

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.121 OF 2015
with
CIVIL APPLICATION NO.1633 OF 2015

Hirabai Dinkar Nanavare .. Appellant
vs
1.Narayan Tukaram Jadhav & ors .. Respondents

Mr.A.B.Tajne for Appellant
Mr.P.D.Dalvi for Respondent no.4
Mr.P.B.Shah and Mr.K.P.Shah for Respondent nos.
1A(i) 1A (ii),1A (iv),1A (v),1B,1C, 2B, 2C and 1A-III
and Respondent nos.2A and 3.

CORAM : A.M.DHAVAL, J

DATED : 3RD SEPTEMBER 2018

P.C.

Heard learned counsel for the parties.

2. The only substantial question of law is whether the suit was maintainable ? Considering the narrow controversy involved, I have heard learned counsel for the parties and I proceed to decide the appeal finally at the admission stage.

3. The appellant-Hirabai filed Regular Civil Suit No.333 of 1983 against her brothers as well as her father Tukaram defendant

no.3. She claimed that the properties described in para 1 were ancestral properties and she had a share in the same. She claimed partition and separate possession of her share.

4. Learned advocate for the appellant has argued that during pendency of the suit, defendant no.3-Tukaram died on 4.12.1985 and the Court has held that some of the suit properties were self-acquired property of deceased Tukaram and the suit would become maintainable to the extent of those self-acquired properties. He also pointed out that the issue regarding maintainability was raised in the trial Court and it was answered in plaintiff's favour.

5. It is a well-settled legal position that daughters were not co-parceners till 1994 amendment of the State which gave rights to unmarried daughters as co-parceners. Subsequent Central amendment of 2005, has granted rights to all daughters. Till then, a daughter could not file a suit against her father and brothers for partition and separate possession of ancestral properties. Learned advocate for the appellant has relied on the written statement of respondent no.4 who has given no objection in respect of some properties except his own property.

6. As held in **Raizada Topandas vs.M/sGorakhram Gokalchand AIR 1964 SC 1348** the maintainability of the suit will have to be determined on the basis of the plaint pleadings itself. If the properties were ancestral, then the daughter had no civil right to claim partition as she was not a co-parcener. Even if it is assumed that some of the properties were self-acquired, she had no right to claim her share during the life time of her father. The suit itself was not maintainable. The findings contrary to the legal position given by the trial Court is not sustainable. Subsequent event of death of Tukaram cannot be taken into consideration in such a suit. The maintainability has to be decided as on the date of institution. In the result, the plaint was liable to be rejected under Order 7 Rule 11 of the Code of Civil Procedure, 1908 for showing no cause of action. The learned trial Judge has wrongly decreed the suit and the appellate Court has dismissed the suit on the ground other than maintainability of the suit.

7. In view of the above legal position, both the Judgments are hereby set aside and the plaint is rejected. Issue $\frac{3}{4}$ court fee refund to the plaintiff. It is clarified that this Court has not decided the rights of the plaintiff accrued to her on the death of her father or

under the new enactment of 2005 if any. Any finding in respect thereof, recorded by the Courts below also stands set aside.

8. The plaintiff is at liberty to take appropriate remedies as may be available in law.

There shall be no order as to costs.

Civil Applications if any, do not survive and are disposed of.

{A.M.DHAVAL, J}