

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

SECOND APPEAL NO.694 OF 2015
WITH
CIVIL APPLICATION NO. 15675 OF 2015

Manik s/o Shesherao Karale,
Age 57 years, Occu. Agri.,
R/o Gaundgaon, Taluka Gangakhed,
District Parbhani

..Appellant

Versus

1. Sumitrabai w/o Tulshiram Sawant,
Age 70 years, Occu. Agri. and
Household, R/o Ukhali (Bk),
Taluka Gangakhed,
District Parbhani

2. Shalubai w/o Sopan Shinde,
Age 44 years, Occu. Agri.,
R/o Masala, Taluka Gangakhed,
District Parbhani

..Respondents

Mr M.P. Kale, Advocate for appellant

Mr S.G. Chapalgaonkar, Advocate for respondents

CORAM : SUNIL P. DESHMUKH, J.

DATE : 10th October, 2016

ORAL JUDGMENT

1. Heard learned counsel for the parties at length.
2. Substantial question arises as to :

*“ Whether the finding recorded by the trial court and confirmed
by appellate court about entitlement of plaintiffs to 5/9th share in
suit property is in accordance with law ? ”*

3. Learned counsel for the respondents, on instructions, waives service and second appeal is taken up for disposal by consent.
4. Agricultural lands bearing blocks no. 362, 407, 311, situated at village Guandgaon in taluka Gangakhed, district Parbhani are ancestral properties of Shesherao and Vishwanath, the two brothers.
5. Shesherao had married to one Chandrakalabai. From said wedlock, Manik was born. After death of Chandrakalabai, Shesherao married to Sumitrabai and from said relationship, daughter Shalubai had been begotten. Sheshrao died leaving behind him wife Sumitrabai, son Manik and daughter Shalubai.
6. After death of Shesherao, Shalubai had instituted proceedings bearing regular civil suit No. 260 of 1989 against Manik and another. In said proceedings, right of partition of property to Shalubai who is plaintiff no.2 in present suit (regular civil suit no.145 of 1997) had been recognised. However, in appeal bearing regular civil appeal no.53 of 1992, the decree of the trial court was set aside and the suit was dismissed for want of Sumitrabai as a party to said suit.
7. Subsequently, Sumitrabai and Shalubai had demanded partition of the ancestral property left behind by Shesherao and had filed proceeding bearing regular civil suit no.145 of 1997. In the suit, son of Shesherao from Chandrakalabai, Manik and his brother Vishwanath had been arrayed as defendants no. 1 and 2 respectively. During

pendency of suit, defendant no.2 Vishwanath died issules. The suit came to be decreed on 4th April, 2003 granting 5/9th share to plaintiffs no.1 and 2 in the property. Appeal therefrom was carried to district court by defendant no.1 bearing regular civil appeal no. 6 of 2014 which has been dismissed holding it to be not maintainable under judgment and order dated 27th August, 2015 and as such, the present second appeal.

8. It appears, regular civil appeal bearing no. 7 of 2005, which had been preferred by third party Vaijanath s/o Rangnathrao Katkar against aforesaid judgment and decree of trial court dated 4th April, 2003, had also been dismissed on 28th August, 2009.

9. Learned counsel Mr. M.P. Kale submits that regular civil appeal no. 6 of 2014 has been considered to be not maintainable, for, an opportunity had been available while regular civil appeal no. 7 of 2005 filed by third party was being prosecuted to which present appellant had been a party. Since the opportunity had not been availed of pursuant to Order XLI, rule 22 of the Code of Civil Procedure, 1908, regular civil appeal no. 6 of 2014 has been thrown out. He submits that although this is being so observed, yet the appellate court has not taken into account that an appeal, in fact, had been preferred by the appellant which was belated and delay had not been condoned by appellate court. The matter had come to upto this high court under writ petition bearing no. 1349 of 2013 and this high court had allowed the same, condoning delay and had directed the district judge to

dispose of the appeal. He submits that it is an error apparent committed by the appellate judge in throwing out the appeal at threshold, holding the same to be not maintainable.

10. Learned counsel further draws attention to that the appellant had disputed relationship of respondent no. 1 with deceased Sheshrao through whom the property is claimed to be derived by plaintiffs-respondents. According to him, relevant issues in respect of the same, which were framed, casting burden on respondents, were erroneously deleted. He, therefore, submits that the matter deserves to be allowed and sent back to trial court for reconsideration afresh letting an opportunity to the parties to contest the same on merits.

11. Aforesaid submissions on behalf of the appellant are countered by learned counsel Mr. S. G. Chapalgaonkar appearing on behalf of respondents, purports to resist the contentions that throwing away regular civil appeal no. 6 of 2014 at the instance of appellant against judgment and decree in regular civil suit no. 145 of 1997 to be not proper and hastens to add that appellant does not have any case on merits.

12. Learned counsel points out that the deletion of issues had been absolutely proper since the deletion had been entailed and stands conceded to by the appellant as the order of deletion of issues had not been challenged during pendency of the suit. He submits that on that score, the appellant has no case at all since in the previous litigation

bearing regular civil suit no. 260 of 1989 at the instance of respondent no. 2 had ended up in accepting the status of plaintiffs no. 1 and 2 as wife and daughter of deceased Sheshrao. Said litigation had, in fact, been disposed of as plaintiff no. 1 Sumitrabai had not been a party to suit, finding that she was necessary party. The appellant is estopped from questioning status of plaintiffs as wife and daughter of Sheshrao and thus, deletion of issues had been proper.

13. Learned counsel contends that in any case, 5/9th share granted in suit property to plaintiffs no. 1 and 2 (respondents no. 1 and 2 herein) is improper and untenable. He submits that shares will have to be recalculated, taking into account prevailing legal position.

14. Learned counsel for respondents submits that shares have been properly granted by the trial court and the decree of the trial court stands confirmed by the appellate court and there does not appear to be any error in the same.

15. There appears to be considerable force in the submission of Mr. Kale about that district court had been in error in dismissing appeal before it holding it to be not maintainable, and also in the submissions of Mr. Chapalgaonkar that deletion of issues had been not erroneous. Having regard to emerging position, it does not appear to be necessary to relegate parties to appellate court.

16. While considering submissions on either side, it would be relevant to refer to that there is no dispute about suit property being

ancestral property of Sheshrao and Vishwanath, the two brothers. Thus, ancestral property would go in equal divisions to Sheshrao and Vishwanath meaning that in the ancestral property, Sheshrao will have half share and Vishwanath will have half. The situation emerges that while Vishwanath, brother of Sheshrao died during pendency of suit. According to the provisions of Hindu Succession Act, 1956, son and daughter of brother would fall in the category of Class-II heirs after death of Vishwanath, wherein wife of deceased brother has not been referred to as heir. Sheshrao's share in the ancestral property would devolve under the circumstances, on defendant no. 1 and plaintiff no. 2, and not on his wife Sumitrabai.

17. The half share of Vishwanath in ancestral property will be equally shared by plaintiff no.2 Shalubai and defendant no. 1 Manikrao. Sumitrabai would not succeed to any share in Vishwanath's half share in ancestral property.

18. Half share of Sheshrao in the ancestral property will undergo three equal divisions applying ratio as emerging under the judgment of the supreme court in the case of *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*, reported in *AIR 1978 SC 1239*. Sheshrao's 1/3rd share in half of the ancestral property would be further divided into three equal shares for wife Sumitrabai-plaintiff no.1, son Manikrao – defendant no. 1 and daughter Shalubai-plaintiff no. 2.

19. Learned counsel on either side fairly concede to emerging legal position that Sumitrabai–plaintiff no. 1 would not have any share in half of ancestral property of Vishwasnath's share. She, however, would be entitled to $1/3^{\text{rd}}$ share in half share of Sheshrao in ancestral property. Further to that, $1/3^{\text{rd}}$ of the half of the ancestral property of Sheshrao will further undergo division in three equal shares for wife, son and daughter.

20. As such, it will have to be considered that the findings recorded by the trial court about entitlement of plaintiffs to partition of ancestral property appears to be proper and correct. However, shares as referred to under the decree would not be said to be in accordance with legal position.

21. The shares as have been purportedly determined under decree of the trial court will have to undergo alteration and the decree would require modification accordingly.

22. At this stage, learned counsel for the parties seek time to submit calculations of share in accordance with emerging legal position as observed hereinabove and state that they will work out share calculations and according to which decree passed by the trial court may be modified.

23. On 26th April, 2017, learned counsel for the parties have submitted calculations of share which are stated to have been verified

by the respective counsel and have been accepted. Said calculations are taken on record and marked 'X' for the purpose of identification.

24. Accordingly, the decree of the trial court to stands modified and the suit would stand disposed of in terms of modified shares viz: plaintiffs no. 1 and 2 will take $8/36^{\text{th}}$ and $11/36^{\text{th}}$ share in ancestral property left behind by Sheshrao and Vishwanath and defendant no. 1 Manik would take $17/36^{\text{th}}$ share in same. Decree will have to be drawn in accordance with the modified shares referred to above, i.e. plaintiff no.1-Sumitrabai would be entitled to $8/36^{\text{th}}$ share in the ancestral property whereas plaintiff no.2 Shalubai and defendant no.1 Manik would be entitled to and $11/36^{\text{th}}$ and $17/36^{\text{th}}$ share in the same respectively. Decree be drawn accordingly.

25. Second appeal stands disposed of in aforesaid terms.

26. Civil application stands accordingly disposed of.

SUNIL P. DESHMUKH,
JUDGE

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