

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Civil Application [CAS] No.192 of 2017
IN
Second Appeal No. 99 of 2017
[Nathu Dajiba Patil Vs. Smt. Chetna Dhanraj Meshram
(Bhajipalawale) & others]

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

Court's or Judge's orders

Mr. O. W. Gupta, Adv., for the applicant-appellant.
Mr. S. A. Bainik, Adv., for respondent nos. 1 to 3 and 5.

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CORAM : A. S. CHANDURKAR, J.

DATE : 24th August, 2017

By this application, it is prayed that the decree for partition passed by the appellate Court be stayed during pendency of the appeal. While hearing this application, the learned counsel for the parties submitted that considering the short issue involved, the appeal itself could be decided.

Hence this application is disposed of and the appeal is taken up for hearing.

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Second Appeal No. 99 of 2017 :

The original defendant has filed the present appeal being aggrieved by the judgment of the first appellate Court in which it has been held that the defendant was entitled to $\frac{2}{3}$ rd share, while the original plaintiffs have been granted $\frac{1}{3}$ rd share in the suit properties.

One Dajiba is the common ancestor who was married with one Vithabai. They had a son Natthu [defendant] and a daughter - Tuljabai who expired in the year 1988. Said Tuljabai had five children who are the plaintiffs. Dajiba expired in the year 1995 and his widow expired in the year 1997. According to the plaintiffs, when they approached the defendant for their share in the suit property which was ancestral in nature, the same was denied to them. Hence, suit for partition and separate possession was filed.

The defendant in his Written Statement denied the claim of the plaintiffs. According to him, after the death of Dajiba, his name was mutated in the revenue records along with his mother's name. Despite knowledge of this mutation entry, the plaintiffs did not claim partition. Hence, it was pleaded that the suit was liable to be dismissed.

The trial Court held that the suit properties were ancestral properties and the plaintiffs were entitled for a share therein. It accordingly granted $\frac{1}{20}$ th share to

each plaintiff which as a whole was $\frac{1}{4}^{\text{th}}$ share in the joint family property. The defendant was granted $\frac{3}{4}^{\text{th}}$ share in the suit properties. The defendant being aggrieved challenged this judgment and the first appellate Court modified the decree. It granted $\frac{2}{3}^{\text{rd}}$ share to the defendant and $\frac{1}{3}^{\text{rd}}$ aggregate share to the plaintiffs. Being aggrieved, the defendant has filed this appeal.

The following substantial question of law was framed while admitting the appeal:-

“Whether the Courts below were right in holding that the plaintiffs had $\frac{1}{3}^{\text{rd}}$ or $\frac{1}{4}^{\text{th}}$ share in the suit property?”

Shri O.W. Gupta, learned counsel for the appellant, submitted that the appellate Court committed an error by reducing the share of the defendant. According to him, the defendant was entitled for $\frac{3}{4}^{\text{th}}$ share in the suit properties, while the plaintiffs were entitled for an aggregate $\frac{1}{4}^{\text{th}}$ share. According to him, the defendant by birth had a right in the ancestral properties along with his father. After the death of the father, his half share would be the subject matter of partition and on that basis, the shares were liable to be worked out. When the shares were worked out in that manner, the defendant would have got $\frac{3}{4}^{\text{th}}$ share, while the plaintiffs would have got $\frac{1}{4}^{\text{th}}$ share in the

aggregate. He referred to the provisions of Sections 6 and 8 of the Hindu Succession act, 1956 [for short, “the said Act”]. He also referred to the judgment of the Honourable Supreme Court in **Uttam Vs. Saubhag Singh & others** [Civil Appeal No. 2360/16; decided on 2nd March, 2016] and submitted that as per the law laid down therein, the defendant was entitled for 3/4th share.

Shri S.A. Bainik, learned counsel for the respondents, supported the impugned judgment. According to him, if the shares of the members of the joint family are calculated by applying notional partition, Dajiba, his wife Vithabai and Natthu would get 1/3rd share each immediately on the death of Dajiba. Thereafter, the shares of Dajiba and Tuljabai would be the subject-matter of further partition. On that basis, the plaintiffs would get 1/3rd share in the aggregate, while the defendant would get 2/3rd share. The learned counsel placed reliance on the judgment in **Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum & others** [AIR 1978 SC 1239] in that regard.

I have considered the respective submissions and I have gone through the impugned judgments.

It is not in dispute that Dajiba was the owner of joint family property which the subject-matter of partition. The manner in which the parties would succeed to the joint family property has to be considered

in the light of provisions of Section 6 and thereafter Section 8 of the said Act. In *Gurupad Khandappa Magdum* [supra], the joint family consisted of Khandappa, his widow – Hirabai, two sons and three daughters. While considering the manner in which the share which the deceased had in the co-parcenary property was to be determined, it was observed that on the basis of notional partition between Khandappa and his two sons, the widow would get 1/4th share. It was held that on that basis Khandappa, his wife and the two sons would each get 1/4th share in the property. Thereafter, the share of the deceased was to be further divided.

The aforesaid decision was also considered by the Honourable Supreme Court in *Uttam* [supra]. After considering the same, the Honourable Supreme Court summarized the law with regard to partition of joint family property prior to the amendment of 2005. It was held that after the death of a male Hindu having interest in the co-parcenary property, his interest would devolve by survivorship upon the surviving members.

When the aforesaid law is applied to the facts of the present case and a notional partition is worked out immediately prior to the death of Dajiba, it is clear that Dajiba, his wife – Vithabai and Natthu would have 1/3rd share each. The first appellate Court in para 32 of its judgment has accordingly worked out the shares of the

parties by proceeding on the legal premise that Vithabai would get 1/3rd share in the suit properties. On that basis, it has come to the conclusion that the plaintiffs were entitled to get aggregate 1/3rd share, while the defendant was entitled to get 2/3rd share in the suit properties. I find that this adjudication by the first appellate Court is in accordance with law. Though it is true that the defendant had a right in the ancestral property by birth, the respective shares have been rightly determined on the basis of notional partition. The substantial question of law as framed is answered by holding that the plaintiffs would get aggregate 1/3rd share, while the defendant would get 2/3rd share in the suit properties.

In view aforesaid, I do not find any reason to interfere with the judgment of the first Appellate Court. The appeal is accordingly dismissed with no order as to costs.

Judge

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