

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (STAMP) NO.15884 OF 2018

ALONG WITH

CIVIL APPLICATION NO.800 OF 2018

1. Bhanudas Rambhau More,	]	
Age : 68 Years, Occ.: Agriculture.	]	
2. Gorakh Rambhau More,	]	
Age : 46 Years, Occ.: Agriculture.	]	
Both residents of Badapur, Tal. Yeola,	]	
Dist. Nashik.	]	 Appellants-Applicants

Versus

1. Savita Machindra More,	]	
Age : 38 Years, Occ.: Agriculture	]	
and Household	]	
2. Aarti Macchindra More,	]	
Age : 18 Years, Occ.: Education	]	
3. Ganesh Macchindra More,	]	
Age : 11 Years, Occ.: Education	]	
Respondent Nos.2 and 3 being minors,	]	
through their mother-guardian	]	
Respondent No.1	]	
All residents of Jalgaon Khurd,	]	
Tal. Nandgaon, Dist. Nashik.	]	 Respondents

Mr. Tushar N. Sonawane for the Appellants-Applicants.

Mr. Girish R. Agrawal, a/w. Mr. Sachin Padye, for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 14TH AUGUST, 2018.

PRONOUNCED ON : 21ST AUGUST, 2018.

JUDGMENT :

1. Heard Mr. Sonawane, learned counsel for the Appellants-Applicants, and Mr. Agrawal, learned counsel for the Respondents.

2. This Second Appeal is preferred by Original Defendant Nos.1 and 2, challenging concurrent finding of the facts and law, as recorded by both the Courts below by the 'Judgment and Decree' dated 19th November 2013 passed in Regular Civil Suit No.177 of 2010 by the Court of Civil Judge, Junior Division, Yeola, Dist. Nashik, which is confirmed by the Court of District Judge-1, Niphad in a 'Judgment and Decree' dated 18th April 2018 passed in Regular Civil Appeal No.152 of 2013.

3. The factual matrix of the case can be stated to the effect that, Appellant Nos.1 and 2 are the brothers of deceased Macchhindra. Respondent No.1 is the wife and Respondent Nos.2 and 3 are the children of late Macchhindra. They had filed this Suit for partition and separate possession of their 1/3rd share in the suit lands. According to them, the suit land described in paragraph No.1(A) of the plaint was purchased by Macchhindra from his own earnings, which was mutated by deceased Macchhindra in the name of his mother Radhabai by way of

family arrangement in the year 2000; whereas, the suit land described in paragraph No.1(B) of the plaint was purchased by deceased Macchhindra in the name of Appellant No.2, out of the income from the joint family. It is their further contention that, after the death of Macchhindra on 20th September 2004, Respondents were driven out of the house and as a result, now they are constrained to file this Suit for partition and their share in both the lands, which, according to them, were purchased by Macchhindra from his own earnings and from the income of the joint family respectively.

4. This Suit came to be resisted by both the Appellants contending *inter alia* that, the Respondents have no concern with the suit lands. It was submitted that, the property mentioned in paragraph No.1(A) of the plaint was given to Radhabai by Macchhindra himself in the family arrangement and then Radhabai had executed a 'Will', bequeathing the said property in favour of Appellant No.2. Therefore, Appellant No.2 has become the sole and exclusive owner thereof. It was submitted that, in the said partition, Macchhindra got the 'Truck' and, therefore, he was not given any share in the landed property. Macchhindra was knowing the said fact; therefore, he had given consent to the execution of the 'Will' by Radhabai in favour of Appellant No.2. As regards the property described in paragraph No.1(B) of the plaint, it was submitted that, it is the separate and self-acquired property of Appellant No.2 and, therefore,

Respondents cannot have any share therein. A plea was also raised that the sisters of the Appellants, namely, Latabai and Ashabai are the necessary parties to the Suit, but they were not impleaded and hence the Suit is barred by the provisions of non-joinder of necessary parties.

5. In support of her case, Respondent No.1 examined herself; whereas, Appellant Nos.1 and 2 also led their own evidence. The 'Will' of Radhabai was produced and proved on record vide 'Exhibit-61'.

6. On appreciation of this oral and documentary evidence produced on record by both the parties, the Trial Court was pleased to hold that, both the suit properties were purchased out of the income from the joint family and, therefore, Respondents are entitled to get $1/3^{\text{rd}}$ share therein. It was negated that, by way of family arrangement, Macchhindra has given the suit property described in paragraph No.1(A) of the plaint to his mother Radhabai and Radhabai was competent to bequeath the said property in favour of Appellant No.2. Accordingly, the Trial Court decreed the Suit, granting $1/3^{\text{rd}}$ share in both the properties to the Respondents and further ordering the enquiry for mesne profits.

7. When the Appellants challenged the 'Judgment' of the Trial Court before the first Appellate Court, the first Appellant Court also confirmed

all the findings of the Trial Court and further held that, the Suit is not bad for non-joinder of necessary parties, as the suit properties are not the ancestral joint family properties for the sisters to be having any share therein.

8. While challenging these concurrent findings of the fact, as recorded by both the Courts below, the only submission advanced by learned counsel for the Appellants is that, both the Courts below have not considered the provisions of Section 14 of the Hindu Succession Act, 1956, which read as under :-

14. Property of a female Hindu to be her absolute property :-

- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*

Explanation :- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after the marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a Civil Court or under an Award, where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.”

9. It is submitted that, as per the said Section, if a widow has acquired the property “in any manner whatsoever” and is in possession thereof, then that right and possession is required to be held as that of a full-fledged owner. Therefore, as the suit property described in paragraph No.1(A) of the plaint was given to Radhabai in family partition and she was in possession thereof, she has become full-fledged owner and hence, she was fully competent to execute the 'Will Deed', bequeathing the suit property in favour of Appellant No.2. According to learned counsel for the Appellants, as this legal provision contained in Section 14(1) of the Hindu Succession Act, 1956, is not considered by both the Courts below, there is a substantial question of law raised in this Second Appeal.

10. However, as rightly submitted by learned counsel for the Respondents, it becomes difficult to accept this submission of learned counsel for the Appellants, firstly because, this contention is raised for the first time in the Second Appeal, that too, in the course of arguments. It is pertinent to note that, this contention was neither raised in the

Trial Court, nor in the first Appellate Court and, for that matter, not even in the Appeal Memo of the Second Appeal. The law is well settled that, a party cannot be permitted to raise a mixed question of fact and law for the first time in the Second Appeal, if it is not framed by the Trial Court and not pressed before the first Appellate Court. It is also well-settled that, mere raising of various grounds in the Memo of Appeal is also not sufficient. Such grounds are required to be urged and argued before the Court, whose decision has been impugned. Here in the case, the ground that, *'in view of Section 14 of the Hindu Succession Act, 1956, Radhabai has become the full-fledged owner of the suit property described in paragraph No.1(A) of the plaint'*, was not at all raised before the Trial Court. Even before the first Appellate Court, this point was not at all argued.

11. In such circumstances, as held in the Judgments of this Court in the case of *Manoj Madhukar Gadge & Ors. Vs. Dattatraya s/o. Manohar Tekade, 2018(3) ALL MR 681*, and in the case of *Ambadas Khanderao Hagvane & Ors. Vs. Shaikh Razaq Shaikh Yakub & Anr., 2009(1) Mh.L.J. 471*, the questions of law, which are not raised before the Trial Court or the first Appellate Court and for the first time, they are tried to be put up at the time of hearing of the Second Appeal, cannot be said to be the substantial questions of law. It is well settled that, the questions of law would be only those, which were actually raised in the grounds taken

by the Appellant in the Appeal Memo or those which are having the foundation in the pleadings. The questions of law necessarily must have the reference to the pleadings and they must arise out of the particular facts of that case. Here in the case, if no such question was raised either before the Trial Court or even before the first Appellate Court and when the question *'whether the property, as described in paragraph No.1(A) of the plaint, was given to Radhabai "in any other manner", as contemplated under Section 14(1) of the Hindu Succession Act, 1956'*, being a mixed question of fact and law, for the first time, Appellants cannot raise this question in the Second Appeal and on this sole ground itself, this contention needs to be rejected.

12. Even assuming that there is such substantial question of law, the facts of the present case do not support the Appellants' case. It is pertinent to note that, in order to attract the legal consequences contemplated by Section 14 of the Hindu Succession Act, 1956, the property must be "acquired" by a female Hindu before or after the commencement of the said Act. Such property may be acquired by her under a Compromise Decree or under a Decree in Invitum or it may be by any instrument of transfer. The property cannot be said to be acquired by mere mutation of names effected in the Revenue Records. This Court has, way back in the year 1981, in the case of *Narayanrao Vs. The State of Maharashtra and Others*, AIR 1981 BOMBAY 271, made this

legal position very clear, after following the Judgment of the Hon'ble Apex Court in the case of *Eramma Vs. Veerupana*, AIR 1966 SC 1879. In paragraph No.6 of the said Judgment, it was held as follows :-

“6. The legal consequence contemplated by the said section arises only when the property is 'acquired' by a female Hindu before or after the commencement of the Act. The property might be acquired by the female under a 'Compromise Decree' or under a 'Decree in Invitum' or it may be by any instrument of transfer. Mere handing over of the property by the husband to the wife does not amount to her having 'acquired' the said property. Moreover, what is to be noted is the strict dichotomy maintained by the said section between the possession of the property as full owner on the one hand and as limited owner on the other. This dichotomy postulates that the female Hindu concerned has got vested in herself at-least limited ownership of the property and there must be something to prove that, such right to the property was transferred to her. By no stretch of imagination, can it be said that mere mutation of names effected in the 'Revenue Records' by the husband in favour of the wife would amount to her having 'acquired' the said property. The 'Revenue Records' may at the most serve as evidence of possession and on occasions, even as presumption of title, but, as mentioned above, mere possession by a female Hindu of any property does not make her a full owner of the said property under said Section 14 of the Hindu Succession Act. The possession must refer to some legitimate claim of title as owner, may be as full owner or limited owner. So far as the presumption of title is concerned, in the context of the admitted facts in the

present case, the presumption stemming from the entries in the 'Revenue Records' can be of no value to the Plaintiff or to his wife Sarubai at all. When it is admitted that the Plaintiff had not executed any document in accordance with the provisions of law, transferring the suit lands to Sarubai in the year 1953 or at any time thereafter, the fact that Sarubai's name was shown in the Kabjedar column as the occupant of the suit lands, could not confer any title upon her."

[Emphasis Supplied]

13. Here in the case, admittedly, deceased Macchhindra has not executed any document for transferring the suit land described in paragraph No.1(A) of the plaint in favour of his mother Radhabai. Only the mutation entry is made to that effect. However, on the basis of such mutation entry, it cannot be said that Radhabai has "acquired" the said property.

14. This position is further made clear by the Hon'ble Apex Court in the case of *Balwant Singh & Anr. Vs. Daulat Singh (Dead) by LRs. & Ors., 1997 (SUPPL.) CIVIL COURT CASES 262 (S.C.)*. In that case also, the mutation was sanctioned in favour of a widow and on that basis, she claimed to be the absolute owner of the suit property, after coming into force of the Hindu Succession Act and she had executed four separate 'Gift Deeds' in favour of the Appellants. When Reversioners challenged the same, it was held that,

“Mutation entries do not convey or extinguish any title. The mutation entries are relevant only for the purpose of collection of the land revenue.”

15. Here in the case, except for the mutation entry, there is no other document, on the basis of which one can say that Radhabai has “acquired” the suit property. Such mutation entry, therefore, cannot give her right to bequeath the suit property by way of 'Will'.

16. This Court has in the case of *Narayanrao Vs. The State of Maharashtra and Ors.*, AIR 1981 BOMBAY 271, also held that,

“Mere mutation of the name of the wife or the widow was not sufficient, as it has to be established that she have some right of ownership over the said property.”

17. Even if one considers the provisions of Section 14(1) and (2) of the Hindu Succession Act, 1956, it can clearly be seen that the said Section makes distinction between the property possessed by a female Hindu, whether acquired before or after the commencement of the Act, which shall be held by her as a full owner and not as a limited owner. Therefore, what is necessarily contemplated is “acquisition of the property”, which is conspicuously not present in the instant case.

18. In this respect, learned counsel for the Appellants has also relied

upon the Judgment of the Hon'ble Apex Court in the case of *Smt. Himi Vs. Smt. Hira Devi, 1996(2) APEX COURT JOURNAL 450 (S.C.)*, wherein also it was held that,

“Section 14(1) applies only if the property is acquired by female Hindu in lieu of maintenance or by virtue of any pre-existing right or at partition and such acquisition is not covered by Section 14(2), which is a proviso to Section 14(1).”

19. Here in the case, both the Trial Court and the first Appellate Court have come to the conclusion that, no case of partition by way of family arrangement is proved on record. Therefore, there is no evidence to show that, Radhabai had any pre-existing right in the suit property, which was howsoever small, prior to enactment of the Hindu Succession Act, 1956, which would blossom into a full-fledged right by virtue of the operation of Section 14(1) thereof.

20. As held by the Hon'ble Apex Court in the case of *Gaddam Ramakrishnareddy & Ors. Vs. Gaddam Rami Reddy & Anr., 2010(3) APEX COURT JUDGMENTS 587 (S.C.)*,

“If such a right was acquired for the first time under an instrument, after the Act came into force, the provisions of Section 14(2) of the Act would be attracted and would not convert such a right into a full-fledged right of ownership of the property.”

21. Thus, in the present case, on the basis of some mutation entry, may be made on the application of Deceased Macchhindra, it cannot be said that Radhabai has “acquired” any title or right over the suit property. The words “in any other manner”, as used in Section 14(1) of the Hindu Succession Act, 1956, are required to be construed and interpreted in the context of the other modes of acquisitions, as stated therein, namely, the partition or inheritance or in lieu of maintenance or arrears of maintenance or by gift by her own skill or exertion or by purchase or by prescription. Once it is held that, by mutation entry, the property cannot be said to be acquired, then the words “in any other manner, whatsoever”, will not be sufficient to attract the elements of “acquisition”, as required under Section 14(1) of the Hindu Succession Act, 1956. Therefore, it has to be held that, there is no case made out even on this alleged substantial question of law.

22. Both the Trial Court and the first Appellate Court have, on proper appreciation of evidence on record, concurrently held that, the suit properties were the joint family properties, having purchased out of the income from the joint family, as admitted by even Appellant No.2 also. In view thereof, after the death of Macchhindra, Respondents become entitled to get their share in the suit properties, despite the alleged 'Will Deed' executed by Radhabai in favour of Appellant No.2 in respect of the suit property, as described in paragraph No.1(A) of the plaint, and even

when the suit property described in paragraph No.1(B) of the plaint is standing exclusively in the name of Appellant No.2.

23. In the Second Appeal, therefore, no interference is warranted in the impugned 'Judgment and Order' passed by both the Courts below. The Second Appeal, therefore, stands dismissed.

24. In view of dismissal of the Second Appeal, Civil Application No.800 of 2018 pending therein does not survive and the same stands disposed off as infructuous.

25. At this stage, learned counsel for the Appellants seeks continuation of the protection in the form of stay to the execution of the 'Partition Decree' for a period of eight weeks. Learned counsel for the Respondents strongly resists the same.

26. In my considered opinion also, having regard to the dismissal of the Second Appeal and on merits, confirming the finding of the first Appellate Court, no case is made out for extension of the protection in the form of stay to the execution of the 'Partition Decree'. Therefore, request to that effect is rejected.

[DR. SHALINI PHANSALKAR-JOSHI, J.]