wife of defendant No. 1 Shankar and plaintiff Nos. 2 and 3 are her issues born from defendant No. 1. Defendant No. 6 Manjulabai was mother of defendant No. 1. It is the case of plaintiffs that defendant No. 2 is the second wife of defendant No. 1 and defendant Nos. 3 to 5 are issues of defendant No. 2 born from defendant No. 1.

3. The Suit was filed for relief of partition and separate possession of in all 8 agricultural lands and 3 house properties. It is the case of plaintiffs that the suit properties are ancestral and joint family properties of plaintiffs and defendant No. 1 and so they are entitled to get share by partition in the property.

4. The marriage between plaintiff No. 1 and defendant No. 1 took place in the year 1969. The parties are Hindus. It is contended that after the marriage, illtreatment was given to plaintiff No. 1 by defendant No. 1 and then she was deserted by defendant No. 1 till the year 1971. It is contended that she had filed proceeding for maintenance against her husband. It is contended that behind her back and without her consent, defendant

No. 1 performed second marriage with defendant No. 2. It is contended that subsequently there was compromise and plaintiff No. 1 was taken back to her matrimonial house. It is contended that after cohabitation, plaintiff Nos. 2 and 3 were born to plaintiff No. 1. It is the case of the plaintiffs that after the birth of second issue, she was again driven out of the house by defendant No. 1. It is contended that due to second wife and issues from her, defendant No. 1 is not taking care of plaintiffs and, therefore, the properties needs to be partitioned. They had claimed that they are entitled to get 3/8th share in the lands and house property No. 334 situated at village Talani.

5. Defendant Nos. 1 to 6 filed joint Written Statement and contested the matter. Defendant No. 1 admitted his relationship with plaintiffs. It was contended that defendant No. 1 is the absolute owner of lands G.Nos. 856, 72 and 1 as they are acquired by him from his separate income. The contentions with reference to other properties is not disputed.

6. In view of the pleadings, issues were framed

by the trial Court. Both sides gave evidence. Defendant No. 1 had taken the defence that the aforesaid 3 properties are his self-acquired properties and so burden was on him to prove this contention, as all other properties are admittedly ancestral properties. He has contended that he was working as contractor and from that business he made separate income and he purchased 3 properties under sale deeds. The sale deeds are on record and they are proved.

7. The total area of the ancestral agricultural lands was around 16 H. 86 R. Thus, there was more than sufficient area which can be called as nucleolus. As the lands were being cultivated by defendant No. 1, the burden was on him to prove the exact income from these lands. The 7/12 extract shows that in the ancestral lands, crops like Hybrid, Toor, Cotton, etc. were taken and defendant No. 1 was cultivating these lands personally. The evidence of defendant No. 1 shows that he is not disputing that some lands were entered in the name of his issues from second wife to see that the lands are saved from the Ceiling Act. So, the circumstance that some lands are entered in the names of issues from second

wife, need not be considered in detail in favour of the defendants. Even in Examination-in-Chief, no particulars of business are given and defendant No. 1 has no record at all to show that he was working as contractor. When there was an area of more than 16 H. 8 R. with him for cultivation, it was not probable that he could have paid attention to any other work. He was personally cultivating these lands. In view of these circumstances, it can be said that the plaintiffs have discharged the burden to prove that all the properties are ancestral and joint Hindu family properties.

8. The other contention of both the sides regarding desertion, etc. need not be considered. Learned counsel for the appellants submitted that in the plaint the plaintiffs had claimed 3/8th share each and so they were not denying the share of the issues from the second wife and so both the Courts below ought to have given shares to the issues from second wife of defendant No. 1. This Court [other Hon'ble Judge] admitted the Appeal by Order dated 31/07/2000 by holding that substantial questions of law need to be formulated on ground Nos. (ii), (vi) and (vii) mentioned in the Appeal

memo. They are as under.

[ii] First substantial question of law involved in this matter is whether Courts are empowered to grant more share in a Suit for partition that claimed by the plaintiffs.

[vi] The plaintiffs did not either challenge the marriage of defendant Nos. 1 and 2 nor pleaded or sought declaration that the marriage being void, children and second wife are not entitled for any share, therefore, under these circumstances whether the defendant Nos. 2 to 5 can be denied the legitimate share in ancestral property.

[vii] The pleading and relief sought by plaintiffs amounts to acquiescence of the fact that the marriage of defendant No. 2 with defendant No. 1 and children born out of that wedlock being legitimate, whether lower appellate Court can be said to have jurisdiction to record finding against undisputed question of fact.

9. Admittedly, defendant No. 2 is the second wife of defendant No. 1. The marriage of plaintiff No. 1 had taken place with defendant No. 1 in the year 1969

and so there was no question of treating defendant No. 2 as the legally wedded wife of defendant No. 1. In view of the provisions of the Hindu Marriage Act, the issues born from second wife also can not be treated as legitimate issues of defendant No. 1. They are entitled to get share only in the property of father, defendant No. 1, and they can not be treated as co-parceners along with plaintiff Nos. 2 and 3. This position of law is considered by the Courts below. As plaintiff No. 1 and defendant No. 6 died during pendency of the Appeal, the remaining members of joint Hindu family, who are entitled to succeed to the properties of plaintiff No. 1 and defendant No. 6 are considered by the Courts below. The first appellate Court has corrected the shares in view of the subsequent development and 1/3rd share is given to defendant No. 1. His legitimate issues will get similar share.

10. There was no need of challenging the status of defendant No. 2 and the issues born to her from defendant No. 1. Admittedly, defendant No. 2 is the second wife of defendant No. 1 and there are aforesaid circumstances. The learned counsel for the appellants

submitted that the principle of equity needs to be considered and the circumstance that the issues of second wife were born first needs to be considered in their favour. When there are specific provisions of law prohibiting the Court from doing something, this Court can not use the principle of equity in favour of defendant No. 2 and her issues. There is no question of use of principle of equity in the matter like present one. In this regard, the rival contentions with regard to the dispute which was prevailing between plaintiff No. 1 and defendant No. 1 also needs to be kept in mind.

11. So, all the points are answered against the appellants and Second Appeal stands dismissed. In view of dismissal of the Second Appeal, all the Civil Applications stand disposed of.

[T.V.NALAWADE, J.]