

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

902 SECOND APPEAL NO.354 OF 2015

1] Pramila Dinkar Borse.
2] Sulochana Yuvraj Koli.
3] Kokilabai Dhanraj Koli .. APPELLANTS
[Orig.Defendants]

VERSUS

1] Shalik Bhika Koli
2] Tukaram Bhika Koli
3] Bhika Navsu Koli
[Since deceased through
his legal heirs of no.1,2,4
and appellant nos.1 to 3]
4] Sumanbai Bhika Koli
5] Gojarabai Bhika Koli
[Since deceased]
6] Radhabai Dinkar Borse
[Since deceased]
Through appellant nos.1 to 3

.. RESPONDENTS

...
Mr.Girish V. Wani, Advocate for the
appellants
Mr.V.B.Patil, Advocate for the respondent
nos.1 and 2 – caveators.
Respondent nos.3, 5 and 6 dead
...

CORAM : V.L.ACHLIYA,J.

DATE : 03.12.2019

PER COURT:

1] Being aggrieved and dissatisfied with the judgment and decree dated 20th January, 2015, passed in Regular Civil Appeal No.234 of 2007 by the Principal District Judge, Jalgaon, reversing the judgment and decree dated 13th August, 2007, passed in Regular Civil Suit No.30 of 2006 by Civil Judge Junior Division, Jamner, District Jalgaon, the appellants—original defendant nos.5 to 7 have preferred this Second Appeal.

2] Heard learned counsel for the appellants – original defendant nos.5 to 7 and the counsel representing the respondent nos.1 and 2—original plaintiffs. The respondent nos.3, 5 and 6 are recorded as dead and represented by their legal representatives already on record. Perused the impugned judgment and decree passed by the trial Court and reversed by the First Appellate Court. Also perused the pleadings of the parties and the evidence adduced in the case.

3] The respondent nos.1 and 2 herein filed suit seeking decree of declaration, partition and possession in respect of land bearing Gat No.283 [Old Survey No.208/1] admeasuring 2 Hector 29 R. hereinafter referred as 'suit property'. For the convenience, the parties are referred as they referred in judgment of trial Court. Plaintiffs have claimed themselves and defendant no.2 to be children born out of marriage of defendant no.1-Bhika with defendant no.3-Gojrabai. Before marriage of defendant no.1 with defendant no.3, the defendant no.1 married with defendant no.4 - Radhabai. The defendant nos.5 to 7 are the children born out of marriage of defendant no.1 with defendant no.4.

4] The plaintiffs have approached with the case that the suit property is their Joint Hindu Family Property. They are entitled for equal share in the suit property along with defendant nos.1 to 7. In order to defeat their claim in the suit property, the defendant nos.4 to 7 in collusion with defendant no.1 got recorded their names as the persons entitle to succeed to suit property upon the death of defendant no.1.

5] The defendant no.1 filed written statement vide Exh.19. He has taken stand that about 60-65 years back, he married to defendant no.4 – Radhabai and defendant nos.5 to 7 are his children born out of his wedlock with Radhabai. Defendant no.4 insisted him to marry with defendant no.3 as all the children given birth were female. In order to have male child, the defendant no.4 insisted and forced to marry with defendant no.3 – Gojrabai. Therefore, about 50-55 years back he married with Gojrabai. He admitted that the plaintiffs and defendant no.2 are his children born out of wedlock with defendant no.3. He has categorically stated that the plaintiffs and defendant no.2 are his legitimate children and entitle to share in suit property with defendant nos.5 to 7. He supported the case of plaintiffs.

6] The defendant nos.4 to 7 resisted the suit claim. They have disputed the marriage of the defendant no.1 with defendant no.3 and further denied the status of plaintiffs and defendant no.2 as legitimate children born out of wedlock of defendant no.1 with defendant no.3. In short, they have denied any sort of relationship between

plaintiffs, defendant no.2 and 3 with defendant no.1.

7] The trial Court has dismissed the suit by holding that the plaintiffs and defendant no.2 as illegitimate children of defendant no.1. It is held that during the subsistence of marriage of defendant no.1 with defendant no.4, the defendant no.1 illegally married with defendant no.3 and therefore plaintiffs are not entitled to share in suit property. Being aggrieved, the plaintiffs have preferred Appeal. The First Appellate Court allowed the Appeal and decreed the suit. The Appellate Court held that the plaintiffs are entitled for decree of partition and separate possession of the suit property. It is held that plaintiffs, defendant no.2 and defendant nos.5 to 7 are entitled for share to the extent of 1/6th each in suit property. While reversing the judgment and decree passed by the trial Court, the First Appellate Court has taken into consideration that the trial Court overlooked Section 16 of the Hindu Marriage Act, 1956, which recognizes right of illegitimate child in the property of his parents. Being aggrieved, the appellants—

original defendant nos.5 to 7 have preferred this Appeal.

8] Mr.Girish V. Wani, learned counsel for the appellants assailed the reasons and findings recorded by the First Appellate Court with contention that the judgment and order passed by the First Appellate Court is cryptic. The contention raised by the appellants that the plaintiffs have failed to prove their relationship with defendant no.1 was not considered by the First Appellate Court. It is submitted that the reasons and findings recorded by the trial Court suffers from no perversity so as to call for interference in exercise of appellate jurisdiction. It is contended that the First Appellate Court exceeded its jurisdiction in holding that the present respondent nos.1 and 2 i.e. original plaintiffs are legitimate children of Bhika Narsu Koli i.e. defendant no.1, in absence proof of marriage between defendant no.1 and defendant no.3.

9] On the other hand, learned counsel for the respondents supported the judgment and decree passed by the First Appellate Court. It is submitted that the judgment and

decree passed by the First Appellate Court is in consonance with the rival pleadings and evidence adduced in the case and due consideration of Section 16 of the Hindu Marriage Act.

10] I have carefully considered the submissions advanced in the light of the judgment and decree passed by the First Appellate Court, I am of the view that the judgment and decree passed by the First Appellate Court suffers from no perversity and Appeal raises no substantial questions of law. The defendant no.1 has filed written statement, accepting the case of the plaintiffs. In view of the pleadings, no fault can be found with the findings recorded by the First Appellate Court to hold that the plaintiffs and defendant no.2 are entitled to claim share in the suit property along with defendant nos.5 to 7. The denial by defendant nos.4 to 7 of relationship of plaintiffs and defendant nos.2 and 3 with defendant no.1 attaches no significance in view of admission on the part of the defendant no.1 accepting their status as children born out of wedlock with defendant no.3.

11] The trial Court has dismissed the suit by holding that the plaintiffs and defendant no.2 are the illegitimate child and not entitled for share in suit property. The trial Court overlooked the applicability of Section 16 of the Hindu Marriage Act while dismissing the suit of plaintiffs. Section 16 of the Hindu Marriage Act was enacted by the Legislature with a laudable and noble object to put an end to a social evil. The said provision has been enacted and introduced to legitimate the children though illegitimate irrespective of fact that the marriage of their parents is void. In that view the view taken by First Appellate Court suffers from no perversity and calls for interference in exercise of appellate jurisdiction of this Court. In this context, learned counsel for the respondents has rightly placed reliance on the decision of the Apex Court in the case of *Jinia Keotin Vs. Kumar Sitaram Manjhi* reported in *2003 [1] SCC 730*, wherein the Apex Court has considered the purport and impact implication of Section 16 of the Hindu Marriage Act as to right of illegitimate child in the property of their parents, which observed in para no.5 of the said judgment, as under:

"(5) So far as section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provide in sub-section (3) by engrafting a provision with a non obstante clause stipulating specifically that nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity under Section 12, "any right in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents." In the light of such an express mandate of the legislature itself, 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 attempt to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants. The view taken by the courts below cannot be considered to suffer from any serious infirmity to call for our interference, in this appeal.

12] In view of the above, there is absolutely no perversity in the judgment and decree passed by the First Appellate Court. The appeal raises no substantial questions of law. Therefore, I am not inclined to entertain this Appeal. Accordingly, the Appeal is dismissed.

13] In view of dismissal of Appeal, Civil Application No.4955 of 2018 filed seeking stay not survives and accordingly dismissed.

14] Learned counsel for the appellants submits that implementation of the judgment and decree passed by First Appellate Court be

stayed for six [6] weeks to enable the appellants to challenge the order.

15] In view of conclusions that Appeal raises no substantial question of law, I am not inclined to entertain request to stay the decree passed by First Appellate Court.

[V.L.ACHLIYA]
JUDGE

DDC