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

WRIT PETITION NO.14090 OF 2017

- | | |
|-------------------------------------|-----------------------|
| 1. Tarabai Dagdu Nitaware |] |
| age: adult Occn. Agriculture |] |
| |] |
| 2. Gautam Gdagdu Nitaware |] |
| age: adult, Occn. Agriculture |] |
| |] |
| 3. Rohidas Suryakant Nitaware |] |
| age: adult , Occn.Service |] |
| |] |
| 4. Nitin Suryakant Nitaware |] |
| age: adult , Occn. Agriculture |] |
| |] |
| 5. Shobha Suryakant Nitaware |] |
| age: adult , Occn. Housewife |] |
| |] |
| |] <u>Petitioners.</u> |
| 6. Uttam Suryakant Nitaware |] Original |
| age: adult, Ocn.Agriculture |] Defendants. |
| Petitioner Nos. 1 to 6 residing at |] |
| House No.157, Kolwadi, Near Shitole |] |
| vasti, Tal.haveli, Dist.Pune |] |
| |] |
| 7. Smt. Hirabai Shyamrao Pawar |] |
| age: adult, Occn. Agriculture |] |
| r/at Saikrupa Society, H.No.35 |] |
| Somnath Nagar, Vadgaonsheri |] |
| Pune -14 |] |
| |] |
| 8. Mirabai Gautam Waghmare |] |
| age: adult,occn.Housewife |] |
| r/at Siddharth Nagar, Nagar Road |] |
| Wagholigaon, Tal.Haveli, Dist.Pune |] |
| |] |
| 9. Smt. Sangeeta Dhanraj Shinde |] |
| age: adult,Occn.housewife |] |
| r/at Post. Wadgaon Kakade |] |

Siddharthnagar, Tal. Haveli]
Dist. Pune.]

V/s.

Narayan Keru Nitaware] Respondent.
Age:80 yrs.occn. House No.93] Original
House No.93 Mahadev Nagar] Plaintiff
Behind Indira School, Manjri Road] No.1.
Pune]

Mr. Chaitanya Nikate, for the Petitioners.
Mr. B. S. Phad, for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 15th JANUARY, 2018.

ORAL JUDGMENT :

1] Heard learned counsel for the petitioners and learned
counsel for the respondent.

2] Rule.

3] Rule returnable forthwith with the consent of both parties
and the petition is heard finally.

4] By this petition, filed under Article 227 of the Constitution
of India, the petitioners are challenging the order dated 28.11.2016,

passed by the 2nd Joint Civil Judge Junior Division, Pune, below exh.31. The said application was filed by the petitioners for rejection of the plaint under Order VII Rule 11(d) of Code of Civil Procedure.

5] The petitioners are the originals defendants in the suit. It was submitted by them that respondent had filed suit for declaration, partition and injunction in respect of the suit properties claiming that respondent -plaintiff No.1 is the husband of deceased Sundarabai and plaintiff Nos. 2 to 5 are her sons and daughters. According to the petitioners, deceased Sundarabai has died issue-less on 18.6.1962. Plaintiff Nos. 2 to 5 are not born to her, but as admitted by respondent himself, these children are born from his second wife. In view thereof, it is submitted that as properties were admittedly received by deceased Sundarabai from her parents, neither respondent husband nor plaintiff Nos. 2 to 5 had any shares in the said properties and therefore, there was no cause of action to file suit and hence plaint was liable to be rejected under Order VII Rule 11 (d) CPC.

6] The trial Court accepted the fact that deceased Sundarabai was not the mother of plaintiff Nos 2 to 5 as they were born from second wife of respondent. The trial Court, therefore, also accepted the fact that plaintiff Nos 2 to 5 cannot claim any share in the suit

properties which were admittedly properties received by deceased Sundarabai from her parents. Accordingly, trial Court rejected plaint in respect of the claim of plaintiff Nos 2 to 5. However, as regards respondent - the husband of Sundarabai, the trial Court held that the claim raised by him needs adjudication and therefore, application at Exh.31 was allowed partly.

7] The petitioners thereafter preferred application at Exh.40 for review of the said order. The trial Court, however, rejected the said application, elaborating that as apart from the relief of partition, respondent has also claimed the relief of declaration and cancellation of heir-ship certificate granted in Misc. Application No.6 of 1997, these reliefs need to be decided on merits and require adjudication.

8] While challenging this order of the trial Court, the submission of learned counsel for petitioners is that once it is held that plaintiff Nos 2 to 5 are not the children of deceased Sundarabai, then it follows that respondent also cannot have any share in the suit property in view of provisions of section 15(2) (a) of the Hindu Succession Act, 1956.

9] As regards the other reliefs which respondent is claiming

in respect of the heir-ship certificate issued in Misc. Civil Application No.6 of 1997 as not binding on him, it is submitted that if respondent is not the legal heir of deceased Sundarabai, he also cannot have any locus to challenge the heir-ship certificate.

10] Per contra, learned counsel for respondent has supported the impugned order passed by the trial Court for the reasons stated therein.

11] In order to appreciate the rival submissions advanced by learned counsel for petitioners and respondent, in my opinion, it would be necessary to consider the provisions of section 15 of the Hindu Succession Act, which are reproduced, for ready reference, as follows :-

“15. General Rule of succession in case of female Hindus

-B(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,-

- (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub section (1)-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub section (1) in the order specified therein, but upon the heirs of the husband.”

12] Thus, as per sub section (2) of section 15, notwithstanding anything contained in sub section (1), any property inherited by a female Hindu from her father or mother, shall devolve, in the absence of any son or daughter of the deceased not upon the legal heirs referred in sub section (1) in the order specified therein, but upon the heirs of the father. This provision, thus, clearly excludes the husband from inheriting the property received by a female Hindu from her parents if she was not having any children or has died issue-less.

13] In the instant case, admittedly the suit property was received by deceased Sundarabai from her parents and admittedly

plaintiff Nos. 2 to 5 are not her children as they are born to respondent from his second wife. Therefore, it follows that Sundarabai has died issue-less and in such situation, in the absence of her son or daughter, her husband also cannot inherit her property and the property will devolve upon the legal heirs of her father. Respondent being her husband and not the legal heir of her father, cannot get any share in the property left behind by Sundarabai. Therefore, he has no cause of action to file the suit for partition of Sundarabai's property. The trial Court should have, hence rejected the plaint not only in respect of plaintiff Nos. 2 to 5 but also in respect of respondent.

14] The only ground on which trial Court has survived the claim of respondent is that, in addition to claiming the relief of partition in the property left behind by Sundarabai, respondent has also claimed the relief of declaration that heir-ship certificate obtained in Misc. Application No.6 of 1997 is not binding on his share and secondly for the relief of injunction restraining petitioners from creating third party interests therein. However, in this respect also, it is not disputed that heir-ship certificate in Misc. Application No.6 of 1997 is obtained by the legal heirs of the father of deceased Sundarabai. Respondent has nothing to do with the said certificate,

once it is held that he cannot raise any claim in respect of the property left behind by deceased Sundarabai as that property is bound to go to legal heirs of her father. Hence, even in respect of these reliefs also, it has to be held that respondent has no cause of action to file the suit.

15] The impugned order passed by the trial Court, holding the suit maintainable qua the respondent needs to be quashed and set aside.

16] Accordingly Writ Petition is allowed.

17] The impugned order passed by the trial Court holding the suit maintainable qua respondent is quashed and set aside. As a result, the application at Exh.31 filed by the petitioners for rejection of the plaint is allowed against all the plaintiff Nos. 1 to 5. The plaint accordingly stands rejected under Order 7 Rule 11(d) CPC.

18] Rule made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]