

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 9/2018

(UTTAM NARAYAN KAPLE & OTHERS **VERSUS** SUMANBAI RAJARAMJI POTE)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri P.S. Patil, counsel for the appellants.
Shri Nitin Lalwani, counsel for the respondent.

CORAM : A.S. CHANDURKAR, J.

DATE : AUGUST 06, 2018.

The learned counsel for the parties have been heard on the following substantial question of law:-

- I) In the light of provisions of Section 30 of the Hindu Succession Act, 1956, whether the finding recorded that the defendants were not entitled to take benefit of the will executed on 4-5-1981 by Narayanrao is in accordance with the law ?

The appellants are the original defendants in the suit for partition and separate possession filed by the respondent herein. It is the case of the original plaintiff that one Narayanrao had initially married the mother of the plaintiff. Subsequently, said Narayanrao contracted second marriage and the defendants were the issues from that marriage. Said Narayanrao expired on 11.07.1994 after which the plaintiff requested the defendants to grant her share in the ancestral properties. In the written statement filed by the defendant no.1, it was pleaded that except land bearing Survey No.52/3 and some movables, all other properties were ancestral in nature. According to the defendant no.1, he had purchased Survey No.52/3 from his own income and therefore that

property could not be the subject matter of the suit for partition. It was further pleaded that Narayanrao had executed a Will on 04.05.1981 in his favour and by virtue of that Will, the defendant no.1 became absolute owner of the suit properties.

The trial Court after considering the evidence on record decreed the suit by holding that all the properties were ancestral in nature and that Narayanrao had no legal capacity to execute the will with regard to the ancestral properties in favour of the defendant no.1. The appellate Court has confirmed that decree.

It is submitted by the learned counsel for the appellant that both the Courts have not considered the effect of the provisions of Section 30 of the Hindu Succession Act, 1956. It is submitted that the said provisions were amended in the year 2005 but its legal effect has not been considered. Narayanrao was competent to execute the said Will in favour of defendant no.1 and the same was duly proved to have been so executed in his favour. Moreover, field Survey No.52/3 was the self-acquired property of the defendant no.1 as he had purchased the same from the income of his Paan-Shop. Both the Courts erred in not accepting that stand of the defendant no.1.

The learned counsel for the respondent supported the impugned judgment. It was submitted that in the written statement itself, it was pleaded that except field Survey No.52/3, all other properties were ancestral in nature. There was no evidence to indicate that even field Survey No.52/3 was purchased by the defendant no.1 from his income. The provisions of Section 30 of the said Act would not assist the case of the defendant no.1 as the property was ancestral in nature. It was thus submitted that the decree for partition has been rightly passed.

I have heard the learned counsel for the parties at length and I have perused the impugned judgment. In the written statement, it was specifically pleaded by the defendant no.1 that all properties except field Survey No.52/3 were ancestral in nature. As regards field Survey No.52/3, it has been pleaded that the said field was purchased by the defendant no.1 alone. However, the defendant no.1 did not lead any evidence to indicate that said property was purchased from his own income. That finding has been recorded by both the Courts. The other plea raised that the alienation was for legal necessity in view of the ailment of Narayanrao has also not been proved by placing on record evidence to indicate that the amounts from the sale proceeds were utilized for the treatment of Narayanrao.

As regards the effect of provisions of Section 30 of the said Act, they entitle disposition of any property by any Hindu that property which is capable of being so disposed of by him. Once it is found that the suit properties were ancestral in nature, same could not have been bequeathed in favour of defendant no.1. The findings recorded by both the Courts are based on material available on record not resulting in any perversity. The substantial question of law as framed is answered by holding that the defendants were not entitled to take the benefit of the will executed by Narayanrao.

In view of aforesaid, the Second Appeal stands dismissed with no order as to costs.

JUDGE

APTE

Rohit
Dattatraya
Apte

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Rohit Dattatraya Apte
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