

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

903 SECOND APPEAL NO. 25 OF 2010
WITH CA/712/2016 IN SA/25/2010

JAGGANATH GORAKH PATIL AND ORS
VERSUS
BHAGIRATHIBAI GORAKH PATIL AND ORS

...
Advocate for Appellants : P.M. Shah, Sr. Counsel i/b. V.B. Patil
Advocate for Respondents 1 & 2 : A.S. Abhyankar h/f. S.V. Natu
...

CORAM : T.V. NALAWADE, J.
DATED : 27th April, 2016.

ORDER :

1. The appeal is filed against judgment and decree of Regular Civil Suit No. 152/2000 (Old No. Special Civil Suit No. 54/1992), which was pending in the Court of Civil Judge, Junior Division, Nandurbar and also against judgment and decree of Regular Civil Appeal No. 31/2001, which was pending in the District Court, Nandurbar. The suit filed for partition and separate possession of Joint Hindu Family property was partly decreed by the Trial Court. Both the sides challenge the decision in first appeal which was filed by original defendants. The plaintiffs filed cross objection. The cross objection of the plaintiffs was allowed and the extent of share of plaintiffs in the suit properties is increased. Both the sides are heard.

2. Plaintiff No. 1 - Bhagirathibai and plaintiff No. 2 - Sushilabai, daughter of Bhagirathibai, had filed the aforesaid suit. Gorakh Patil was the husband of plaintiff No. 1 and father of plaintiff No. 2. Defendant No. 1 is the real brother of Gorakh. Defendant Nos. 2 to 4 are issues of other brother of Gorakh namely Narsu. Defendant No. 5 is a cousin of plaintiff No. 2 and defendant No. 6 is a sister of Gorakh. Defendant No. 7 is widow of Narsu.

3. It is the case of plaintiffs that Gorakh died during lifetime of his father prior to 1970 when he was living in Joint Hindu Family with his father. It is contended that Gorakh had 1/4th share in the suit properties as the properties were ancestral and Joint Family properties of his father. They contended that as successors of Gorakh, they are entitled to that share.

4. It is the case of plaintiffs that Gorakh had no male issue and due to this circumstance, the defendants do not want to give share to plaintiffs. It is contended that plaintiff No. 1 was driven out of Joint Hindu Family house when she demanded the house and when she refused to execute relinquishment document in favour of defendants. It is the case of plaintiff No. 1

that plaintiff No. 2 is married and so, she is living with plaintiff No. 2.

5. It is the case of plaintiffs that defendant No. 3 is claiming himself to be adopted son of plaintiff No. 1. It is contended that plaintiff No. 1 never took defendant No. 3 in adoption and he is a son successor of Narsu. It is contended that no adoption ceremony took place and no document of adoption was prepared by plaintiff No. 1 regarding adoption.

6. Defendant No. 3 filed written statement. Defendant Nos. 1, 2, 4 and 6 adopted written statement of defendant No. 3. Defendant No. 7 filed similar written statement. They contended that on 22.3.1971 defendant No. 3 was adopted by plaintiff No. 1 and deed was executed by plaintiff No. 1 in that regard. It is contended that the adoption deed was registered and that adoption was never challenged and as no relief is claimed in respect of said adoption, the suit is not tenable.

7. Defendants took the defence that on 1.4.1972 partition was effected and plaintiff No. 1 had signed that document also and mutation was made on the basis of that document. It is contended that due to these circumstances also,

plaintiffs cannot contend that there is no adoption and partition has not taken place.

8. Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. The Courts below have held that there was no partition. It is held that the so called document cannot be read in evidence as by that document, partition was to be made and it was not registered. The Trial Court held that defendant No. 3 was taken in adoption by plaintiff No. 1 and it was necessary for her to seek declaration in respect of that adoption. By presuming adoption of defendant No. 3, the Trial Court first separated the share of Gorakh and then divided the share of Gorakh between plaintiffs and defendant No. 3.

9. The District Court held that factum of adoption was proved, but the adoption was not valid. Due to this finding, the District Court further held that there was no necessity of getting declaration in respect of adoption and so, the plaintiffs together were entitled to get the share of Gorakh. The share of Gorakh in the property of his mother Sarubai is also given to the plaintiffs. The share of Gorakh in the property of Raghunath, father of Gorakh is also given to the plaintiffs. There is no dispute about

the extent of share which plaintiffs will get if the adoption is not proved.

10. The learned Senior Counsel for the appellants submitted that following substantial questions of law need to be formulated.

- (i) Whether the District Court has committed error in holding that the adoption is not valid when there was no specific pleading in the plaint in that regard ?
- (ii) Whether the District Court has committed error in holding that the suit is within limitation when the suit was filed after 20 years of the date of adoption ?
- (iii) Whether the District Court has committed error in holding that the age difference between the age of plaintiff No. 1 and defendant No. 3 was less than 21 years and for that reason, the adoption was not valid ?
- (iv) Whether the Courts below have committed error in not accepting the case of defendants that partition had taken place in the year 1972 ?

11. On the other hand, the learned counsel for plaintiffs submitted that the suit ought to have been decreed in toto by the Trial Court itself on the ground that plaintiff No. 1 had

become absolute owner of the properties after the death of Gorakh in view of provisions of section 14 of Hindu Succession Act, 1956 and section 12 of Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as 'the Act' for short). The learned counsel submitted that on this ground, the suit ought to have been decreed and there is no question of formulation of substantial questions of law on any of the aforesaid points.

12. Both the Courts below have held that the factum of adoption, giving and taking, is proved. The District Court has held that the adoption was not valid as the age difference between the age of plaintiff No. 1, adoptive mother and defendant No. 3, adoptee boy was less than 21 years. The main grievance of the learned Senior Counsel for the appellants is that there was no specific pleading with regard to the age difference and further, the suit was not within limitation, if the relief of declaration in respect of adoption was necessary.

13. The Courts below have held that partition is not proved. The finding that there was no partition, given by the Trial Court, is confirmed by the First Appellate Court. Exh. 127, the so called partition document shows that by this document, the parties had effected the partition. The document was not

registered and further, there are more circumstances like record of mutation of the year 1957 showing that in that it was informed to revenue authority that there was oral partition and two properties like Survey No. 81/1 and Survey No. 78/2 were given to the share of Gorakh. After making the mutation in favour of Gorakh in respect of these lands, in the year 1967 after the death of Gorakh, another mutation was made in favour of plaintiffs in respect of these two lands. In spite of this record, the defendants wants to prove that the actual partition took place under the aforesaid document, Exh. 127. In the year 1972, one more mutation, mutation No. 80, was made after the death of Raghunath, father of Gorakh. This document shows that names of all the issues of Raghunath were entered as successors of Raghunath in respect of lands Survey Nos. 27 and 97. If there was partition made in the year 1972, in ordinary course, such mutation would not have been made and it can be said that the document was not acted upon and the names of most of the successors of Raghunath were entered in the revenue record after his death. The findings on the factum of partition of the Courts below are concurrent and no substantial question of law as such is involved in that regard.

14. At the time of consideration of point of limitation, it

needs to be kept in mind that the defendants failed to prove that there was partition. If the properties were Joint Hindu Family properties and the defendant No. 3 was claiming some share in the properties as adopted son of plaintiff No. 1, he could not have defended the matter by saying that the suit was not within limitation. Other defendants also could not have defended the suit by taking such defences. Further, if the adoption was not valid, it was void, then it can be said that the properties remained with Joint Hindu Family and so, the point of limitation was not involved. Thus, only the point of validity of adoption needs to be dealt with in the present proceeding. The learned counsel for plaintiffs placed reliance on the case reported as **A.I.R. (31) 1944 Madras 550 [Nalam Ramayya and Ors. Vs. Nalam Achamma]**. On the other hand, the learned counsel for appellants placed reliance on the cases reported as **A.I.R. 1953 NAGPUR 239 [Nago and Ors. Vs. Sukya and Anr.]**, **AIR 1957 MADHYA BHARAT 179 [Madhavrao Vs. Netram]** and **AIR 1961 KARNATAKA 49 [Mallappa Fakirappa Sanna Nagashetti and Ors. Vs. Shivappa and Anr.]**. The facts of the cases on which reliance was placed by the learned Senior Counsel for appellant show that they are in respect of disputed adoption which had taken place prior to coming into force of the provisions of the Act. The points of consent of other spouse or

permission of the collateral were involved in the two matters. In the third matter, the case of plaintiff of adoption was conceded by the other side.

15. In the codified law, the Act, there is concession in respect of the consent of other spouse and if the conditions laid down in that regard are fulfilled, the adoption by one spouse can be accepted. In view of the previous position of law, in the first case cited by the learned Senior Counsel for appellants, it was observed that a bare denial of adoption is not sufficient and its validity needs to be challenged. In the case reported as **1983 Mh.L.J. 402 [Madhusudandas Vs. Narayanibai and Ors.]**, the Apex Court has discussed the codified law in respect of adoption and it is laid down that both the factum and validity of adoption need to be proved by the person alleging adoption as adoption seeks to displace the natural succession to property.

16. Section 4 of the Act shows that unless expressly provided by provisions of this Act, Hindu Law, its interpretation or even custom in respect of Hindu adoption shall cease to have effect. It is made clear that any law inconsistent with the provision of this Act shall cease to apply. Due to this overriding effect, cases cited supra by the learned Senior Counsel are of no

use to the appellants, defendants.

17. Section 5 of the Act runs as under :-

"5. Adoptions to be regulated by this Chapter.-- (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth."

18. The provisions with regard to the requirement of valid adoption can be found in section 6 of the Act, which runs as under :-

"6. Requisites of a valid adoption.--No adoption shall be valid unless--

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this chapter."

The requirements mentioned in section 6 are specifically quoted in sections 7 to 10. The provision of section 11 shows the other conditions which also need to be complied as per the requirement of section 6 (iv) of the Act. So, the provision of section 11 (iv) is relevant and it is as under :-

"11. Other conditions for a valid adoption.--

In every adoption, the following conditions must be complied with :

(i)

(ii)

(iii)

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted."

19. In view of the wordings of sections 5, 6 and 11 (iv), it needs to be presumed that if the age difference is less than 21 years in a case when adoption is by female and person to be adopted is male, such adoption is void.

20. The adoption document, Exh. 126, which was registered and on which defendant No. 3 is placing reliance

shows that the age of the plaintiff No. 1 was shown as 33 years and age of defendant No. 3 was shown as 15 years. Thus, from the document itself, it can be said that there was difference of age of hardly 18 years. At Exh. 72, there is birth certificate of plaintiff No. 1 and it shows that the date of birth of plaintiff No. 1 is 10.5.1945. So, it can be said that on 22.3.1971 the date of execution of Exh. 126, the age of plaintiff No. 1 was 26 years. The District Court has considered the best possible case available for defendant No. 3 by presuming that the age of plaintiff No.1 was probably not 26 years, but it was 33 years. Similarly, there is admission given by defendant No. 3 in the evidence that his birth date is 23.4.1954 i.e. he was aged about 17 years at the relevant time. Thus, in any case, the age difference was 16 to 18 years and not 21 years. Thus, the adoption was void. In view of the aforesaid position of law, there was no need of specific pleading from plaintiffs' side in that regard and it was up to defendant No. 3 to prove that all the aforesaid conditions were fulfilled including the condition of difference in the age. On this point, the learned counsel for plaintiffs placed reliance on the case reported as **1994 Mh.L.J. 1078 BOMBAY [Nemichand Shantilal Patni Vs. Basantabai w/o. Nemichand Pahade]**. Thus, no substantial question of law as such is involved in respect of the main contention made for

appellants, defendant No. 3.

21. The learned counsel for respondents placed reliance on the case reported as **B.L.R. [Vol. [XXXIII] 46 [Kesharbai Jagannath Gujar Vs. State of Maharashtra]** to support his contention that in view of the provision of section 12 (c) of the Act and section 14 (i) of the Hindu Succession Act, the property of Gorakh, his share in the Joint Hindu Family property had vested in plaintiffs and so, defendant No. 3 cannot get anything even after proving adoption. This Court has carefully gone through the facts of the case of Kesharbai cited supra. In that case, husband of Kesharbai was having absolute property at the time of his death and only due to the provisions of Hindu Law, prevailing at that time, the widow got the property as limited owner in the year 1934 and then due to subsequent changes in the law, Hindu succession Act 1956, she became absolute owner of the property. The facts of the present case are different. The suit is filed for relief of partition of joint Hindu Family properties and it is the case of plaintiffs that partition had not taken place. On the point, the following reported cases can be cited.

(i) AIR 1987 SUPREME COURT 398 [Vasant and Anr. Vs. Dattu and Ors.],

(ii) AIR 1966 BOMBAY 174 (V 53 C 38) [Ankush Narayan Shingate Vs. Janabai Kom]

Rama Sawat and Ors.].

In view of the position of law laid down by the Apex Court in the case of **Vasant** cited supra, which is not supporting the proposition made for plaintiffs, there is no need to go in to more details of this point. As no substantial question of law is involved in the matter, following order is made.

ORDER

The appeal stands dismissed. Civil Application is disposed of. The learned Senior Counsel for original defendant prayed for stay to the execution of decree. The suit was of 1992. The age of the lady, plaintiff No. 1 is more than 75 years. The entire property is with defendants. Due to this circumstance, stay is refused.

[T.V. NALAWADE, J.]

ssc/