

(1)

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

**SECOND APPEAL NO. 103 OF 2015
WITH
CIVIL APPLICATION NO. 3184 OF 2015**

1. Manga Gula Nikumbhe,
Deceased, through L.Rs.
- 1A. Sonu Manga Nikumbhe,
Age: 35 years, Occu: Agrist.
R/o. Mohida, Taluka Shahada,
District Nandurbar
- 1B. Sau. Mirabai Jalindar Chitte,
Age: 38 years, Occu: Household work,
R/o. Nawagaon, Taluka Nawapur,
Dist. Nandurbar
- 1C. Sau. Sarlabai Ravindra Dhiware,
Age: 30 years, Occu: Household work,
R/o. Nawagaon, Taluka Nawapur,
District Nandurbar
2. Sambhu Gula Nikumbhe,
Deceased, through L.Rs.
- 2A. Vishram Sambhu Nikumbhe,
Age: 55 years, Occu: Agrist.
- 2B. Laxmibai Sambhu Nikumbhe,
Age: 57 years, Occu: Agrist.
- 2C. Yashwant Sambhu Nikumbhe,
Age: 40 years, Occu: Agrist

Nos. 2A to 2C R/o. Madkani,
Taluka Shahada, District Nandurbar
- 2D. Chandrakant Sambhu Nikumbhe,
Age: 35 years, Occu: Service,
- 2E. Madhukar Sambhu Nikumbhe,
Age: 30 years, Occu: Service,
- 2F. Rajesh Sambhu Nikumbhe,
Age: 32 years, Occu: Service,

(2)

- 2G. Manjubai w/o Rohidas Nikumbhe,
Age: 35 years, Occu: Nil
- Nos. 2D to 2G R/o. Udhana Jakatnaka,
Panchshil Nagar, Near Old Manmohan,
Dine Mill, Gandhi Khadi,
Surat, District Surat
3. Shivdas Gula Nikumbhe,
Deceased, through L.Rs.
- 3A. Yuvraj Shivdas Nikumbhe,
Deceased, through L.Rs.
- 3A-1. Ramanbai w/o Yuvraj Nikumbhe,
Age: 50 years, Occu: Labour
- 3A-2. Anita Yuvraj Nikumbhe,
Age: 22 years, Occu: Labour
- 3A-3. Anand Yuvraj Nikumbhe,
Age: 20 years, Occu: Labour
- 3A-4. Sangitabai Yuvraj Nikumbhe,
Age: 18 years, Occu: Labour
- 3A-5. Dhanraj Yuvraj Nikumbhe,
Age: 15 years, Occu: Nil
- 3B. Lalchand Shivdas Nikumbhe,
Age: 43 years, Occu: Agrist.
- 3C. Motanbai d/o Shivdas Nikumbhe,
Age: 56 years, Occu: Labour,
R/o. Madkani, Taluka Shahada,
District Nandurbar
- 3D. Bebibai d/o Shivdas Nikumbhe,
Age: 30 years, Occu: Household work,
R/o. Nawagaon, Taluka Nawapur,
District Nandurbar
- 3E. Arunabai d/o Shivdas Nikumbhe,
Age: 40 years, Occu: Labour,
Udhana Jakatnaka, Panchshil Nagar,
Near Old Manmohan Dine Mill,
Gandhi Khadi, Surat, District Surat
4. Rohidas Gula Nikumbhe,
Died, through L.Rs.

(3)

4A. Narottam Rohidas Nikukmbhe,
Age: 40 years, Occu: Agrist.

4B. Rajendra Rohidas Nikumbhe,
Age: 35 years, Occu: Agrist.

4C. Kalabai Rohidas Nikumbhe,
Age: 56 years, Occu: Agrist.

Nos. 4A to 4C R/o. Madkani,
Taluka Shahada, Dist. Nandurbar

5. Bhatubai w/o Shrawan Ramraje,
Deceased, through L.Rs.
Nana Shrawan Ramraje,
Age: 45 years, Occu: Service,
R/o. Van-Vibhag, Dalepur Road,
Taloda, Taluka Taloda,
District Nandurbar
**(Deleted as per Hon'ble Registrar's
order dtd. 21.1.2015)**

6. Dhrupatabai d/o Gula Nikumbhe,
Deceased, through L.Rs.
Mayabai w/o Suresh Shirsath,
Age: 28 years, Occu: Household work,
R/o. Dongargaon, Taluka Shahada,
District Nandurbar

7. Shantabai w/o Shankar Pawar,
Age: 60 years, Occu: Household, work,
R/o. Koparli, Taluka Nandurbar,
District Nandurbar

..APPELLANTS
(Orig. Defts.)

VERSUS

Guntabai w/o Raghunath Bhamre,
Age: 52 years, Occu: Household work,
R/o. Bramhanpuri, Taluka Shahada,
District Nandurbar

..RESPONDENT
(Orig. Plaintiff)

Mr Amey Sabnis, Advocate holding for Mr V. D. Gunale, Advocate for appellants;
Mr D. M. Pingale, Advocate for respondent

(4)

CORAM : N.W. SAMBRE, J.**DATE : 18th July, 2017****ORAL ORDER**

One Gula Keshav was having two wives Hirabai @ Hirkanbai and Radhabai. Plaintiff Guntabai, who claims to be born to Radhabai from Gula Keshav, filed Regular Civil Suit No.78 of 2007 claiming partition and separate possession and also mesne profits. The aforesaid suit came to be decreed on 25th August, 2010 by judgment and decree passed by Civil Judge Senior Division, Shahada, which was further confirmed in Regular Civil Appeal No.19 of 2010 by learned Ad hoc District Judge-1, Shahada on 19th August, 2014. Thus, the present Second Appeal.

2. Mr Sabnis, learned Counsel appearing on behalf of appellants-defendants would strenuously urge that following substantial questions of law are required to be considered in the present appeal :-

(a) When the relationship between Radhabai of that of wife of Gula Keshav was disputed, whether the Courts below have committed an error in not recording finding in absence of any issue to that effect in affirmative on the said issue ?

(b) Once the defendants have come out with a specific plea of effecting partition in 1979, in absence of prayer for setting aside

(5)

such partition, whether a suit at the behest of the plaintiff was tenable ?

3. So as to substantiate the contentions, Mr Sabnis would urge that admittedly Hirkanbai was the first wife of Gula Keshav from whom the defendants were born. He would then urge that in the defence a specific plea is raised that in 1979 suit property was subjected to partition and as such there is a presumption that the property already being subjected to partition cannot be further partitioned at the behest of the plaintiff. He would then urge that no material is brought on record to infer the alleged relationship between the parties.

4. While countering the submissions, learned Counsel appearing on behalf of the respondent-plaintiff would support judgments and decrees rendered by the Courts below and object for entertaining the appeal being against concurrent findings. He then would urge that Radhabai and Hirkanbai are the two real sisters and it is after death of Hirkanbai, Radhabai was married to Gula Keshav and she had taken care of all children. For the said purpose, he would rely upon oral evidence. According to him, the relationship between the present respondent and appellants is required to be inferred as admitted, particularly in the backdrop of the findings recorded *qua* mutation entry no.468 in relation to the suit property. According to him, the appeal lacks merit and is liable to be dismissed.

(6)

5. The parties to the proceedings, particularly the appellants have adopted written statement Exh.38 and the issues were framed at Exh.41.

6. So far as denial of relationship of the appellants and respondent is concerned, the burden shifts on the present appellants in view of their defence to prove that the original plaintiff was not related to the defendants. Though the defendants, in support of their claim examined a witness, namely, Vishram, still he was unable to demonstrate that Gula Keshav was never married to Radhabai. Rather, it has come in the evidence that the respondent-plaintiff was named as one of the successors of Gula Keshav and was accordingly shown to have been entitled for succession in the suit property as is reflected in mutation entry no.468.

7. Apart from above, the evidence of the respective parties has established that Radhabai was married to Gula Keshav and plaintiff was born out of such relationship.

8. Apart from above, it is required to be noted that both the Courts below have concurrently held that the respondent-plaintiff is entitled for 2/9th share in the suit property.

9. So far as the claim that the property was subjected to partition way back in 1979 is concerned, the said issue is also properly dealt with by both the Courts below, particularly in the backdrop of oral evidence of the plaintiff and evidence of defendant no.2 (k) Vishram.

(7)

10. In the aforesaid backdrop, I hardly notice any material to formulate a substantial question of law in the present appeal. Second Appeal lacks merit and stands dismissed.

11. In view of dismissal of the Second Appeal, pending Civil Application does not survive and stands disposed of accordingly.

(N.W. SAMBRE, J.)

amj