

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

**905 SECOND APPEAL NO. 210 OF 2011
WITH
CA/15737/2015
IN
SA/210/2011**

**JAGUBAI W/O BABANRAO WAGH
AND ANR.**

VERSUS

**SHRIDHAR S/o BABANRAO WAGH
AND ORS.**

.....

Mr. S.S.Gangakhedkar, Advocate for Appellants.
Mr. B.A.Dhengle h/f Mr. T.J.Poul, Advocate
for R – 1 to 3.

.....

CORAM : T.V.NALAWADE, J.

DATE : 28th JULY, 2016

ORDER :-

. The Appeal is filed by original plaintiffs of R.C.S. No. 352/2000 [old Spl.Civil Suit No. 198/1996] which was pending in the Court of the Civil Judge [Jr.Division], Parbhani. The Appeal is against the decision of the trial

Court and also against the decision of R.C.A. No. 96/2004 which was pending in the Court of the District Judge -2, Parbhani. Heard both sides.

2. The Suit was filed for relief of partition and possession of the share of the plaintiffs in so called joint Hindu family properties of plaintiffs and defendants. It was filed in respect of land G.No. 427 admeasuring 13 H. 6 R. [to the extent of 8 H. 35 R.], G.No. 613 admeasuring 4 H. 33 R. [to the extent of 1 H. 5 R.], G.No. 562 admeasuring 75 R., G.No. 651 admeasuring 3 H. 41 R. [to the extent of 86 R.], all lands situate at Pokharni, Tahsil and District Parbhani and one house situated at Pokharni, Tahsil and District Parbhani having 3 rooms and open space.

3. It is the case of the plaintiffs that aforesaid properties are ancestral properties of plaintiffs and defendant Nos. 1 to 6. It is contended that one Babanrao was common ancestor of the parties. Subhadrabai was the first wife of Babanrao and defendant No. 1 was born to Subhadrabai from Babanrao. It is contended that after the death of Subhadrabai, Babanrao performed second marriage with plaintiff No. 1 and she delivered 2 daughters from Babanrao.

Plaintiff No. 2 and defendant No. 6 are the said 2 daughters.

4. It is the case of the defendants that after the death of Babanrao, plaintiffs started residing separate from the defendants and they are living separate since last about 20 years. It is contended that the defendants have not taken care of the plaintiffs and they have not provided anything for their maintenance. It is contended that maintenance proceeding is filed by plaintiff No. 1 against defendant No. 1 and that proceeding is still pending.

5. It is the case of the plaintiffs that to deprive them of their right to get share, defendant No. 1 has transferred land G.No. 613 to defendant No. 2, his wife and some property is transferred in the name of defendant No. 3. It is contended that the transactions made in favour of the defendants are not binding on the plaintiffs. It is contended that they demanded partition on 14/07/1996, but defendants refused to make partition and so cause of action took place for the Suit.

6. Defendant Nos. 1 to 5 filed joint Written Statement and they denied the aforesaid contentions. They

contended that the Suit is bad for non joinder of necessary party. They contended that plaintiff No. 1 was the second wife of Babanrao and this marriage was performed during life time of Subhadrabai and so plaintiff No. 1 is not legally wedded wife of Babanrao. It is contended that the marriage of plaintiff No. 1 took place after coming into force of Hindu Marriage Act and Hindu Succession Act and so plaintiff Nos. 2 and defendant No. 6, the daughters, are not entitled to get share in the ancestral property of Babanrao.

7. It is the case of defendant No. 1 that he had maintained plaintiff No. 1 and her daughters, but they started living separate on their own. He contended that in the maintenance proceeding, maintenance is awarded in favour of plaintiff No. 1. It is contended that it is defendant No. 1 who had spent for the marriage of defendant No. 6 and for the marriage expenses, he had sold 3 Acres portion of land from G.No. 427 to defendant No. 4. It is contended that no relief is claimed for setting aside the sale deed executed in favour of other defendants and for that reason also Suit is not tenable.

8. Defendant No. 1 contended that he is still ready

to maintain plaintiff No. 1, but no share can be given to the plaintiffs.

9. The Suit was dismissed as against defendant No. 6, but no steps were taken to restore the Suit. Issues were framed on the basis of aforesaid pleadings. Though specific issue was not framed with regard to the legality of marriage of plaintiff No. 1 with Babanrao, evidence was given by both sides on such issue as in Written Statement, defendants have made contentions that plaintiff No. 1 is not legally wedded wife of Babanrao. On the basis of oral evidence and as burden to prove the legal marriage was not discharged by the plaintiffs, the Courts below have dismissed the Suit.

10. The Courts below considered the circumstances as follows.

[i] The age of Shridhar, defendant No. 1, was given as 55 years when the Suit was filed in the year 1996. Thus, he was born in the year 1941. The age of plaintiff No. 2, the elder issue of plaintiff No. 1, was given as 35 years in the year 1996 and so she was born in the year 1961. Even if these years or the period is considered as the

approximate period, in the plaint or in the evidence, no specific year of the marriage is given by the plaintiffs.

- [ii] The evidence is given by plaintiff No. 1 that she married with Babanrao when defendant No. 1 was one year old, but this substantive evidence is not consistent with the aforesaid age given in the title of the Suit. The age of plaintiff No. 1 is given as 60 years and age of defendant No. 1 is given as 55 years and so the age difference is given of only 5 years. Then she tried to say that she was aged about 10 – 12 years at the time of her marriage. She has given evidence that plaintiff No. 2 was born after 2 years of her marriage. If age of plaintiff No. 1, which is certain, is taken into consideration, inference is drawn that her marriage had taken place after 1956.
- [iii] No record about the death of mother of defendant No. 1 is produced, which could have been produced.
- [iv] Witness Manikrao examined by the plaintiffs has stated in evidence that first wife of Babanrao died during second delivery and thereafter Babanrao married with plaintiff No. 1, after one year of the death of first wife. This evidence is not consistent with the case and the evidence of

plaintiff No. 1.

[v] There is specific evidence of defendant No. 1 that the marriage of plaintiff No. 1 took place with Babanrao during the life time of first wife of Babanrao. He has specifically stated in the evidence that his mother Subhadrabai died in the year 1958. One witness Munjabhau examined by the defendants has stated that the marriage of plaintiff No. 1 with Babanrao took place in the year 1957.

11. On the basis of aforesaid circumstances, the Courts below have given finding that the marriage between plaintiff No. 1 and Babanrao took place after 1956, after coming into force of Hindu Marriage Act and Hindu Succession Act but during life time of first wife. These findings are on question of facts. The relevant provisions are considered by the Courts below and it is held that in the ancestral properties, the plaintiffs can not get share as plaintiff Nos. 2 and defendant No. 6 are illegitimate children of Babanrao. It is held that plaintiff No. 1 is entitled to get maintenance and separate proceeding is filed for maintenance. The findings are on question of facts and so there is no possibility of interference in the decision given by

the Courts below.

12. Learned counsel for the appellants/plaintiffs placed reliance on some reported cases viz. AIR 2012 Supreme Court – 2010 [A. Shanmugam Vs. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, represented by its President], 1952. AIR (SC) – 231 [Gokal Chand Vs. Parvin Kumari] and 2011 (4) JT – 90 [Revanasiddappa & Anr. Vs. Mallikarjun & Ors.]. On the basis of the observations made in the last case, it was submitted that the matter is referred to the Larger Bench and so present matter also needs to be kept pending. This submission is not acceptable. At present there is settled law that illegitimate children are not entitled to get share in the ancestral property and they can not file Suit for partition. The other cases are on different points. The case of Gokal Chand [supra] is on the point of presumption available u/s 114 of the Evidence Act and the case is also u/ss 32 (5) and 50 of the Evidence Act. In the present matter, factum of marriage is not disputed. The plaintiffs have failed to prove that the marriage of plaintiff No. 1 with Babanrao was legal. In view of the above, this Court holds that no substantial question of law as such is involved in the matter.

13. In the result, Second Appeal stands dismissed.
In view of dismissal of Second Appeal, C.A. No. 15737 of
2015 stands disposed of.

[T.V.NALAWADE, J.]

KNP/S.A. 210.2011.odt