

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.406 OF 2014

Smt.Shantabai Shivdas Patil & Ors.

... Appellants

Vs.

Champabai Shrimant Patil & Ors.

... Respondents

Mr.V.S. Talkute for the Appellants

Mr.S.S. Patwardhan for Respondent Nos.4 to 6

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: MAY 2, 2018

P.C. :

1. This Second Appeal is directed against the judgment and order dated 30.10.2010 of the learned District Judge, Pandharpur, dismissing the Civil Appeal No.128 of 2003 by which the judgment and decree dated 24.7.2003 passed by the learned Civil Judge Junior Division, Sangola in Regular Civil Suit No.135 of 1996 is confirmed. Considering these facts and the legal position in this case, the following points can be framed as substantial questions of law:

i) Whether the children begotten from void marriage are entitled to claim equal share in the ancestral property of the father?

ii) Whether the Courts below were justified in law in accepting the case of alleged oral partition in the year 1976 which is *per se* illegal and contrary to well established principles of law?

2. The appellants filed the suit for partition and separate possession in respect of the suit property. The appellants are the legal representatives of the original Plaintiff Shivdas, who was the son of Shankar and his first wife. Shankar is the original defendant No.1. The other defendant Nos.2 and 3 i.e., Shantinath and Maruti are the two sons of Shankar from his second wife, i.e., defendant No.4. The trial Court and the first appellate Court accepted the case of the defendants of oral partition which had taken place between Shankar and his three sons in the year 1976 and the parties have acted upon this partition by filing application under section 85 of the Maharashtra Land Revenue Code on 10.6.1977 before the Tehsildar and accordingly, the entries were mutated.

3. After hearing the learned Counsel for both the parties at length, it is found that the issues of illegitimacy of defendant Nos.2 and 3 and then proprietary right u/s 16 of the Hindu Marriage Act are involved. The two aspects have direct bearing on these points i.e., firstly, the applications made before the Tehsildar on 10.6.1977

by Shankar and Shivdas i.e., the original defendant No.1 and the original plaintiff, though were produced before the trial Court and the first appellate Court and in the record, they are not exhibited and yet, they are referred to by the Courts below. Secondly, in view of the judgment of the Supreme Court in the case of **Revanasiddappa & Anr vs Mallikarjun & Ors.**¹ wherein the Division Bench of the Supreme Court has discussed the issue as to whether the illegitimate children have right in the ancestral property and has taken a different view from the earlier and referred the matter to a larger Bench.

4. However, as stated above, the applications made before the Tehsildar on 10.6.1977 by the original plaintiff and the defendants, are a decisive factor while considering the above two substantial questions of law, and I think it is appropriate to remand this matter to the first appellate Court so that the first appellate Court may consider to take additional evidence and decide the matter afresh. Accordingly, the following order is passed:

ORDER

¹ (2011) 11 SCC 1

i) The judgment and order of the first appellate Court dated 30.10.2010 passed by the learned District Judge, Pandharpur in Civil Appeal No.128 of 2003, is hereby quashed and set aside;

ii) The first appellate Court to decide the issues and consider the matter afresh.

5. Second Appeal is disposed of accordingly.

(MRIDULA BHATKAR, J.)