

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

**Second Appeal No. 384 of 2012
With
Civil Application No.6685 of 2012**

Ramesh Rupaji Valvi. **.. Appellant.**

Versus

Sabubai Rupaji Valvi & Others. **.. Respondents.**

Shri. Mukul Kulkarni, Advocate, holding for Shri. J.R.
Shah, Advocate, for appellant.

Shri. V.P. Latange, Advocate, for respondent No.1.

Shri. P.R. Katneshwarkar, Advocate, for respondent Nos.3
to 6.

CORAM: T.V. NALAWADE, J.

DATE : 11th AUGUST 2016

ORDER:

1) The appeal is filed by original defendant No.2 of Regular Civil Suit No.28/1996 which was pending in the Court of the Civil Judge, Junior Division, Taloda, District Nandurbar and also against the judgment and decree of Regular Civil Appeal No.10/2005 which was pending in the Court of the District Judge Shahada, District Nandurbar. Both the sides are heard.

2) In the suit filed for partition and separate possession by present respondent Nos.1 and 2, namely, Sabubai and Amarsing, decree is given in their favour by the trial Court and each of them is held to be entitled to get 1/4th share in the suit property. The suit property includes agricultural lands and house property. Decision of the trial Court was challenged by filing appeal in District Court by Ramesh, son of Rupji but the said appeal is dismissed and the decision of the trial Court is confirmed. Defendant No.1 and his other issues did not challenge the decision. Defendant No.1 had filed second appeal along with delay condonation application bearing Civil Application No.9652/2012 in this Court. But due to death of defendant No.1, the said matter is abated. These circumstances need to be kept in mind while deciding present matter.

3) Plaintiff No.1, Sabubai is wife of Rupji. Plaintiff No.2 and defendant No.2 are sons of Sabubai born from defendant No.1. It is the case of Sabubai that defendant No.5 is the keep of defendant No.1 and defendant Nos.3 and 4 are sons of defendant No.5 born from defendant

No.1. It is their case that four agricultural lands mentioned in the suit and the house property are the ancestral property of defendant No.1 and so Amarsing is entitled to get partition and separate possession. It is their case that on partition she is also entitled to get share as per the provisions of the Hindu Law.

4) It is the case of the plaintiffs that defendant No.1 is not partitioning the property and is not giving separate share to the plaintiffs. It is their case that defendant No.1 has deserted plaintiff Sabubai and he has not made any provision for maintenance and so there was no other alternative than to file the suit for partition. It is specifically contended by the plaintiffs that the parties are from Bhill community, Scheduled Tribe and the provisions of the old Hindu Law, the first Hindu Succession Act is applicable to them. It is their case that as per the Hindu law only plaintiff Nos.1 and 2 and defendant Nos.1 and 2 are entitled to get share in the property.

5) The defendant Nos.1 and 2 filed written statement and they contested the suit. They contended

that previously Regular Civil Suit No.15/1981 which was filed for similar relief was dismissed and so present suit is not tenable. The said suit was against the father of Rupji and at that time it was held that father of Rupji had got the property under Inam Abolition Act and so there was no question of giving share to the plaintiffs. The defendants contended that defendant No.5 is also legally wedded wife of defendant No.1 and the issues born to her from defendant No.1 are also entitled to get share on partition. This written statement was adopted by defendant Nos.3 to 5.

6) Issues were framed on the basis of the aforesaid pleadings. Plaintiffs gave evidence and defendant No.1 examined himself. The trial Court held that the properties are ancestral property of defendant No.1. The trial Court held that there is no pleading and there is no evidence as regard the custom for the second marriage and for giving share to defendant Nos.3 and 4 and so the trial Court has given 1/4th share to each plaintiff and to each of the defendant Nos.1 and 2.

7) In view of the aforesaid nature of decision, it was necessary to challenge the decision of the trial Court by defendant Nos.3 to 5 but they did not file appeal. When this decision was not against Ramesh, son of Rupji, he had filed first appeal but that appeal is dismissed and the District Court has confirmed the decision of the trial Court. Only defendant No.2 has come in the second appeal and as already observed the matter filed by defendant No.1 is disposed of as abated.

8) There is evidence to show that father of Rupji had received the property under the Inam Abolition Act. Thus the property is the ancestral property in the hands of Rupji. The plaintiffs have come with specific case that the provisions of the first Hindu Succession Act, of 1956 are applicable to their community but there is no pleading in that regard of the defendant. There is no specific pleading with regard to the custom. In any case, the decision of the trial Court was not challenged by the parties affected. In view of these circumstances, there was no other alternative before the District Court than to confirm the findings of the trial Court. Defendant No.1 is son of Rupji,

son from first wife and in view of these circumstances, there are no merits in the appeal filed by original defendant No.2. No substantial question of law as such is involved so far as the interest of defendant No.2 are concerned in the present matter. There is no dispute over the extent of shares fixed by the trial Court. The learned counsel for the appellants placed reliance on a case reported as **AIR 2014 SC 1201 (R. Unnikrishnan v. V.K. Mahanudevan)**. There cannot be dispute over the proposition made in this case by the Apex Court. But the facts of the present matter are totally different. In the previous suit the property was in the hands of father of Rupji and now the property is in the hand of Rupji. So, the appeal stands dismissed. Civil Application is disposed of.

Sd/-
(T.V. NALAWADE, J.)

rsl