

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

Second Appeal No. 0442 of 2016

District : Nandurbar

1. Ramesh Harsing Pawar,
Aged : 35 years,
Occupation : Cultivation.
2. Dasharath Harsing Pawar,
Aged : 32 years,
Occupation : Cultivation.
3. Dilip Harsing Pawar,
Aged : 30 years,
Occupation : Cultivation.
4. Sau. Sindhubai Dilip Bhil,
Aged : 27 years,
Occupation : Agriculturist.

All are residents of
Kusumwade,
Taluka Shahada,
District Nandurbar.

.. Appellants
(Original
defendants
no.02 to 05)

versus

1. Vasubai Brijlal Pawar,
Aged : 45 years,
Occupation : Nil,
R/o. Fattepur,
Taluka Shahada,
District Nandurbar.
2. Kirsing Waman Pawar,
Through his legal heirs :-

(2A) Sumanbai Motiram Thakare,
Aged : 48 years,
Occupation : Household,
R/o. Dongale,
Taluka Taloda,
District Nandurbar.

- (2B) Ganesh Kirsing Pawar,
Age : 46 years,
Occupation : Agriculture.
- (2C) Ramanbai Rahemsing Thakare,
Aged : 43 years,
Occupation : Household.
- (2D) Jamnibai Kirsing Pawar,
Aged : 65 years,
Occupation : Household.
- (2E) Rajendra Kirsing Pawar,
Aged : 42 years,
Occupation : Agriculture.
- (2F) Anitabai Kirsing Pawar,
Aged : 40 years,
Occupation : Household.
- (2G) Santosh Kirsing Pawar,
Aged : 38 years,
Occupation : Agriculture.
- (2H) Padamsing Kirsing Pawar,
Aged : 36 years,
Occupation : Agriculture.
- (2I) Pramilabai Laxman Patle,
Aged : 34 years,
Occupation : Household.
- (2J) Sahdev Kirsing Pawar,
Aged : 32 years,
Occupation : Agriculture.
- (2K) Ramchandra Kirsing Pawar,
Aged : 30 years,
Occupation : Agriculture.

Respondents no.(2B) to (2K)
are R/o. Kusumwade,
Taluka Shahada,
District Nandurbar.

3. Maharubai Ramsing Bhil,
Aged : 27 years,
Occupation : Nil,
R/o. Kusumwade,
Taluka Shahada,
District Nandurbar.

.. Respondents
(No.01 - Original
 plaintiff
 &
Nos.02 & 03 -
Original
defendants
no.02 & 06,
respectively)

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Mr. Amit S. Savale, Advocate, for the appellants.

Respondents no.01, 2A to 2K and 03 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 04th July 2019.**

**Date of pronouncing
the judgment : 29th August 2019**

JUDGMENT :

01. Present appeal has been filed by the original defendants no.02 to 05, challenging the concurrent findings and decree in Regular Civil Suit No. 18 of 2007, passed by the Joint Civil Judge (Junior Division), Shahada, District Dhule, dated 20-03-2010, confirming the decree passed in the suit, in Regular Civil Appeal No. 09 of 2010, by the Ad hoc District Judge-1, Shahada, District Nandurbar, dated 15-02-2016.

02. Present respondent no.01 - plaintiff had

filed said suit for partition, possession and permanent injunction. She had claimed to be widow of one Brijlal Pawar, who was the brother of one Harsing and defendant no.01. Defendants no.02 to 05 are the legal representatives of deceased Harsing. Defendant no.06 is the step-daughter of plaintiff. One Waman Ravan Pawar, who was the father of Brijlal, defendant no.01 and Harsing, left ancestral property agricultural land bearing Gut no.20 admeasuring 03 hectares 39 R, Gut no.111 admeasuring 01 hectare 25 R, situated at Kusumwada and agricultural land bearing Gut no.48 admeasuring 04 hectares 29 R, situated at village Akaspur. House property that was left was Grampanchayat house no.90 situated at Kusumwada, Taluka Shahada. Plaintiff claimed that she has 1/3rd share in the same; there was no partition between Brijlal, who expired on 14-04-2001, and his brothers. *[Parties are referred as per their nomenclature before the trial Court.]*

03. Defendants no.02 to 05 resisted the claim by filing written statement. They denied the relationship between the plaintiff and deceased Brijlal. It was contended that one Pilibai was the wife of Brijlal and defendant no.06 is the daughter of Brijlal and Pilibai. In fact, Ravan, who was the great grandfather of them, had three brothers and they have also share in the property. They have given separate genealogy as per schedule 'A' and it

is stated that the suit is bad for non-joinder of legal heirs of one Jyadya. They prayed for dismissal of the suit mainly on the ground that the plaintiff is not the legally wedded wife of Brijlal.

04. After the issues were framed, both the parties have led oral as well as documentary evidence. The learned trial Court held that the plaintiff is wife of deceased Brijlal and has 1/3rd share along with defendant no.06 in the suit property and accordingly the suit was decreed which was then challenged in the appeal. After hearing both parties, learned first appellate Court has dismissed the suit, thereby confirming the decree. Hence, present second appeal.

05. Heard learned Advocate Mr. A.S. Savale for the appellants. Though the respondents were served, none appeared. It has been vehemently submitted on behalf of the appellants, that in the cross examination, plaintiff has admitted that she was married to one Mamsya prior to her alleged marriage with Brijlal and there was no divorce between her and Mamsya. It has also come on record, that Brijlal was married to Pilibai. Evidence has been led by the plaintiff, stating that marriage between Brijlal and Pilibai was dissolved as per custom by paying 'Zhagada' amount. However, the said evidence led by the plaintiff, on the point of alleged custom, is

beyond pleadings and therefore, it cannot be stated that there was proper evidence to prove the second marriage between plaintiff and Brijlal. When there is no documentary evidence also to show that plaintiff was belonging to Bhil community and no pleading to that effect by parties, both the Courts went wrong in holding that Hindu Marriage Act is not applicable. So also, the caste certificate which has been produced on record, is in different name, may be it was in the maiden name of plaintiff; but that cannot be considered without proof to hold that she belongs to Bhil community. Under such circumstance, both the Courts went wrong in holding that there was legal marriage between plaintiff and Brijlal or in other words, both the Courts went wrong in holding plaintiff to be the wife of / widow of Brijlal, having share in the suit properties.

06. Following substantial question of law was framed while admitting the appeal on 06-12-2016 :-

" While it is the case of the appellant that plaintiff Vasubai - respondent no.01 as well as Brijlal, whom she claims to have married, had subsisting previous marriages and spouses of said marriages were alive and specially when the custom / tradition of the disruption in status of such marriages not being pleaded and proved, whether the documents viz; ration card, voters' list, election

card etc. would render the marriage between the plaintiff and Brijlal legally valid ? "

07. Both the Courts have taken note of the fact that plaintiff admitted that her first marriage with Mamsya had taken place when she was 18 years of age. She resided with him for about 5 days only and thereafter she returned to her parent's house and then she claims that she performed marriage with Brijlal. There is clear admission on her part, that there was no divorce between her and Mamsya. However, she went on to examine two persons from her community to prove that Brijlal had performed marriage with her. PW 02 Renya and PW 03 Uttam have deposed about the marriage between plaintiff and Brijlal that took place about 30 years prior to their deposition. That means, it was tried to be brought on record, that the community was accepting plaintiff as the wife of Brijlal. Documentary evidence was also produced on record to show that plaintiff had daughter by name, Sushila from Brijlal but unfortunately Sushila expired in the year 1993. As regards Pilibai is concerned, it is stated that with her consent, Brijlal had performed marriage with plaintiff and then it has come on record, that Pilibai had performed marriage with one Dharamsingh; that means, Pilibai had left Brijlal. Pilibai's death extract is on record which shows name of her husband as Dharamsingh. Now, it is to be noted that

when plaintiff had come with a case, that she is the widow and the said fact was denied by the defendants, she has led evidence to show that she was considered as wife of Brijlal. She might not have pleaded about the custom but that custom was in respect of marriage between Pilibai and Brijlal regarding the amount of 'Zhagada'.

08. It has been tried to be brought on record, that if a marriage is to be severed, then the husband is required to give 'Zhagada' amount to the wife and after that amount is fixed from the *panchas* from the community, the husband or wife would be at liberty to perform second marriage. In this case, the evidence to that effect, which has been tried to be led through PW 02 Renya, cannot be considered as beyond pleadings for the simple reason that the dispute between Pilibai and Brijlal is not the subject matter but it was incidental to come to a conclusion as to whether plaintiff was considered as wife of Brijlal for a longstanding period of 30 years or not.

09. Another fact in respect of caste of plaintiff as well as defendants is concerned, the said fact has come on record in the cross of PW 02 Renya. Thus, when undisputedly, it had come on record that plaintiff as well as Brijlal belong to Bhil community, which is a Scheduled Tribe; under such circumstance, both the Courts were justified in

coming to the conclusion that provisions of Hindu Marriage Act are not applicable. Taking into consideration the longstanding status of plaintiff as wife of Brijlal, both the Courts were justified in holding her as wife of Brijlal having right to succeed to the property left by Brijlal. On the contrary, the defendants have not led any evidence to prove that at any earlier point of time, admittedly when plaintiff was residing with Brijlal, they had ever tried to challenge her status as wife of Brijlal. The genealogy that has been given along with written statement at schedule 'A' also depicts that plaintiff is second wife of Brijlal.

10. When plaintiff had proved that she is the widow left by Brijlal, definitely she would succeed to the property which can be said to have been left by Brijlal. Here again, both the Courts have correctly held that the provisions of Hindu Succession Act will not be applicable to the parties. However, taking into consideration catena of judgments which have been mentioned in both the judgments, it has been held that the general principles contained in the Hindu Succession Act, which are consistent with the justice, equity, fairness, etc. would be applicable to the succession of the persons from Scheduled Tribe. Here, in this case, further it is required to be considered that the defendant no.06, who is admittedly daughter of

Brijlal and Pilibai, has not contested the suit and denied the status of plaintiff as wife of Brijlal. She would have been more interested in denying the status.

11. Therefore, taking into consideration the above said reasons, though it had come on record that plaintiff had married earlier with another person, yet, she was wife of Brijlal. The evidence led by the plaintiff, in absence of pleading of custom and tradition, will have to be considered and it is held to be proved that she was wife of Brijlal. No interference is required in the concurrent findings recorded by both the Courts.

12. In the result, the second appeal fails and the same is hereby dismissed.

(Smt. Vibha Kankanwadi)
JUDGE

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