

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0277 of 1996

District : Nanded

1. Maroti Parbhatrao,
Age : 55 years,
Occupation : Agriculture,
R/o. Upsawargaon,
Taluka Degloor,
Dist. Nanded.
2. Watchalabai w/o. Marotirao,
Age : 50 years,
Occupation : Agriculture,
R/o. as above.
3. Parbatrao s/o. Marotirao,
Age : 18 years,
Occupation : Agriculture,
R/o. as above.
4. Digamber s/o. Marotirao,
Age : 15 years,
minor u/g. of mother
Watchalbai w/o. Marotirao,
Age : 55 years,
Occupation : Household,
R/o. Upsawargaon,
Taluka Degloor,
Dist. Nanded.
5. Gangabai d/o. Marotirao,
Age : 32 years,
Occupation : Agriculture,
R/o. as above.

.. Appellants
(Original
defendants
no.01 to 05)

versus

1. Muktabai w/o. Marotrao,
Age : 48 years,
Occupation : Household,
R/o. Upsawargaon,
Taluka Degloor, Dist. Nanded.

2. Venkatrao s/o. Madhav Bhamne,
Age : 21 years,
Occupation : Agriculture,
R/o. Sugaon, Tal. Degloor,
Dist. Nanded.

3. Panditrao s/o. Deorao Bamne,
Age : 30 years,
Occupation : Agriculture,
R/o. Sugaon, Tal. Degloor,
Dist. Nanded.

4. Masna s/o. Yellappa Gullewad,
Age : 70 years,
Occupation : Agriculture,
R/o. Sugaon, Tal. Degloor,
Dist. Nanded.

5. Ashok s/o. Narayanrao Dhangar,
Age : 22 years,
Occupation : Agriculture,
R/o. Nipani Sawargaon,
Tal. Degloor, Dist. Nanded.

6. Parvatibai w/o. Parbatrao,
Age : 60 years,
Occupation : Agriculture,
R/o. Upsawargaon,
Tal. Degloor, Dist. Nanded.

.. Respondents
(No.01 -
Original
plaintiff
&
Nos.02 to 06
- Original
defendants
no.06 to 10)

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Mr. S.V. Chandole, Advocate, for the appellants.

*Mr. P.V. Mandlik, Senior Advocate, for
respondent no.01.*

*Mr. V.D. Salunke, Advocate, for respondents
no.02 to 06 (Absent).*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 14th March 2019**

**Date of pronouncing
the judgment : 04th June 2019**

JUDGMENT :

01. Present appeal has been filed by original defendants no.01 to 05, challenging the concurrent judgment and decree passed in Regular Civil Appeal No. 171 of 1993 [Old Regular Civil Appeal No. 115 of 1990], by Additional District Judge, Biloli, dated 28-02-1996 and in Regular Civil Suit No. 406 of 1986 by Civil Judge (Junior Division), Degloor, District Nanded, dated 30-03-1990, whereby the learned trial Court had decreed the suit for partition and separate possession filed by present respondent no.01 - original plaintiff and the said judgment and decree was confirmed by the first appellate Court. (Parties are referred as per their nomenclature before trial Court.)

02. It is not in dispute, that the original plaintiff and her minor son had filed R.C.S. No.47 of 1974 for partition and separate possession against defendant no.01 Maroti. The said suit came to be compromised and the share of son of the plaintiff to the extent of 1/3rd was carved out and he was declared as owner.

03. The original plaintiff had come with a case, that she is the legally wedded wife of defendant no.01. Her marriage with defendant no.01 was solemnized in 1954 and she has three children from defendant no.01. Suit lands are the ancestral lands of plaintiff and defendant no.01. In the said suit i.e. R.C.S. No.47 of 1974, it was agreed that her 1/3rd share in the suit property would be kept joint with defendant no.01 and defendant no.01 will not alienate the suit land without her consent. It is stated that defendant no.01 got married to defendant no.05 in 1970. The said marriage is illegal and void. Defendants no.01 and 05 have defendants no.02 to 04 children who are illegitimate and they have no right in the ancestral property of plaintiff and defendant no.01. It is stated that defendant no.01 got names of defendants no.02 to 04 recorded in the revenue record of the suit land without the consent of plaintiff. Defendants no.02 and 03 have not got any ownership or possessory right over the suit land to the extent of the area shown in their names. It is stated that defendant no.09 managed to file R.C.S. No.55 of 1980 through defendant no.02 but it was dismissed. They had also preferred appeal but it was also dismissed on 28-02-1986. But then defendant no.01 without the consent of the plaintiff as well as without any legal necessity started alienating the suit properties in favour of defendants no.06 to 09.

Those transactions are not binding on the plaintiff. It is also stated that defendant no.09 has further transferred the suit land in favour of defendant no.10. It is also stated that the plaintiff does not want to keep her 1/3rd share joint with defendant no.01 and, therefore, she had prayed for partition and separate possession of the same with mesne profit at the rate of Rs. 500/- per annum.

04. Defendants no.02 to 05 have filed their written statement at Exhibit 68, defendant no.01 at Exhibit 73, defendants no.06 and 07 at Exhibit 69 and defendant no.08 at Exhibit 71 and they denied the claim of the plaintiff. The suit proceeded without written statement of defendants no.09 and 10. Defendants no.01 to 05 have denied that plaintiff is the legally wedded first wife of defendant no.01. They admit that Hanmantrao, who is son of plaintiff, had filed R.C.S. No.47 of 1974 and it was compromised. But it is stated that it was a family arrangement and not partition. It is stated that plaintiff is residing with her son and, therefore, she ought to have claimed her share, so also, got it separated and since it has not been done, the suit is barred under Order II Rule 2 of the Code of Civil Procedure, 1908. It is stated that defendant no.01 as a Karta of the family, has given some lands to defendant nos.02 and 03. According to defendant no.01, defendant no.05 is his legally wedded wife and

plaintiff is second wife. He reiterates the fact that by way of family arrangement, he had compromised R.C.S. No.47 of 1974 and it was not a partition. It is stated that the plaintiff has filed another suit i.e. R.C.S. No. 216 of 1986 for partition of the house property in order to dispossess defendants no.01 to 05. He has sold suit property to defendants no.06 to 09 as Karta of the family for legal necessity. It is stated that whatever was given by him to defendant no.09 was a conditional sale without any right of transfer in that land but the transaction between defendant no.09 in favour of defendant no.10 is illegal.

05. Defendants no.06 and 07 have contended that they were not aware about the compromise decree in R.C.S. No.47 of 1974. They have perused the revenue record of the suit land which was standing in the name of defendant no.01 and then purchased the land. Therefore, they are bona fide purchasers for value without notice. Defendant no.08 is also contending the same contention.

06. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the suit of the plaintiff was decreed preliminary. Plaintiff was held to get her 1/3rd share from the suit land

partitioned by metes and bounds. The sale deeds executed by defendant no.01 in favour of defendants no.06 and 07, defendants no.08 and 09 as well as defendant no.10 to the extent of 1/3rd share of the plaintiff held to be ineffective. Mesne profit was granted at the rate of Rs. 1000/- per annum.

07. As aforesaid, original defendants no.01 to 05 filed R.C.A. No. 171 of 1993 and after hearing both sides, learned Additional District Judge, Biloli, dismissed the appeal on 28-02-1996. Hence, present second appeal.

08. When the second appeal was admitted on 25-01-1999, it was observed, *"Effect of the decree in R.C.S. No.47 of 1974; and the share to which the plaintiff Muktabai is entitled to, assuming that the suit is maintainable, are the substantial questions of law."* That means, in specific words, though the substantial question of law was not framed, but what was substantial question of law was outlined and, therefore, taking into consideration those observations, it can be said that maintainability of the suit by Muktabai and the effect of decree in R.C.S. No.47 of 1974 on the present suit are the two substantial questions of law on which the matter has to proceed.

09. Heard learned Advocate Mr. S.V. Chandole appearing for the appellants. Heard learned Senior

Advocate Mr. P.V. Mandlik appearing for respondent no.01. Though Vakalatnama on behalf of respondents no.02 to 06 was filed, learned Advocate for them was absent.

10. It has been vehemently argued on behalf of the appellants, that both the Courts below have failed to consider the facts as well as law points involved in the matter. When the suit for partition was filed by Hanmanta i.e. the son of present plaintiff, R.C.S. No.47 of 1974, at that time, defendants no.02 to 05 in this suit were not party. According to the plaintiff, 1/3rd share of Hanmanta was separated in the compromise that had taken place on 05-07-1977 and rest of 2/3rd was kept in common between Muktabai and Maroti. In fact, daughters of Muktabai were also not party to that suit. Now, defendants no.02 to 04 have been held to be illegitimate children. He submitted that in *Jinia Keotin & others Vs. Kumar Sitaram Manjhi & others* [(2003) 1 SCC 730], it has been observed thus :-

" Section 16 of the Hindu Marriage Act, 1955, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children is concerned, to the properties of the

parents only.

Though Section 16 was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time, in view of an express mandate of the legislature itself under sub-section (3), there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would amount to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself."

Therefore, though it was held in this case, that the children born of void or voidable marriage are not entitled for inheritance in ancestral coparcenary right but they are entitled to claim inheritance in the property of parents. Later on in recent decision in *Revanasiddappa & another Vs. Mallikarjun & others* [(2011) 11 SCC 01], the decision in *Jinia Keotin's case* (*supra*) has been referred to the Larger Bench and the matter is still pending. Though defendants no.02 to 04 are said to

be the children born from void or voidable marriage, definitely they have share in the suit property and therefore, when this fact has not been noted by both the Courts below, the concurrent findings deserve to be set aside.

11. Per contra, learned Advocate appearing for respondent no.01 supported the reasons given by both the Courts below. It was stated that the defendant no.01 in the compromise has in categorical terms stated that plaintiff is his legally wedded wife. In the compromise which was done in suit for partition, 1/3rd share of Hanmanta was carved out. It cannot be stated as a family arrangement now. Defendant no.01 is interested in even denying what he has compromised and contended before the Court in R.C.S. No.47 of 1974. He has been rightly disbelieved by both the Courts below. The 1/3rd share of the plaintiff was kept joint with defendant no.01 and specifically it was observed that defendant no.01 should not alienate the land without the consent of the plaintiff. In spite of this compromise to the Court and to the plaintiff, defendant no.01 has sold out portion from the suit land and, therefore, she has no desire to keep her 1/3rd share joint with defendant no.01. Both the Courts have rightly decreed the suit and confirmed the said decree respectively.

12. The first and the foremost fact is that when

plaintiff had come with a case that she is the legally wedded wife of defendant no.01 and the defendant no.01 denied this fact; on the contrary, came with a case that she is the second wife and in fact defendant no.05 is the first wife, specific issue to that effect has been rightly framed by the learned first appellate Court. It was not necessary to go into all those facts and lead the evidence to prove the said fact for plaintiff for the simple reason that defendant no.01 is not denying that there was a compromise between him and the plaintiff who was the guardian of Hanmanta in R.C.S. No. 47 of 1974. In the compromise, he has specifically stated that plaintiff no.02 therein (present plaintiff) is the legally wedded wife of him. Now, he cannot dispute the said fact. Further, it is to be noted from the compromise decree in R.C.S. No. 47 of 1974, produced at Exhibit 91, that from in all three properties, 1/3rd share of Hanmanta was carved out by mentioning boundaries and it was stated that those properties have been given to him as owner and it would be under plaintiff no.02 as the guardian of plaintiff no.01, minor Hanmanta. Now, defendants no.01 to 05 are contending that it was a family arrangement. When in a suit for partition on the basis of the compromise, the suit is disposed of, then defendants no.01 to 05, especially defendant no.01, cannot term it as family arrangement. It was, in fact, partition of the properties only. What is

further not in dispute, that even in that suit, the plaintiff had come with a case that the suit properties are ancestral properties. This fact is not denied by defendant no.01 in specific terms. Under such circumstance, when there was a partition between son and father i.e. Hanmanta and Maroti, definitely Muktabai, the present plaintiff, being mother of Hanmanta, got equal share in view of paragraph no.314 of Hindu Law of Mulla, 21st Edition, re-print 2012.

13. If we consider the further portion of the compromise decree, Exhibit 91, it is stated, *"05. That, remaining two shares will be in possession of defendant no.01 and defendant no.01 will not entitle to alienate the lands in any way if the defendant no.01 wants to alienate, he should obtain the consent of plaintiff no.02."* That means, at the time of arriving at the compromise, the parties were aware that when there would be a partition between son and father, the mother of the son (wife of husband) would get equivalent share to that of son and, therefore, the two shares in this case were agreed to be in possession of defendant no.01. That means, it was kept joint with defendant no.01. It cannot be stated that, that share was not carved out. It was determined. Unless determination, it will not be carved out. Therefore, definitely she got her share 1/3rd determined in the decree that was passed in R.C.S. No.47 of 1974. It appears from para 06 of the

compromise decree, that when defendant no.01 compromised that he would maintain good relations with plaintiff no.02 and maintain her in future, she had agreed to keep it joint with Maroti. Therefore, effect of said compromise decree in R.C.S. No.47 of 1974 was that of partition.

14. It is to be noted that in that suit, both the plaintiffs had prayed for separation of their 2/3rd share. Therefore, there is no substance raised in the contention by defendants no.02 to 05 now, that plaintiff ought to have got her share separated at the time of passing decree in R.C.S. No.47 of 1974 itself. She had prayed it but then since because of the compromise she agreed to have her share which was, as aforesaid, determined to be joint with defendant no.01. Now, in this case, she is claiming separation of her that determined share. It is not a regular suit for partition. But as an effect of compromise in R.C.S. No.47 of 1974, when her share was determined, she became tenant in common with Maroti. In ordinary rule of succession under Hindu Law, a wife is not entitled to file suit for partition against husband during his lifetime. But here in this Case, when the wife's share was already determined, in earlier round of litigation for partition, but she had agreed to keep it joint; thereby agreeing to be tenant in common with the husband, the wife herein was entitled to file suit

for partition for getting separation and possession of her 1/3rd share which was already determined. Therefore, the suit filed by the present plaintiff was maintainable.

15. As aforesaid, in the said compromise decree, Exhibit 91, defendant no.01 had agreed that he will not alienate the suit land i.e. the two parts which were kept joint and if at all he would be required to sell the portion of the land in future, then he promised the plaintiff that he would take her consent. It appears that defendant no.01 did not keep his promise. He alienated as well as transferred portion from the suit lands to defendants no.02 to 04, 06 to 09 and then by defendant no.09 to defendant no.10. Under such circumstance, both the Courts below were right in decreeing the suit. Further, defendants no.06 to 10 cannot be said to be the bona fide purchasers for value without notice to the extent of the share of the plaintiff in the suit lands.

16. It is to be noted that defendants no.02 to 04, who are the children born to defendant no.05 from defendant no.01, are held to be illegitimate children. As aforesaid, Muktabai was considered by Maroti as his legally wedded wife and then the compromise Exhibit 91 had taken place. There is no evidence on record to prove that marriage between

defendant no.01 and defendant no.05 had taken place prior to 1954. Therefore, defendants no.02 to 04 are the children born of void or voidable marriage. The legal position from *Jinia Keotin's case (supra)* cannot be denied. But as regards the ratio in *Revanasiddappa's case (supra)*, it is to be noted that at this stage, the matter has been referred to Larger Bench by the Hon'ble Supreme Court, taking into consideration contrary view taken in *Bharatha Matha Vs. R. Vijaya Renganathan* [(2010) 11 SCC 483] from the decision in *Jinia Keotin's case (supra)*. When contrary views are taken by coequal Bench and the matter is referred to the Larger Bench and still pending, then it would be appropriate for this Court to go with a view in *Jinia Keotin's case (supra)*. As the law of precedence, until the view taken earlier is set aside by the Larger Bench and there are contrary views with coequal Benches, then earlier view will prevail. In *State of Bihar Vs. Kalika Kuer @ Kalika Singh & others* [JT 2003 (4) SC 489], so also in *Siddharam Satlingappa Mhetre Vs. State of Maharashtra & others* [(2011) 1 SCC 694], the Hon'ble Apex Court has held that the decision of earlier coequal Bench is binding on the subsequent coequal Bench. Under such circumstance, unless it is set aside by a Larger Bench, the earlier will prevail. Therefore, taking into consideration this legal position, defendants no.02 to 04 cannot have any right in the ancestral properties of plaintiff and defendant no.01.

17. In view of the aforesaid reasons, the substantial question of law can be answered, that the effect of decree in R.C.S. No.47 of 1974 was that, it determined share of the plaintiff in partition and she was entitled to file suit for partition and separate possession.

18. There is no merit in the second appeal. Hence, it is dismissed with costs. Decree be drawn accordingly.

(Smt. Vibha Kankanwadi)
JUDGE

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