

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO.356 OF 2017

KAILASH S/O CHINKU MULE AND ANOTHER
VS
VIMAL W/O ANANDA WAGH AND ANOTHER

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri N. B. Kalwaghe, Advocate for the appellants.
Shri A. A. Choube Adv. h/f Shri A. A. Naik, Advocate for respondent no.1.

CORAM : A.S. CHANDURKAR, J.
DATED : AUGUST 18, 2017.

1. Admit.
2. Heard finally with the consent of the learned Counsel for the parties.
3. The learned Counsel for the parties have been heard on the following substantial question of law:
4. When it is the case of the plaintiff – daughter that the whereabouts of her father were not known since 1985 and it was her case that there was a presumption as to his civil death, what is the effect of the amended provisions of Section 6 of the Hindu Succession Act, 1956 on her claim for partition?
5. The facts giving rise to this appeal are that the respondent no.1 is the original plaintiff. She is the sister of the defendant nos.1 and 2. The plaintiff, defendant nos.1 and 2 and one Dagdabai were the children of Chinku and Punjabai. According to the plaintiff, Chinkuba her father had left the village some time in the year 1985 after which his whereabouts were not

known. The plaintiff and the defendant nos.1 and 2 being the only legal heirs and the other sister having relinquished her share, suit for partition and separate possession of 1/4th share came to be filed. In the written statement, the relationship of the parties was not disputed. It was, however, pleaded that the defendant nos.1 and 2 had taken care of their mother and had spent various amounts for her treatment. It was denied that the plaintiff had any right in the ancestral property and, therefore, the suit was liable to be dismissed.

6. The trial Court after considering the evidence on record held that the suit properties were ancestral properties. By relying upon the amended provisions of Section 6 of the Hindu Succession Act, 1956 (for short, the said Act), the suit was decreed. 1/4th share each was granted to the children of Chinkuba. The share as relinquished by the sister was directed to be equally divided.

In the appeal filed by the defendants, the appellate Court confirmed the judgment of the trial Court.

7. Shri N. B. Kalwage, learned Counsel for the appellants – defendant nos.1 and 2 submitted that it was the case of the plaintiff that their father had left the village in the year 1985 after which he was not heard of. In view of Section 108 of the Evidence Act, 1872 it was presumed that he had suffered civil death. On that count, it would have to be treated that he was not alive when the provisions of Section 6 of the said Act were amended. Since these provisions have been held to be applicable only when the father as

well as daughter are alive, the plaintiff could not have been granted 1/4th share. It was, therefore, submitted that on the basis of notional partition the plaintiff would get a lesser share than that which is awarded by the Courts below.

8. Shri Choube, learned Counsel for the respondent no.1 supported the impugned judgments. According to him, the plaintiff was rightly granted 1/4th share in the ancestral property. He submitted that both the Courts rightly considered the provisions of Section 6 of the said Act as amended and granted relief to the plaintiff.

9. In the alternate and without prejudice, it was submitted that even if the shares were worked out on the basis of notional partition, the plaintiff would be entitled to a share in the joint family property.

10. I have heard the learned Counsel for the parties at length and given due consideration to their submissions.

11. In para 6 of the plaint, it has been pleaded that the father of the plaintiff and the defendant nos.1 and 2 had left the village prior to about 25 years. He was not heard of after the said period. On the basis of this case, as set up by the plaintiff, it is clear that after expiry of seven years, the effect of Section 108 of the Evidence Act would come into play. By that count a presumption would arise as to the civil death of the father in the year 1995. It is on that basis that a notional partition of the ancestral property was required to be worked out.

12. The Hon'ble Supreme Court in *Prakash and others Vs.*

Phulavati and others 2016 (1) *Mh.L.J.* 1 has held that for the purpose of seeking benefit of Section 6 of the said Act as amended, it was necessary that the coparcener as well as daughter should be living on 9-9-2005. Considering the case as pleaded, it is clear that the provisions of Section 6 of the said Act as amended would not be applicable to the case in hand. The entire basis on which the Courts have granted $1/4^{\text{th}}$ share to the plaintiff is, therefore, erroneous.

13. On the basis of notional partition when shares are worked out the share as awarded to the plaintiff would have to be reduced. Both the learned Counsel have jointly submitted that on the basis of notional partition the plaintiff would be entitled to $2/12^{\text{th}}$ share while the defendant nos.1 and 2 would be entitled to $5/12^{\text{th}}$ share each. This is on the basis of presumption of civil death of Chinkuba in the year 1995 and the death of his widow in the year 1998.

Accordingly, the substantial question of law as framed is necessary by holding that the amended provisions of Section 6 of the said Act would not be applicable. Instead, the plaintiff would be entitled to get $2/12^{\text{th}}$ share in the suit property.

14. As a result of aforesaid discussion, the judgment of the trial Court as affirmed by the appellate Court is partly modified. It is held that the plaintiff would have $2/12^{\text{th}}$ share in the suit properties as mentioned as item Nos.1-B and 1-C in the plaint. The defendant nos.1 and 2 would have $5/12^{\text{th}}$ share each in the aforesaid properties. The decree for partition be sent to the

Collector in terms of Section 54 of the Code of Civil Procedure, 1908 after the plaintiff deposits deficit Court fee as directed earlier. Thereafter the parties would be entitled for their respective shares. Decree be drawn accordingly.

15. The second appeal is allowed in aforesaid terms. No costs.

JUDGE

/MULEY/