

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.390 OF 2005

Tejibai w/o Dhanji Chavan Died L.Rs.

- 1) Dayalal s/o Dhanji Chavan Died L.Rs.,
- A) Laxmikant s/o Dayalal Chavan,
Age 37 years, Occupation Business,
R/o Vazirabad, Nanded.
- B) Manoj s/o Dayalal Chavan,
Age 40 years, Occupation Business,
R/o Ramnagar Colony, Vishal
Complex, Pune.

...Appellants.

VERSUS

- 1) Mohanlal s/o Devram Parmar Died L.Rs.
- A) Gouribai w/o Mohanlal Parmar,
Age 67 years, Occupation Household,
R/o Akola.
- B) Deepika d/o Mohanlal,
Aged 45 years, Occupation Service,
R/o as above.
- C) Hanibai w/o Mahendra,
Age 49 years, Occupation Household,
R/o Aurangabad.
(Dismissed vide Court Order dated
27-07-2011)
- D) Meena d/o Mohanlal,
Age 43 years, occupation Service,
R/o C/o Rasikbhai Vora, Sunder
Bardan Tilak Rd. Raj Guru Compound,
Akola.

- E) Vidya d/o Mohanlal,
Age 40 years, Occupation Household,
R/o C/o As above.
 - F) Mohini d/o Mohanlal,
Age 38 years, occupation Household,
R/o C/o As above.
 - G) Nilima d/o Mohanlal,
Age 33 years, Occupation Household,
R/o C/o As above.
- 2) Kantilal s/o Deoram Parmar Died L.Rs.,
- A) Mrs. Savita w/o Kantilal,
Age 66 years, Occupation Household,
R/o Kacheri Rd. Old Jalna.
 - B) Rajeshbhai s/o Kantilal,
Age 37 years, Occupation Business,
R/o As above.
 - C) Mangesh s/o Kantilal,
Age 34 years, Occupation and
R/o As above.
- 3) Jayabai Jayantilal Parmar Died L.Rs.
- A) Mira w/o Ranjit Parmar,
Age 52 years, Occupation Lecturer,
R/o Ranchi 312 Kiinke Rd.
Ranchi (Bihar).
 - B) Navin s/o Jayantilal Parmar,
Age 50 years, Occupation Service,
R/o As above.
 - C) Arun Jayantilal Parmar,
Age 50 years, Occupation Business,
R/o As above.

- i) Nalini w/o Arun Parmar,
Age 52 years.
- ii) Nidhi d/o Arun Parmar,
Age 23 years.
- iii) Bhagyashri d/o Arun Parmar,
Age 20 years, R/o Ranchi 312
Kiinke Rd. Ranchi (Bihar).
- D) Deepu s/o Jayantilal Parmar,
Age 46 years, occupation Service,
R/o As above.
- E) Bharat Jayantilal Parmar,
Age 44 years, Occupation Business,
R/o As above.
- 4) Motilal s/o Dhanji Chavan
Died L.Rs.
- A) Jayabai w/o Motilal Chauhan,
Age 62 years, Occupation Household,
R/o Vazirabad, Nanded.
- B) Lalit s/o Motilal Chauhan,
Age 50 years, Occupation Service,
R/o As above.
- C) Miss Mala d/o Motilal Chauhan,
Age 45 years, Occupation Head Mistress,
Gujarati High School, R/o As Above.
- D) Miss Hanni d/o Motilal Chauhan,
Age 45 years, Occupation Service,
R/o As above. At Present C/o.
R/No.4-F.
- E) Jayashri w/o Nitin Chawla,
Age 35 years, Occupation Household,
R/o Boring Contractor Stn.Rd.Parbhani.

- F) Tanuja w/o Umesh Padiyar,
Age 45 years, Occupation Housewife,
R/o Padiyar Mansion Tiles Factory,
Main Road, Miraj Dist. Sangli.
- 5) Mohanlal s/o Dhanji Chavan,
Age 62 years, occupation Contractor,
R/o Vazirabad, Nanded.
- A) Maltiben w/o Mohanlal Chavan,
Age 62 years, occupation Household,
R/o Gujrati Galli, Vazirabad, Nanded.
- B) Nitin s/o Mohanlal Chavan,
Age 32 years, Occupation Service,
R/o As above.
- C) Hitesh s/o Mohanlal Chavan,
Age 30 years, R/o As above,
At Present Goa.
(Dismissed vide Court Order dated
27-07-2011).

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Mr. D. R. Bhadekar, Advocate for Appellants.

Mr. P. G. Godhamgaonkar, Advocate for Respondents
No.4A to 4F

Mr. H. I. Pathan, Advocate for Respondents No.1A, 1B,
1E, 1F, 1G, 2A to 2C, 3A, 3B, 3D & 3E.

Mr. V. V. Bhavthankar, Advocate for Intervenor.

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**WITH
CIVIL APPLICATION NO.7641 OF 2015
IN SA/390/2005**

**WITH
CIVIL APPLICATION NO.5320 OF 2009
IN SA/390/2005**

**WITH
CIVIL APPLICATION NO.8740 OF 2007
IN SA/390/2005**

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Judgment :
25-02-2019.**

**Date of Pronouncing The Judgment :
24-04-2019.**

JUDGMENT :

1. Present appeal has been filed by legal representatives of original defendant No.1. Respondents are the original plaintiffs who had filed Special Civil Suit No.35 of 1979 before Civil Judge, Senior Division, Nanded for partition and separate possession of the suit properties to the extent of 1 /2 share and recovery of rent to the extent of their share. The suit properties were the House Nos.3-1-298, 3-1-306, 3-1-308 and 3-1-310 situated at Vazirabad Nanded (The parties would be hereinafter referred by their nomenclature before the trial Court).

2. The plaintiffs had come with a case that one Bhoja Natha was the original owner of the suit properties. He expired in 1949-1950. He had two wives namely Panibai and Walibai. Panibai predeceased Bhoja Natha. Walibai died issueless on 02-02-1979. Panibai was having two daughters namely Tejibai (defendant No.1) and Dahibai. Dahibai expired in 1960 and is survived by the original plaintiffs Mohanlal and Kantilal and one daughter Jayabai (defendant No.2). It is stated that, after death of Bhoja Natha, Walibai and the daughters of Panibai

namely Tejibai and Dahibai became the heirs and successors of the suit properties. They were also the joint owners and possessors of the suit properties. It is also stated that, after death of Dahibai, the plaintiffs became joint owners and possessors along with Tejibai and Walibai. It is also stated that, after death of Walibai, the plaintiffs and defendants became her legal heirs to succeed her properties, and therefore, they have 1 /2 share along with the 1/ 2 share of Tejibai. Jayabai was impleaded as defendant No.2 as she was not ready to be joined as plaintiff. When the plaintiffs demanded their share from defendant No.1 Tejibai, she refused and therefore, the plaintiffs filed suit for partition and separate possession.

3. Original defendant No.1 Tejibai had resisted the suit by filing written statement. She has not disputed that, she and plaintiffs became legal heirs and successors to the properties left by Bhoja Natha, however she denied that, plaintiffs are the joint owners and possessors of the suit properties along with her. It is stated that, even Dahibai was not having joint ownership or possession over the suit properties after death of Bhoja Natha. It has been stated that, she is the only legal heir and successors of Walibai and Bhoja Natha. It will not be out of place to mention here that, Tejibai – defendant No.1 had based her claim on the basis of will executed by Walibai on 10-12-1978,

however, she waived that claim by filing pursis Exhibit 70. It was also contended by defendant No.1 that, Bhoja Natha was a contractor who had left behind him suit properties as well as some valuable securities. Walibai had obtained succession certificate in respect of the valuable properties after death of Bhoja Natha, to which plaintiffs had not raised any objection. The said certificate came to be issued in the exclusive name of Walibai. However, husband of deceased Dahibai and plaintiffs No.1 and 2 had filed Special Civil Suit No.03 of 1961 before Civil Judge, Senior Division, Nanded for their share to the extent of 1/ 2 share from the valuable securities i.e. Rs.51,685.70 Ps. In that suit the plaintiffs had not included the suit properties but that suit was ultimately withdrawn in 1964. Under the said circumstance the suit is barred under Order II Rule 2 of Code of Civil Procedure. The plaintiffs ought to have included all the properties left by Bhoja Natha and / or Walibai in that suit. It is also contended that, there were several attempts on the part of plaintiffs as well as their father to get the properties and in that respect they had got a Will executed from Walibai on 26-12-1974 bequeathing a suit properties in their favour, however, when Walibai came to know about the ill intention, she cancelled the Will. Further the suit has been resisted on the point of limitation also.

4. Defendant No.2 was served with the summons but she did not

remain present, and therefore, matter has proceeded ex-parte against her. But thereafter when she expired, her legal representatives were brought on record. They were also served, however they did not remain present, and therefore, the suit has proceeded ex-parte against the legal representatives of defendant No.2 also.

5. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the said evidence, the learned trial Court decreed the suit. It was held that, the plaintiffs are having 1/ 2 share in the suit properties and they are entitled to recover rent to the extent of 1/ 2 portion out of Rs.360/- per month. The said suit was decreed by learned Civil Judge, Senior Division, Nanded on 30-08-1983.

6. The original defendant approached this Court in First Appeal No. 197 of 1983, however after the enhancement of the pecuniary jurisdiction of this Court, the matter was transferred to District Court, Nanded and it was renumbered as Regular Civil Appeal No.25 of 2001. It was heard by learned Joint District Judge, Nanded and after hearing both sides, the appeal has been partly allowed on 05-03-2003. The finding of the learned trial Court that the plaintiffs are entitled to get half share in the suit properties is confirmed, however the Judgment to the extent of half share in the rent amount Rs.360/- per month was set

aside and modified by giving directions to hold inquiry for mesne and profits under Order XX Rule 12 of Code of Civil Procedure. Now the original defendants i.e. the legal representatives of original defendant No.1 have filed this second appeal. The second appeal has been admitted by this Court by order dated 09-02-2010 on following substantial question of law ;

Whether Bhoja's property on his death devolved on his three heirs namely Walibai (widow), Tejibai and Dahibai, (daughters from first wife), in equal shares or whether his property was succeeded only by his surviving widow Walibai.

7. Heard Mr. D. R. Bhadekar, advocate representing appellants, Mr. P. G. Godhamgaonkar, advocate representing respondent No.5, Mr. H. I. Pathan, advocate representing respondent No.1A, 1B, 1E, 1F, 1G, 2A to 2C, 3A, 3B, 3D and 3E, Mr. Vivek Bhavthankar, advocate representing Intervenor In Civil Application.

8. The learned advocate for appellant submitted that, Dahibai and Tejibai were already married when Bhoja Natha died. As per defendant No.1, Bhoja Natha died in November 1949. His first wife Panibai had already predeceased him, and therefore, his second wife Walibai made application for succession certificate. It was granted to her only and at that time the no objection certificate was given by Dahibai and Tejibai.

Under that circumstance, the succession certificate came to be issued only in favour of Walibai. Partition suit was filed by plaintiffs in the year 1961, however it was got withdrawn in 1964. It was in respect of the movable property, however immovable properties were not got included when the plaintiffs contend that, they were also the heirs left by Bhoja Natha. In fact all the properties left by Bhoja Natha ought to have been included in the suit that was filed in the year 1961. Cause of action arose on that day itself, and therefore there is bar under Order II Rule 2 of Code of Civil Procedure. Further the first appellate Court did not consider that the Will was produced along with Civil Application No.587 of 1994 in appeal filed before High Court for adducing additional evidence under Order XLI Rule 27 of Code of Civil Procedure. No order was passed on that application, and therefore, that can still be considered and hence an application has been filed in this second appeal i.e. Civil Application No. 8740 of 2007 (Exhibit 13). In the said application attention of the learned first appellate Court was invited to consider the appellants' entitlement on the basis of Will dated 10-12-1978. The learned first appellate Court passed an order that the application would be considered at the time of final hearing but the Judgment is silent on that point. Therefore, that can be still considered in view of Civil Application No.8740 of 2007. On the basis of said Will left by Walibai, original defendant No.1 had become exclusive owner. It

was also submitted that, since Bhoja Natha expired prior to Hindu Succession Act, 1956, in view of Hindu Law Women's Right Act 1933, Walibai alone had become owner of the suit properties. The daughters left by the first widow will not inherit anything, and thereafter, when Hindu Succession Act, 1956, came into force and the fact that Walibai alone was the owner of the properties, by virtue of Section 14 of the Hindu Succession Act, 1956, she alone became the owner of the property. She had every right to bequeath the suit properties and accordingly she had left the said Will dated 10-12-1978.

9. In order to buttress this submission he relied on the decision in *L. Gowramma (Dead) By Legal Representative Versus Sunanda (Dead) By Legal Representatives and Another*, reported in (2016) 3 Supreme Court Cases 356, wherein it has been held that,

"As per Section 10 (1) (g) of Hindu Law Women's Rights Act, 1933, does not include property taken by inheritance by unmarried daughters from their father.

It was held that ,

"In absence of any male issue, widow alone would succeed to deceased husband's estate under Section 4 (1) (ii) of Hindu Law Women's Rights Act, 1933. The right of succession of daughters is thereby excluded in the order of succession prescribed under Section 4 (1) of the Act."

It has been further submitted that, in view of the Will left by Walibai but the original was not produced on record but Under 41 Rule 27 of Code of Civil Procedure now produced, the evidence can be adduced under Order XLI Rule 28 of Code of Civil Procedure, and for that purpose matter can be remanded. He relied on the decision in *N. Srihari (D) Th. LRs. & Ors. Versus N. Prakash & Ors., AIR 2008 Supreme Court 1548*. He therefore submitted that, plaintiffs will not get any share in the suit properties, and therefore, the Judgment and decree passed by both the Courts deserves to be set aside.

10. It has been submitted on behalf of respondents No.1, 2 and 3 that the relationship between the parties is admitted. Most of the facts are not in dispute. When Bhoja Natha expired, at that time already the Hindu Law Women's Right to Property was already force since 1937. In view of Section 3 of that Act, Walibai got limited interest, however after Hindu Succession Act 1956 came into force, by virtue of Section 14 of the said Act, she became full owner. Plaintiffs are not only claiming partition on the basis of heirship from Bhoja Natha but they are also claiming that after death of Walibai, the partition opened and since Walibai expired issueless and she had got the property from her husband, the property will relate back to the relatives of husband, and therefore, the plaintiffs as well as defendants would get share in the

suit properties. As regards earlier suit, it was in respect of movable property only, and therefore, question of Order II Rule 2 of Code of Civil Procedure will not arise. Will allegedly left by Walibai cannot be considered for the simple reason that no evidence was led. Learned advocate for the respondent No.1, 2 and 3 supported the reasons given by both the Courts below.

11. Learned advocate appearing for respondents No.4 and 5 submitted that, he is adopting the arguments submitted by respondents No.1 to 3 and he also submitted that the application under Order XLI Rule 27 of Code of Civil Procedure will not lie. A detailed reply has been given by him.

12. There is one more application bearing No.5320 of 2009. In the said application the applicants have come with a case that, they are the daughters of original defendant No.1 - Tejibai, however they were not added as party to the appeal which was filed by Tejibai. After death of Tejibai they came to know about pendency of the second appeal just prior to the date of application and they claimed that, they have share and interest in the property, and therefore, they are necessary party to the proceeding. They have, therefore, prayed for their impleadment.

13. As regards applicants in Civil Application No.5320 of 2009 it

appears that, the relationship of the applicants with deceased Tejibai is not disputed. In fact the First Appeal No.197 of 1993 (New RCA No.25 of 2001) was filed by Tejibai herself, therefore after her death the present appellants ought to have brought, the daughters left by Tejibai on record. It will not be out of place to mention here that, Tejibai's branch was represented by the present appellants, and therefore, addition of the applicants in Application No.5320 of 2009 will not cause any kind of prejudice to anybody nor it will require remand of the matter. Hence, the said application is allowed.

14. Before considering the merits of the case I would also like to deal with the application No.8740 of 2007 filed under Order XLI Rule 27 of Code of Civil Procedure. No doubt it appears that, before this Court an application was filed when it was first appeal (First Appellate No.197 of 1983) and the civil application was C.A.No.587 of 1994, yet it can be seen that even the present application Civil Application No.8740 of 2007 should be within the parameters of Order XLI Rule 27 of Code of Civil Procedure. A specific issue was framed before the trial Court that, "Does defendant No.1 prove that by Will dated 10-12-1978 deceased Walibai widow of Bhoja Natha made bequest of the suit properties in her favour ?". It can be seen from the Judgment of the learned trial Court and record of the matter that, the learned advocate representing

defendant No.1 passed a pursis at Exhibit 70 stating that, defendant No.1 does not want to lead evidence on the point of Will. Therefore, even observation was made by the learned trial Court that, though the learned advocate representing the defendant No.1 has not specifically stated in Exhibit 70, but the pursis indicates that and it was orally addressed by the learned advocate that, defendant No.1 does not want to claim her title on the basis of Will. If such pursis was specifically passed and thereafter defendant No.1 did not adduce any evidence, then may be in first appeal or now in second appeal the application under Order XLI Rule 27 cannot be considered at all. The scope of Order XLI Rule 27 is different. Rule 27 of Order XLI provides for, additional evidence to be adduced or received by the appellate Court if the appellant specifies the Court that, after the exercise of due diligence, such evidence was not within his knowledge or could not be produced when the trial Court decided the suit against him. Here the case is totally different. In spite of knowledge of framing of specific issue, of which burden was on her; defendant No. 1 filed pursis at Ex.70 stating that she does not want to lead any evidence. This act on the part of defendant No. 1 amounts to giving up of claim by her on that point. Original will was in the possession of original defendant No.1, still when she did not adduce any evidence, with knowledge; then she or her heirs cannot seek any relief by laying hand on Order XLI

Rule 27 of Code of Civil Procedure. Therefore, the said application No.8740 of 2007 deserves to be rejected.

15. Now turning towards the controversy in the appeal. It is to be noted that, the fact is not in dispute that the suit properties were left by Bhoja Natha, who expired in 1949 leaving behind Walibai (widow), Tejibai- defendant No.1 (daughter) and Dahibai (daughter). Panibai (wife) had predeceased Bhoja Natha. But since Bhoja Natha expired in 1949, i.e. prior to Hindu Succession Act 1956, the succession would be governed by the old Act. At that time Hindu Women's Right to Property Act 1937 was prevalent in India. It was different from Hindu Law Women's Rights Act, 1933 referred in 2016 (3) SCC 356 (Supra). It was the act i.e. the Mysore Act 10 of 1933, and the parties therein are from Karnataka. The said Act was limited to Karnataka State, and therefore, we are required to see the provision under the Hindu Women's Rights to Property Act, 1937 applicable to this area. Section 3 of the said Act provided for devolution of property. Sub-section (2) of said Section 3 of the Act provided, when a Hindu governed by any school of Hindu Law other than the Dayabhaga School or by customary law dies having at the time of his death and interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-section 3, have in the property the same interest as he himself had.

Sub-section 3 of Section 3 of the Act provided any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Women's estate, provided however that she shall have the same right of claiming partition as a male owner. The conjoint reading of these two sub-sections would provide that, Walibai in this case after death of Bhoja Natha in 1949 received limited interest in the properties left by Bhoja Natha. This section does not include daughters, much less married daughters. Admittedly Tejibai and Dahibai had married prior to the death of Bhoja Natha. Therefore, both the Courts below have correctly held that, Waliabai alone had succeeded to the property after death of Bhoja Natha in 1949.

16. Much has been stated about succession certificate granted to Walibai alone. However it is to be noted that, even as per the case of the defendant No.1, she as well as Dahibai had given no objection. That means, the no objection has been given only to receive the property i.e. money that was involved. That does not mean that, defendant as well as Tejibai admitted that, they are not the heirs of Bhoja Natha.

17. Though substantial question of law has not been framed in respect of point raised under Order II Rule 2 of Code of Civil

Procedure, it can be cursorily sated that, the earlier suit was restricted to movable property and that too it was withdrawn. Here the claim of the plaintiffs is that, even after death of Walibai the property would devolve on them as heir of Walibai. Walibai expired in 1979 and the suit has been filed on 23-11-1979. Therefore, it is neither hit by limitation nor under Order II Rule 2 of Code of Civil Procedure. A fresh cause of action can be said to have arisen for the plaintiffs after death of Walibai and since they are claiming to be the heir of Walibai under Section 15 of the Hindu Succession Act, 1956. The suit properties were devolved on Walibai through her husband. Though as per the contention of the defendant No.1, Walibai had left Will but she herself had not pressed for that claim by pursis Exhibit 70 then definitely the said properties, of which Walibai had become full owner in view of Section 14 of the Hindu Succession Act, 1956, would revert back to the heirs left through husband. Therefore, when the cause of action is different, there is no question of bar under Order II Rule 2 of Code of Civil Procedure. Hence, the substantial question of law has been answered as,

"Property left by Bhoja Natha was succeeded only by his surviving widow Walibai and after her death, the property would revert back to the heirs of her husband

in view of Section 15 (1) (b) of the Hindu Succession Act, 1956”.

18. Therefore, taking into consideration the above discussion, it is concluded that, both the Courts below have not committed any kind of error in fact or as well as in law. No interference is required in the decree that has been passed. Hence, following order : -

ORDER

- 1) Application No.5320 of 2009 stands allowed. The applicants therein be impleaded as party respondent. Amendment to be carried out by the appellant immediately.
- 2) The second appeal is dismissed with costs. Decree be drawn accordingly.
- 3) Application No.8740 of 2007 is hereby rejected. Civil Application No.7641 of 2015 stands disposed of accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.