

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

Second Appeal No. 0007 of 2019

District : Ahmednagar

1. Ashok s/o. Gangaram Arote
(Died) Through his L.Rs.,

1-A. Rahul Ashok Arote,
Age 34 years,
Occupation Agriculture,
R/o. Mehenduri,
Taluka Akole,
Dist. Ahmednagar.

1-B. Bharti w/o. Anil Arote,
Age 38 years,
Occupation Household,
R/o. Wadgaon Pan,
Taluka Sangamner,
Dist. Ahmednagar.

1-C. Mandakini Sangam Davre,
Age 36 years,
Occupation Household,
R/o. Nimbral,
Taluka Akole,
Dist. Ahmednagar.

1-D. Leelabai w/o. Ashok Arote,
Age 57 years,
Occupation Household,
R/o. Mehenduri,
Taluka Akole,
Dist. Ahmednagar.

.. Appellants
(Original
defendants)

2. Leelabai Ashok Arote,
Age 57 years,
Occupation Household,
R/o. Mehenduri,
Taluka Akole,
Dist. Ahmednagar.

versus

1. Sakubai Gangaram Arote,
Age 81 years,
Occupation Agriculture,
R/o. Mehunduri,
Taluka Akole,
Dist. Ahmednagar.

2. Shantabai Pandharinath Karpe,
Age 61 years,
Occupation Agriculture,
R/o. Pimpalgaon Konzira,
Taluka Sangamner,
Dist. Ahmednagar.

.. Respondents
(Original
plaintiffs)

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Mr. Ankush N. Nagargoje, Advocate, for the appellants.

*Mr. Vinod Y. Bhide, Advocate, for respondent no.02
(caveator).*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 11TH FEBRUARY 2019

ORAL JUDGMENT :

01. Present appeal has been filed by legal representatives of defendant no.01 and defendant no.03, challenging the judgment and decree in Regular Civil Appeal No. 86 of 2010, passed by learned Ad hoc District Judge-2, Sangamner, District Ahmednagar, dated 05-02-2018, whereby the appeal filed by the present appellants came to be dismissed. In the said appeal, judgment and decree in Regular Civil Suit No. 144 of 2004 passed by learned Civil Judge (Junior Division), Akole, District Ahmednagar, dated 06-07-2007 was

challenged. The said suit was filed by present respondents.

02. Present respondents - original plaintiffs had come with a case, that agricultural lands bearing Survey no.74/2 admeasuring 01 hectare 53 R, Survey no.30/1C admeasuring 0.03 R and Survey no.75/3A/B/1/2 admeasuring 0.78 R were the ancestral properties. Their common ancestor Gangaram had two wives, namely, Laxmibai and Sakhubai. Laxmibai had one son by name Ashok - original defendant no.01. Plaintiff no.02 is daughter of plaintiff no.01. Original defendant no.03 is the wife of original defendant no.01. It is stated that during the lifetime of Gangaram, there were no cordial relations with the defendants and, therefore, defendants no.01 to 03 started residing separately. Gangaram expired in 1991. It is clear pleading, that Gangaram had married Laxmibai as well as Sakhubai prior to 1950. It is stated that after death of Gangaram, plaintiff no.01 was not looking after properly by the defendants and, therefore, she went to stay along with plaintiff no.02. Now, they do not want their share to be kept jointly with the defendants and, therefore, they prayed for separation of their share and possession thereof.

03. During the pendency of the suit, defendant no.02 has expired.

04. In spite of service of summons, defendants no.01 to 03 did not appear. Therefore, the suit proceeded without written statement against them. Plaintiffs led oral as well as documentary evidence and taking into consideration the said evidence, learned trial Court decreed the suit. It was clear that plaintiffs no.01 and 02 have 5/9th share and defendant no.01 was stated to have 4/9th share.

05. Original defendants no.01 and 03 challenged the said judgment and decree in the aforesaid Regular Civil Appeal No.86 of 2010 and after hearing both sides, the said appeal came to be dismissed confirming the judgment and decree passed by the trial Court. Now, the legal representatives of original defendant no.01 and original defendant no.03 intend to challenge the said judgment and decree regarding dismissal of their appeal on a very small point.

06. Taking into consideration the point involved, the appeal is heard finally at the stage of admission by consent of both the parties.

07. Heard learned Advocate Mr. A.N. Nagargoje

appearing for the appellant and learned Advocate Mr. V.Y. Bhide appearing for the respondent.

08. It has been submitted on behalf of the appellants, that the learned trial Court has not calculated the shares properly. The fact that original defendant no.02 Laxmibai had expired during the pendency of suit itself. However, no order has been passed in respect of her share. So also, it has been wrongly calculated that plaintiffs no.01 and 02 have 5/9th share. It is to be noted that though in the appeal memo, it was tried to be contended that plaintiff no.01 was the second wife and plaintiff no.02 was illegitimate daughter of Gangaram, learned Advocate appearing for the appellants submitted that there is no factual evidence to support his contention. He also submitted that even if for the sake argument it is kept aside, yet, on the basis of facts stated in the plaint, shares have not been properly calculated. Learned first appellate Court also did not correct the said calculation which was on the basis of the legal propositions of succession.

09. Per contra, learned Advocate appearing for respondent no.02 submitted that the learned trial Court has given the manner in which calculation has been done and, therefore, it has not been

interfered with as it was found to be correct by the learned first appellate Court.

10. At the cost of repetition, it can be said that though it has been tried to be contended by the defendants, that plaintiff no.01 is the second wife and plaintiff no.02 was the illegitimate daughter of Gangaram, no evidence was tried to be adduced by the defendants. In fact, the suit has proceeded without written statement against them and, therefore, they will have to be constrained themselves to the facts which have been stated in the plaint. Specific pleading was made, that Gangaram married to Sakhubai and Laxmibai prior to 1950. Sakhubai had daughter, by name, Shantabai and Laxmibai had son, by name, Ashok from Gangaram. Gangaram expired in the year 1991 and, therefore, notional partition was open after his death. Gangaram, Ashok and Sakhubai with Laxmibai as one unit would get 1/3rd share in view of Section 6 and 10, Rule 1 of Hindu Succession Act, 1956. Thereafter Gangaram's 1/3rd share would be divided between Shantabai (daughter), Ashok (son) and Sakhubai plus Laxmibai (widows) as one unit. Thus, after distribution of the 1/3rd share of Gangaram, Sakhubai and Laxmibai together would get 4/9th share. Son Ashok would get 4/9th share and daughter Shantabai would get 1/9th share.

Thereafter, it is to be noted that defendant no.02 i.e. Laxmibai expired during pendency of the suit. She had the right with Sakhubai to the extent of 4/9th share. If it is divided amongst them, then Sakhubai would get 2/9th share and Laxmibai would get 2/9th share. Laxmibai's share would go to her son Ashok only and, therefore, in all, Ashok would get $4/9\text{th} + 2/9\text{th} = 6/9\text{th} = 2/3\text{rd}$ share. Now, as regards plaintiff no.01 is concerned, she would get 2/9th share and plaintiff no.02 is concerned, she would get 1/9th share. It appears that the learned trial Court failed to allocate the share of Laxmibai and, therefore, calculation has been wrongly done. Under such circumstance, to that extent, the said judgment and decree deserves to be corrected.

11. Hence, the following order :-

(a) The second appeal is hereby partly allowed.

(b) The judgment and decree passed in Regular Civil Suit No. 144 of 2004 dated 06-07-2007 passed by Civil Judge (Junior Division), Akole, District Ahmednagar, and Regular Civil Appeal No. 86 of 2010 passed by Ad hoc District Judge-2, Sangamner, District Ahmednagar, dated 05-02-2018, is hereby modified as follows :-

(b-1) It is declared that plaintiff no.01 has 2/9th share; plaintiff no.02 has 1/9th share and defendant no.01 has 6/9th i.e. 2/3rd share in the suit properties.

(b-2) There is no change in rest of the decree.

(c) Decree be drawn accordingly.

(d) Parties to bear their own costs of this appeal.

(Smt. Vibha Kankanwadi)
JUDGE

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