

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

**SECOND APPEAL NO.722 OF 2016
WITH
CIVIL APPLICATION NO.8213 OF 2017
AND
CIVIL APPLICATION NO.9518 OF 2017**

1. Shrikant s/o. Namdev Nirmale,
Age : 36 years, Occ. Agri.,
r/o. Ruibhar,
Tq. and Dist. Osmanabad
2. Chandrakant s/o. Dattatraya
Nirmale, Age : 50 years,
r/o. Ruibhar,
Tq. and Dist. Osmanabad
3. Prakash Mohan Bhopi @ Sonji,
Age : 55 years, Occ. Agri.,
r/o. Khadkal Galli, Tuljapur,
Tq. Tuljapur, Dist. Osmanabad ..Appellants

Vs.

1. Vilas s/o. Yeshwantrao Bhopi
@ Sonji, Age : 66 years,
2. Deepak Pandit Bhopi @ Sonji,
Age : 62 years, Occ. Agri.
3. Manoj Pandit Bhopi @ Sonji,
Age : 53 yaers, Occ. Agri.,
4. Sunil Pandit Bhopi @ Sonji,
Age : 50 years, Occ. Agri.,
5. Parwatibai w/o. Mohan Bhopi @
Sonji, Age : 50

all r/o. Khadkal Galli,
Tuljapur, Dist. Osmanabad

..Respondents

Mr.R.N.Dhorde, Senior Advocate i/b. Mr.V.R.Dhorde,
Advocate for Appellants

Mr.S.A.Wakure, Advocate for respondent no.1

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CORAM : SANGITRAO S. PATIL, J.

DATE : JULY 24, 2017

ORAL ORDER :

Heard.

2. Appellant nos.1 and 2 who are original defendant nos.6 and 7, respectively, and appellant no.3 who is original defendant no.2 have preferred this appeal against the judgment and decree dated 10.02.2016 passed in R.C.A. No.234 of 2011 by the learned District Judge-2, Osmanabad, whereby he confirmed the judgment and decree dated 26.08.2011 passed in Special Civil Suit No.116 of 1999 by the learned Joint Civil Judge, Senior Division, Osmanabad.

3. Appellant nos.1 and 2 have purchased the suit land from appellant no.3. Respondent no.1 (original plaintiff) who claiming himself to be a co-sharer of the suit land, filed the above-numbered suit for partition and for getting separate share therein. The learned trial Judge held that the suit land is ancestral and joint family property of respondent no.1, appellant no.3 and other respondents and declared that respondent no.1 would have $1/3^{\text{rd}}$ share therein.

4. The learned Senior Counsel for the appellants submits that one Yashwantrao Bhopi was grand-father of respondent nos.2 to 4. He had two wives namely, Gopikabai and Devaibai. He got one son Mohan from Gopikabai and two sons namely, Vilas and Pandit from Devaibai. Appellant no.3 is the son of Mohan. It is the case of the appellants that the suit land was gifted by the father of the deceased Gopikabai in the year 1939 under a

registered gift-deed. After her demise, the said land came to be recorded in the name of Yashwantrao Bhopi, however, as per Section 15 of the Indian Succession Act, the suit land, being the property acquired by the deceased Gopikabai from her father, was liable to be inherited by the father of appellant no.3 namely, Mohan and then after demise of Mohan, it was liable to be inherited by appellant no.3. It was their case that respondent no.1 and his brother, the deceased Pandit or his legal representatives, had no right to inherit the suit land since they were not the legal heirs of the deceased Gopikabai. However, neither the trial Court nor the first appellate Court framed issue in respect of this inheritance of the suit land and have wrongly held that it was an ancestral and joint family property of the deceased Yashwantrao Bhopi.

5. The learned Senior Counsel for the appellants submits that the gift-deed, under which

the suit land was received by Gopikabai from her father namely, Abarao Lomate, r/o.Village Ruibhar, Dist. Osmanabad, could not be made available despite desperate efforts made by appellant no.3. Since it was an old record and was in Urdu, it was difficult to trace out. He submits that recently appellant no.3 succeeded to get the certified copy of the said gift-deed from the office of the District Collector. He has filed Civil Application No.8213 of 2017 for production of the said gift-deed and Civil Application No.9518 is filed for permission to produce the application made by appellant no.3 as well as the order recording the name of the deceased Gopikabai as owner of the suit land, passed by Awal Taluka, Osmanabad. He submits that these documents, which were not available to appellant no.3 during pendency of the suit, may be allowed to be produced by way of additional evidence because they will have a great effect on the controversy that is involved in this

Second Appeal. The said documents would make it clear as to how, the deceased Gopikabai became owner of the suit land.

6. On the other hand, the learned Counsel for respondent no.1 submits that appellant nos.3 and 4 had filed written statements and admitted the genealogy given by respondent no.1 in the plaint and therefore, it is not open for appellant no.3 to take any different stand and claim that he is not the real owner of respondent no.1. He further submits that there was no evidence produced before the trial Court to establish that the suit land was given to the deceased Gopikabai by her father by way of gift-deed. The suit land was standing in the name of the father of respondent no.1. Consequently, the trial Court rightly held that it is an ancestral and joint family property of the parties and rightly allotted the shares therein to respondent no.1.

He submits that the documents which are proposed to be produced by appellant no.1 at this stage, cannot be allowed to be produced, more particularly, when appellant no.3 had not preferred appeal against the judgment of the trial Court. He further submits that the suit land never stood in the name of the deceased Gopikabai, however, in view of the documents produced by appellant no.3 before this Court, the source of title of the deceased Gopikabai has been shown by the appellant and its effect will have to be considered while deciding the Second Appeal.

7. The fact that appellant no.2 and respondent no.5 (original defendant no.1) admitted genealogy given by the plaintiff in the written statement and therefore, they cannot take any different stand, as has been observed by the trial Court, cannot be accepted. In paragraph 12 of the judgment of the trial Court, it is mentioned that in their additional written statements, appellant

no.2 and respondent no.5 stated that the suit land was belonging to the father of the deceased Gopikabai i.e. mother-in-law of respondent no.5. It is further observed that the father of the deceased Gopikabai had given the suit land to her, when there is a reference to the contentions of appellant no.3 and respondent no.5 that they had been cultivating and enjoying the suit land since 1973. With these averments in the additional statements of appellant no.3 and respondent no.5, the subsequent observations made by the trial Court in paragraph 20, indicating that appellant no.3 accepts the genealogy, wherein the father of appellant no.3 - Mohan is stated to be the real brother of respondent no.1, cannot be accepted being contrary. Even otherwise, in the evidence of appellant no.3, he specifically stated that Yashwantrao Bhopi had two wives and as such, it is the specific case of appellant no.3 that the deceased Gopikabai got the suit land from her

father. Therefore, he alone is entitled to inherit the suit land through his father, who was only son of the deceased Gopikabai.

8. This substantial question of law, as contemplated under the provisions of Section 15 sub-section (2) of the Hindu Succession Act, has not been considered either by the trial Court or by the first appellate Court and in my view, it will have to be considered in this Second Appeal.

9. From the documents produced with the Civil Application, it is clear that appellant no.3 could succeed in getting the certified copy of the gift-deed executed by the father of the deceased Gopikabai after filing of this appeal. Thus, the said documents certainly could have a great effect on the fate of the litigation. In order to decide the controversy between the parties finally and effectively and to do substantial justice, in my view, it is essential to allow appellant no.3 to

produce the said documents on record. Once these documents are allowed to be produced on record, it will be necessary to see the effect of these documents, on the rights of the parties to inherit the suit land.

10. The contention of the learned Counsel for the respondents that appellant no.3 had not filed appeal against the judgment of the trial Court and therefore, the appeal filed by him is not maintainable, cannot be accepted for the simple reason that appellant nos.1 and 2 were the persons who preferred the appeal from the judgment of the trial Court and appellant no.3 was very much party to the suit. In case appellant no.3 joined appellant nos.1 and 2 in filing the present appeal, that will not have adverse effect on tenability of the appeal and it cannot be dismissed on that ground.

11. Considering the rival contentions of the

learned Counsel for the parties as well as the facts and circumstances of the case, I frame the following issues.

(i) Whether the suit land was liable to be inherited by appellant no.3 and respondent no.5 only, in view of subsection (2)(a) of Section 15 of the Hindu Succession Act, 1964 ?

(ii) Whether respondent no.1 had a legal right to claim his share in the suit land ?

12. **Admit the appeal.** On admission, Mr.Wakure, learned Counsel for respondent no.1 waives service of notice on behalf of respondent no.1.

13. Issue notice to respondent nos.2 to 5. In addition to the regular mode of service, the appellants shall serve respondent nos.1 to 5 by private notice.

14. Call Record and Proceedings.
15. Liberty to move for expeditious hearing after the paper book is filed.
16. Civil Application Nos.8213 and 2017 and 9518 of 2017 for production of documents stands disposed of accordingly.

Sd/-
[SANGITRAO S. PATIL, J.]

kbp