

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

SECOND APPEAL NO. 165 OF 2003

1. Sidram s/o Lingoji Bhaskare
Age : 60 Yrs., Occ. Agri.,
R/o : Biloli, Tq. Biloli,
District : Nanded.
2. Uttam s/o Sidram Bhaskare
Age : 21 Yrs., Occ. Agri.,
R/o : Biloli, Tq. Biloli,
District : Nanded.
3. Gangabai w/o Sidram Bhaskare
Age : 41 Yrs., Occ. Household
& Agri., R/o : Biloli, Tq. Biloli, **APPELLANTS/**
District : Nanded. **[ORI. DEFENDANTS]**

V E R S U S

1. Laxman s/o Sidram Bhaskare
Age : 25 Yrs., Occ. Agri.,
R/o : Biloli, Tq. Biloli,
District : Nanded.
2. Babanbai w/o Sidram Bhaskare
Age : 55 Yrs., Occ. Household
& Agri., R/o : Biloli, Tq. Biloli,**RESPONDENTS/**
District : Nanded. **[ORI. PLAINTIFFS]**

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Mr. V.D.Gunale, Advocate for Appellants.

Mr. U.B.Bilolikar, Advocate for R.Nos. 1 & 2.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 05/05/2016

JUDGMENT :

1. The Appeal is filed to challenge the Judgment and Decree of R.C.S. No. 62/1997 which was pending in the Court of the Civil Judge [Jr.Division], Dharmabad, deputation at Biloli, and also against the Judgment and Decree of R.C.A. No. 70/2000 which was pending in the Court of the Additional District Judge, Biloli, district Nanded. The Suit filed by present respondents for the relief of partition and separate possession is decided in their favour. Both sides are heard.

2. The Suit was filed for partition of house property bearing No. 1298 situated at Naikwadi Galli at Biloli proper and 1/3 share was claimed by each of the 2 plaintiffs. The Suit was filed for partition of agricultural

lands viz. G.No. 21 admeasuring 2 H. 30 R. [to the extent of 1 H. 5 R.] and G.No. 49 admeasuring 30 H. 16 R. [to the extent of 6 H. 58 R.] both situated at village Ainapur, Tahsil Biloli, district Nanded.

3. Plaintiff No. 1 is son of plaintiff No. 2 and plaintiff No. 2 is the first wife of defendant No. 1 Sidram. Defendant No. 2 is son born from second wife of Sidram and defendant No. 3 is second wife of Sidram. It is contended that as defendant No. 1 married with defendant No. 3 during life time of plaintiff No. 2, it is void marriage and so defendant Nos. 2 and 3 are not entitled to get any share in the suit properties as the suit properties are ancestral properties of defendant No. 1.

4. It is the case of plaintiffs that they were driven out of the house by defendant No. 1 and after that proceeding was filed for maintenance by plaintiff No. 2 and some lands were given to her in lieu of maintenance and she has become absolute owner of those lands in view of the provisions of Section 14 (1) of the Hindu Succession Act. It is contended that when plaintiff Nos. 1 and 2 demanded the partition of the ancestral

properties, defendant No. 1 refused to give the share of plaintiffs. It is the case of plaintiffs that defendant No. 1 is trying to dispose of the property and he has transferred some properties in the name of defendant Nos. 2 and 3 but they have no right in the properties and the mutations made in favour of defendant Nos. 2 and 3 are not binding on plaintiffs. $\frac{1}{2}$ share was claimed in the suit lands though $\frac{1}{3}^{\text{rd}}$ share is claimed in the suit house. No share was claimed by plaintiff No. 2 in lands as she had already got some land in lieu of maintenance.

5. Defendants filed joint Written Statement. They denied that the plaintiffs are entitled to get relief of partition and separate possession. They contended that daughters of defendant No. 1 are necessary parties to the Suit and due to non joinder of necessary parties, the Suit is bad. It was denied that plaintiff No. 2 has become owner of properties given to her and it is contended that the so called compromise is not binding on defendant No. 1. It is contended that in the past, Suit was filed for relief of partition and so the present Suit is not tenable.

6. Defendant No. 4, the purchaser from plaintiff

No. 2, has filed Written Statement and she has contended that G.No. 19 is sold by plaintiff No. 2 by sale deed dated 09/06/1992 for valuable consideration and as plaintiff No. 2 was absolute owner of the property, the transaction is binding on the defendants and plaintiff.

7. On the basis of aforesaid pleadings, issues were framed. Both sides gave evidence. Though the defence was taken in respect of filing of Suit in the past and dismissal of it, this point is considered by both the Courts and as the Suit was not in respect of present suit properties and as no share was given to plaintiff No. 1 in the ancestral and joint family properties, this point is decided against defendants. Oral evidence is given that no partition is effected and defendant No. 1 has also admitted that partition was not effected. Admittedly there was the cause of action and some properties were shown to be given to defendant Nos. 2 and 3. The Courts below have held that as the ancestral properties are involved, in the notional partition, the daughters are not involved as they were married prior to 1994 and as the parents are alive, shares can not be carved out for daughters. Due to this reason, it is held that Suit is not

bad for non joinder of the daughters. As there was no partition, partition is effected as per the provisions of Hindu Law by the Courts below of house property and equal share is given to plaintiff Nos. 1,2 and defendant No. 1. As the agricultural land is already given to plaintiff No. 2 though it was in lieu of maintenance and as no share was claimed by plaintiff No. 2 in agricultural lands, the land is equally divided between plaintiff No. 1 and defendant No. 1. This decision is not challenged by original plaintiffs and the decision is confirmed in the Appeal filed by defendant No. 1 by the first appellate Court.

8. When this Court [other Hon'ble Judge] admitted the appeal, this Court held that substantial questions of law can be formulated on the basis of ground Nos. (iii), (iv), (v), (vi) and (xiii). The grounds are as under.

(iii) *That, the court below ought to have seen that the respondent No. 2/original plaintiff filed Misc. Criminal Application No. 19/1975 for maintenance u/s 125 of Criminal Procedure Code against the appellant No. 1/original*

defendant No. 1. The said Criminal Application was compromised. In that compromise, the land S.No. 19 - B, admeasuring 3 Acres and 39 gunthas, S.No. 9 admeasuring 2 Acres and 16 gunthas, S.No. 1/A, admeasuring 3 Acres and 9 gunthas, S.No. 18/2 admeasuring 1 Acre and 34 gunthas situated at village Indapur were given to the respondent No. 2 in lieu of maintenance. The possession of the said land was also given to respondent No. 2 on 22/10/1975 and since then she is in possession of the said lands. Out of the said land, she has sold some land to the original defendant No. 4 and others. Therefore, she is not entitled for any partition, as more than 14 Acres of land is in her possession.

- (iv) That, the courts below ought to have seen that the present respondent No. 1/plaintiff had also filed Suit bearing R.C.S. No. 300/1992 against the appellant and original plaintiff No. 2/respondent No. 2 for partition and said suit came to be dismissed on 27/03/1995. Being aggrieved by the Judgment, the respondent No. 2 preferred an appeal bearing R.C.A.No. 91/1995. In the said Appeal, there was compromise took place between the respondent Nos. 1 and 2. The present appellant No. 1 was not party to the said compromise. The said

compromise decree took place in collusion with respondent Nos. 1 and 2, which is not binding upon present appellant No. 1, as the suit of partition filed by the respondent No. 1 is dismissed, therefore, the present suit i.e. R.C.S.No. 62/1997 is barred by res-judicata and hence not maintainable. That, whether in such circumstance the suit is maintainable or not is the substantial questions of law involved in this present Appeal.

- (v) *That, Chandrabai, Lamibai and Pirasavi are the daughters of appellant No. 1 are not made parties in the Suit, therefore, Suit is not maintainable for non joinder of necessary parties. This is also the substantial question of law involved in this Second Appeal.*
- (vi) *That, the property given to respondent No. 2 in lieu of maintenance is not added in the suit. Unless and until non suit properties are added, no effective decree can be passed in partition suit. Moreover, the respondent No. 2 has sold the joint family property to original defendant No. 4 without any right. Hence, in these circumstances the Suit filed by the respondents/plaintiffs is not at all maintainable.*
- (xiii) *That, whether the appellant Nos. 2 and 3 are*

entitled for share in joint family property who are the real wife and son of appellant No. 1 is also substantial question of law involved in this Second Appeal.

9. This Court has already discussed the relevant material and the material shows that most of the facts are admitted. It is not the case of defendant No. 1 that more properties will go to his share if the property given to plaintiff No. 2 in lieu of maintenance is considered in the present Suit. Further, the property was transferred to her in lieu of maintenance and she sold some of the properties to defendant No. 4 under registered sale deed. That transaction was never challenged. In view of these circumstances, this Court holds that there was no alternative before the Courts below than to give relief of partition and separate possession. It is not contended by defendant No. 1 that as per Hindu Law, he is entitled to more share. It can not be disputed that the second wife and issues from second wife are not entitled to get share in the ancestral properties and they can get share in the property of only defendant No. 1. Thus, no substantial question of law as such is involved though this Court has formulated some substantial questions of law.

10. In the result, Second appeal stands dismissed.

[T.V.NALAWADE, J.]

KNP/S.A. S.A. 165.2003 - [J]