

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 207 OF 2014
WITH
CIVIL APPLICATION No. 542 OF 2014
IN
SECOND APPEAL No. 207 OF 2014

Vilas Sahebrao Godase & Ors. ... Appellants/Applicants
Vs.
Kisan Sahebrao Godase & Ors. ... Respondents

Mr. Yogesh V. Patil i/b. Mr. Vijay D. Patil, Advocate for the appellants/applicants.
Mr. Dipak S. Shinde, Advocate for respondent nos. 1 and 3.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 18th April, 2018.

P.C.:

This Second Appeal is directed against the judgment and order dated 26th November, 2013 passed by the Principal District Judge, Satara in Regular Civil Appeal No. 243 of 2008 thereby confirming the judgment and decree dated 28th February, 2008 passed by Joint Civil Judge Junior Division, Phaltan in Regular Civil Suit No. 250 of 2000. The Regular Civil Suit was filed for partition by respondent No. 1/original plaintiff. The suit was decreed by holding that the plaintiff and his four siblings were having 1/5th share in the ancestral property.

2. The learned counsel for the appellants has submitted and

formulated following substantial questions of law:

- (i) The learned Judges of the Appellate Court and trial Court have failed to appreciate the case of defendants, i.e., appellants on the point of notional partition;
- (ii) The learned Judges of the Appellate Court and trial Court have failed to appreciate the position of law on the point of share of the daughter in the ancestral property as co-parcener when the father has died prior to amendment, i.e., in the year 1991.

3. The Appeal is admitted on second substantial question of law and it is heard finally by consent at the stage of admission.

4. The appellants and respondent are addressed by their original status for the sake of convenience. The plaintiff and defendant nos. 2, 3,4 and deceased Mamta, who is the mother of original defendant nos. 15 and 16, were children of Sahebrao Govindrao Godse, who died in the year 1991. Their mother Anusaya, who was original defendant No. 1, also expired pending suit. The plaintiff and contesting defendants/appellants admitted that the properties mentioned in the suit are ancestral properties, however, the

defendants challenge the relief claimed in the suit on the ground that there was notional partition in the year 1990 pursuant to which the parties have entered into Memorandum of Partition on 17th July, 1990, which is marked as Exhibit 110. Both the parties have tendered oral as well as documentary evidence and after considering the oral and documentary evidence, the trial Court has decreed the suit.

5. The entire case of the defendants was based on the point of notional partition and Exhibit 110. After perusal of the judgment and order passed by the learned trial Judge so also the judgment passed by the First Appellate Court, it is found that both the Courts especially the trial Court has discussed the evidence and the contents of Exhibit 110 so also the point of notional partition threadbare. The trial Court has held that the defendants, who are claiming notional partition, have failed to prove it and also gave correct reasoning of discarding the contents in the Memorandum of Partition, i.e., Exhibit 110. The trial Court has rightly considered that the defendants in the cross-examination could not tell what partition of the ancestral property has fallen to their share. The suit was filed in the year 2000, till then the revenue entries were not taken in respect of suit properties pursuant

to the alleged Memorandum of Partition of 1990. In view of this, the issue raised by the learned counsel in respect of appreciation of notional partition by the trial Court and First Appellate Court cannot be taken as substantial question of law.

6. The trial Court has granted 1/5th share to the plaintiff, two brothers Vilas and Pandharinath, sister Shantabai and two children of deceased Mamta. The learned counsel for the appellants has submitted that the trial Court has erred in holding that the amendment in Hindu Succession Act of 2005 is to be given retrospective effect. He submitted that in view of the judgment of the Hon'ble Supreme Court in **Prakash & Ors. vs. Phulavati & Ors., reported in (2016) 2 SCC 36**, retrospective effect cannot be given, as the father died in the year 1991. He claims that the contesting defendants/appellants are entitled to get 1/3rd share in the property.

7. The learned counsel for the respondents opposed this Appeal.

8. In the light of the ratio laid by the Hon'ble Supreme Court in **Prakash** (*supra*), if the coparcener and daughters were alive on the date of commencement of the Act, i.e., on 9th September, 2005, then

the amendment is applicable. Sahebrao Godse died in the year 1991. He died intestate. However, as per Sections 8 and 10 of the Hindu Succession Act, the property is to be distributed as per Schedule 1 of the Hindu Succession Act, 1956. The property of Sahebrao was distributed in four shares, i.e., widow and three sons. Thus, at the time of filing of the suit, the plaintiff, two sons and widow/defendant No. 1 were entitled to get $1/4^{\text{th}}$ share each.

9. However, in the pendency of the suit, defendant No. 1- Anusaya, widow of Sahebrao, died and therefore, her $1/4^{\text{th}}$ share is to be distributed as per Section 15 read with Section 16 of the Hindu Succession Act, 1956. All her children are entitled to get equal shares. In the present case, Mamta died before her mother Anusaya and therefore, as per Section 15 read with Section 16 of Hindu Succession Act, Mamta's children are jointly entitled to get share of Mamta. Thus, three sons- Kishan, Vilas and Pandharinath, daughter Shantabai and deceased Mamta are entitled to get $1/5^{\text{th}}$ share each. As Mamta is no more, her children are entitled to get $1/5^{\text{th}}$ share of Mamta, who has equal share in the property, i.e., share fallen to Anusaya.

10. With this, Second Appeal is partly allowed, as the remaining finding of the trial Court is hereby maintained. However, the shares are modified as above.

11. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)