

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

Second Appeal No. 0561 of 2015

District : Ahmednagar

Yamunabai Shankarrao Budhwant,
Age : 86 years,
Occupation : Nil,
R/o. Nandur Vihire,
Taluka Shevgaon,
Dist. Ahmednagar.

.. Appellant
(Original
plaintiff)

versus

1. Satyabhamabai Eknathrao Bangar,
Age : 62 years,
Occupation : Household / Agri.
R/o. Nalewadi, Taluka Ambad,
District Jalna.

2. Shobhabai Damodar Avhad,
Age : 57 years,
Occupation : Agriculture,
R/o. Vasant Nagar,
Jawahar Colony,
Aurangabad.

3. Kalavati @ Kalabai Shankarrao
Budhvant,
Age : 67 years,
Occupation : Nil.

4. Rajendra Sheshrao Vanve,
Age : 29 years,
Occupation : Medical
practitioner.

5. Sanjay Sheshrao Vanve,
Age : 27 years,
Occupation : Education.
Respondents no.3, 4 & 5,
R/o. Nandur Vihire,
Taluka Shevgaon,
Dist. Ahmednagar.

.. Respondents
(Original
defendants)

.....

Mr. S.S. Wagh, Advocate, for the appellant.

*Mr. S.G. Jadhavar, Advocate, for respondents
no.01 and 02.*

Mr. N.V. Gaware, Advocate, for respondent no.03.

Respondents no.04 and 05 served.

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With

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*Mr. M.R. Khutwad, Advocate, for respondents
no.04 and 05.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 26th February 2019.**

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

JUDGMENT :

01. Both these appeals have been filed by the original plaintiff. She had filed Special Civil Suit No. 258 of 2010 before 5th Joint Civil Judge (Senior Division), Ahmednagar, for partition, separate possession and injunction.

02. Before turning to the rival contentions, note is taken in respect of admitted facts. Plaintiff is the wife of deceased Shankarrao Budhwant. Defendants no.01 and 02 are the daughters of plaintiff and Shankarrao. Shankarrao was the owner of agricultural lands, Gut no.8A admeasuring 11 R, Gut no.8B admeasuring 0.2.28 R, Gut no.205 admeasuring 3 hectares 40 R, Gut no.206 admeasuring 14 hectares 76 R, Gut no.231 admeasuring 0.03 R, Gut no.225 admeasuring 2 hectares 55 R, along with farm houses situated at village Nandur Vihire, Taluka Shevgaon, District Ahmednagar. He was also owner of the house property no.149 area 20 ft. X 10 ft. in the same village. He has also left immoveable properties including car, tractor, bullocks, other cattle, gun and gold. Shankarrao died intestate on 23-08-2010. It is also not in dispute, that defendant no.03 was treated as wife of Shankarrao and was with him till his death. It is further not in dispute, that all the suit properties are the ancestral properties of Shankarrao. (Parties are referred as per their nomenclature before the trial Court.)

03. With this background, the plaintiff has come with a case, that she was married to Shankarrao around 1942. Thereafter, Shankarrao married to defendant no.03 but that marriage is void *ab initio* because the marriage between plaintiff and Shankarrao was still subsisting at that time. Shankarrao was

suffering from severe diseases. It is stated that he was totally dependent on defendants no.03 to 05 and taking disadvantage of the said situation, defendants no.03 to 05 have played mischief and got their names mutated to some of the properties. Land Gut no.225 was mutated by defendant no.03 illegally in her name on 01-07-1973. It is, however, stated that the said mutation had not given any right, title or interest to her. That application was never signed by Shankarrao. Notices were not given to plaintiff as well as defendants no.01 and 02. Further, land admeasuring 4 hectares 73 R out of land Gut no.206 is shown to have been given in partition to defendant no.03 illegally vide ME No. 1675 dated 04-04-2010. Further, 04 gunthas land from the same land has been shown to have been transferred by deceased Shankarrao in the name of defendants no. 04 and 05 by registered sale deed dated 27-04-1999 for Rs. 25,000/-. However, that transaction is illegal and without consideration, without legal necessity; therefore, not binding on the plaintiff. It is also stated that the said transaction is also hit by the provisions of Prevention of Fragmentation & Consolidation of Holdings Act. After death of Shankarrao, when plaintiff and defendants no.01 and 02 collected the extracts of the revenue record, they came to know about the mischief played by defendants no.03 to 05 and, therefore, they orally prayed for partition to be effected, to which defendants no.03 to 05 had

initially agreed but thereafter they refused. Hence, the suit.

04. Defendant no.01 admitted claim of the plaintiff by filing Pursis at Exhibit 56. Defendant no.02 failed to appear. Hence, the suit proceeded ex parte against her. Defendant no.03 has filed written statement and the same has been adopted by defendants no.04 and 05. Defendants no.03 to 05 have denied all the adverse contentions made by the plaintiff. According to them, the suit was not maintainable; some of the properties have not been included in the hotchpot. It is stated that the defendant no.03 is the legally wedded wife of Shankarrao and their marriage had taken place in 1954. However, she also admits that the plaintiff is the wife of Shankarrao and defendants no.01 and 02 are their daughters. But according to her, since Shankarrao had no male issue, he married to defendant no.03. They together resided as husband and wife for many years. During the lifetime of Shankarrao, he gave land Gut no.225 to her towards maintenance and mutation to that effect has been recorded in 1973, as the sole owner Shankarrao was authorized to transfer the property towards maintenance of defendant no.03. It is stated that since then she is exclusive owner and possessor of Gut no.225. It is also stated that thereafter Shankarrao had given application under Section 85 of the Maharashtra Land Revenue Code, 1966, seeking

partition in respect of 04 hectares 73 R land out of Gut no.206. After due enquiry, Tahsildar has passed the order of partition. There was no question of issuing any notice to plaintiff and defendants no.01 and 02. In the alternative, defendant no.03 is claiming to be the owner of Gut no.225 by adverse possession.

05. 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, learned trial Court has partly decreed the suit. The mutation entries no.824 and 1675 were declared as illegal. It was held that the plaintiff and defendants no.01 and 02 have 1/3rd share each in the properties described in paras 1A, 1B & 1C of the plaint. However, it appears that the prayer in respect of mesne profits was not granted.

06. The said judgment and decree was challenged by original defendant no.03 by filing Regular Civil Appeal No. 35 of 2013 before District Court, Ahmednagar. Separate appeal was also filed by the original plaintiff, being Regular Civil Appeal No. 145 of 2013, challenging the refusal of awarding mesne profits in the same judgment and decree passed by the trial Court. Both the appeals were heard by learned Ad hoc District Judge-2, Ahmednagar.

However, two separate judgments have been pronounced on the same day i.e. 30-06-2015. Regular Civil Appeal No. 145 of 2013 was dismissed, whereas Regular Civil Appeal No. 35 of 2013 was partly allowed. The mutation entries no. 824 and 1675 were declared as legal, proper and having binding effect on the plaintiffs. Except land Gut no.225 and 206, partition as directed by the learned trial Court in the said decree, was confirmed. The original plaintiff has filed both these second appeals challenging the judgment and decree passed in both the Regular Civil Appeals.

07. Heard learned Advocate Mr. S.S. Wagh for the appellant - original plaintiff. Heard learned Advocate Mr. S.G. Jadhavar for respondents no.01 and 02 i.e. original defendants no.01 and 02. Heard learned Advocate Mr. N.V. Gaware for respondent no.03 - original defendant no.03. Heard learned Advocate Mr. M.R. Khutwad for respondents no.04 and 05 i.e. original defendants no.04 and 05. As per order dated 09-07-2018 passed by this Court, both the second appeals are heard finally at the stage of admission itself.

08. It has been submitted on behalf of the appellant, that most of the facts are admitted to both the parties. Though defendant no.03 tried to contend that her marriage with Shankarrao was legal,

but then she accepts the fact that Shankarrao was married to plaintiff and then they had defendants no.01 and 02 as their daughters when her marriage with Shankarrao was performed. That means, she is the second wife of Shankarrao. She has not produced any documentary evidence on record to show that her marriage with Shankarrao was prior to 1956. Under such circumstance, she cannot get any share in the properties left by Shankarrao. The first appellate Court has confirmed the main finding of the trial Court, that defendant no.03 has failed to prove that she is the legally wedded wife of Shankarrao and her marriage was performed in the year 1952. Therefore, the dispute before the first appellate Court was restricted to Gut no.225 and 206 only. As regards these two lands are concerned, Gut no.225 is said to have been given by Shankarrao in the year 1973 to defendant no.03 towards maintenance. In fact, at that time, there was no such situation which could have demanded grant of maintenance to the second wife. Shankarrao had expired in the year 2010. Therefore, there was no occasion or propriety for him to transfer the property to defendant no.03 in 1973. Mere transfer by way of mutation entry will not give any right, title or interest to defendant no.03. Mutation entries are made for fiscal purposes and, therefore, she cannot claim ownership. Further, as regards Gut no.206, it was shown by Shankarrao that he is transferring about 04 gunthas land to

defendants no.04 and 05 by registered sale deed dated 27-04-1999. However, it was without consideration and without legal necessity. That sale deed is not binding on the plaintiffs. Further, 04 hectares 73 R land out of the same Gut number was shown to have been transferred by way of partition vide ME no.1675 dated 04-04-2010. No enquiry had taken place and notice was not given to plaintiff and defendants no.01 and 02. When it was by way of partition, then definitely notice ought to have been given to them. Tahsildar had no authority to effect partition nor Shankarrao could have effected the partition without taking into consideration the shares of plaintiff as well as defendants no.01 and 02. Therefore, that mutation also would not have given any right, title or interest to defendant no.03.

09. Learned Advocate for the appellant further submitted that the first appellate Court did not consider the legal aspects involved in the matter and unnecessarily taken a stand that as regards mutation entry no.824 since it was done in 1973, the suit that was filed in 2010 was beyond the period of limitation. There was no question for plaintiff to challenge any of the mutation entries because it has not created any kind of right, title or interest in either defendant no.03 or defendants no.04 and 05. He, therefore, submitted that the substantial question of law is arising in this matter and

modification done by the first appellate Court deserves to be set aside. Learned trial Court had taken the correct view in respect of partition of the properties. However, learned trial Court had also erred in not granting mesne profits in respect of land Gut no.225 as well as Gut no.206 which were in the exclusive possession of defendants no.03 to 05 since 1973 and 2010, respectively. Learned Advocate Mr. S.G. Jadhavar has supported the submissions made by learned Advocate for the appellant.

10. Per contra, learned Advocate appearing for respondent no.03 submitted that the plaintiff has not entered into witness box and, therefore, adverse inference has rightly been drawn against her. There is absolutely no evidence led by plaintiff to prove illegality in the transaction entered into by Shankarrao. The mutation entry no.824 was passed as per order dated 10-07-1973 and it is a *quasi judicial* order and, therefore, it ought to have been challenged by the plaintiff. Even a wrong or illegal order is required to be challenged to get it cancelled or get its effect cancelled. Further, as regards entry no.1675 also, it will have to be presumed that all the procedure as required under law has been followed unless any perversity is shown. Section 85 of the Maharashtra Land Revenue Code (hereinafter referred to as "**MLR Code**") authorizes partition to be effected by Collector. Thereafter,

Sections 246 and 247 of the said Code gives remedy to the aggrieved party to challenge the entries. Sections 149, 150 and 157 give statutory presumption to those mutation entries and, therefore, the effect of Section 158 of the MLR Code is required to be considered. It prescribes a bar of jurisdiction of Civil Court and under this circumstance, there was inherent lack of jurisdiction to the Civil Court to declare both the mutation entries as illegal and void *ab initio*. Though a specific contention was raised in the written statement regarding jurisdiction of the Civil Court, in respect of prayer to challenge the mutation entries, specific issue to that effect was not framed by the trial Court. The initial burden in this case is not discharged by the plaintiff and coupled with the adverse inference required to be drawn against the plaintiff, as she failed to enter into witness box, the modification made by the first appellate Court to the decree passed by the learned trial Court is justified. He has relied on the decision of Hon'ble Apex Court in *Vidhyadhar Vs. Manikrao* [1999 AIR (SC) 1441] in support of his contentions. Learned Advocate for respondents no.04 and 05 has supported the submissions made by learned Advocate for respondent no.03.

11. The first and the foremost fact that is required to be noted is that the learned trial Court had partly decreed the suit. What was rejected was

that the 1/3rd share was not given in land Gut no.206 to the extent of 04 gunthas of land which was purchased by defendants no.04 and 05. There is no appeal filed by plaintiff to that extent. The appeal that was filed by her, was in respect of not granting the mesne profits in respect of other properties. As regards the sale deed executed in favour of defendants no.04 and 05 to the extent of 04 gunthas in Gut no.206 by sale deed dated 27-04-1999 is concerned, it is to be noted that it was executed by deceased Shankarrao himself. It was never challenged by anybody, not even by Shankarrao who expired on 23-08-2010. Therefore, from all angles, relief in respect of said sale deed was time barred for plaintiff also. Now, we are required to see what would be the position in respect of other properties in respect of which the suit was partly decreed and then in appeal, the said decree has been set aside.

12. The first and the foremost objection that has been raised on behalf of the defendant - present respondent no.03, that the plaintiff has not entered the witness box and, therefore, has not discharged even initial burden and, therefore, adverse inference has been rightly drawn by the learned first appellate Court. Here, it is to be noted that most of the facts are admitted to both the parties. It is not in dispute, that the plaintiff was the legally wedded wife of Shankarrao and defendants no.01 and 02 are

her daughters. It was for defendant no.03 to prove that she is the legally wedded wife of Shankarrao and her marriage was performed in 1954. If she was able to prove that, then the consequent rights could have been considered. When facts are admitted, as regards the facts which are contended by the plaintiff, it is not necessary that the plaintiff herself or himself should enter the witness box. When the suit properties were ancestral, the relationship was not denied, the question was only to the extent as to how much could be said to be the share of the plaintiff as well as defendants no.01 and 02 in the suit properties. Under such circumstance, there was no question of drawing adverse inference on account that the plaintiff had not entered the witness box in this case. The ratio laid down in *Vidhyadhar's case (supra)* cannot be denied but that will be the situation when burden of proof is on the plaintiff to prove something. Here, when the facts are clear and also admitted and then defendant no.03 was coming with a case that under certain circumstance, she got the property, then it is for her to prove that she received the property legally. So also, when her relationship with Shankarrao was denied, it was for her to prove the same.

13. As regards marriage of defendant no.03 with Shankarrao is concerned, plaintiff is not completely denying the said fact but she has categorically

stated that she got married with Shankarrao in 1942. Though she had not entered the witness box, it can be seen that the said fact is admitted by defendant no.03 in her cross. Defendant no.03 had come with a case that she got married with Shankarrao in 1954. Learned trial Court has given calculation taking into consideration the age of defendant no.03 and it was concluded that the marriage between defendant no.03 and Shankarrao would have taken place after commencement of Hindu Marriage Act, 1955. This calculation was accepted by the first appellate Court also and, therefore, there is concurrent finding which has not been challenged by defendant no.03. Under the said circumstance, the marriage between defendant no.03 and Shankarrao will have to be held as a void marriage because on the date of marriage between them, the marriage between plaintiff and Shankarrao was still in subsistence.

14. Defendant no.03 has contended that by way of mutation entry no.824 dated 01-07-1973, land Gut no.225 was given to her by Shankarrao. The said mutation entry has been tried to be supported by defendant no.03 / respondent no.03 by taking help of Section 85 of the MLR Code. Even such kind of argument was submitted before the first appellate Court and that has been upheld by the first appellate Court. In the said mutation entry and as per the contention of defendant no.03, it is stated that the

said land has been given to her towards maintenance. Important point that has not been considered by the learned first appellate Court was that the mutation entry cannot confer any title. It is well settled principle of law, that the mutation entries are made for fiscal purposes. Further, as regards other lands also, the mutation entry no.1675, Exhibit 217, dated 04-04-2010 and in respect of Gut no.206 to the extent of 03 hectares was shown under Section 85 of the MLR Code by order of Tahsildar dated 15-03-2010. Here, defendant no.03's marriage with Shankarrao was void, as aforesaid. Under the said circumstance, it cannot be stated that he was bound to maintain defendant no.03 and for that purpose, he could have transferred his ancestral land in her name. This fact can also be viewed from another angle. If there would have been an occasion for defendant no.03 to claim maintenance, then it could not have been legally allowed for the simple reason that she being the second wife whose marriage is void, could not have got maintenance. Under such circumstance, any land which is given in her name would amount to "transfer" within the meaning of Section 5 of the Transfer of Property Act and, therefore, when the transfer is of land of value more than Rs.100/-, then it should be by registered and sufficiently stamped instrument as per law. She being the second wife, cannot be said to be a co-owner and co-holder, as has been rightly observed by the learned trial Court and, therefore,

there was no question of application of Section 85 of the MLR Code in this case.

15. Section 2(13) of the MLR Code defines '*holding*' means a portion of land held by a holder. A holder of a land means a holder in actual possession and the same has been defined under Section 2(23) of the MLR Code. Section 2(15) defines "*joint holders*" or "*joint occupants*", means holders or occupants who hold land as co-sharers, whether as co-sharers in a family undivided according to Hindu law or otherwise, and whose shares are not divided by metes and bounds; and where land is held by joint holders or joint occupants, "holder" or "occupant", as the case may be, means all the joint holders or joint occupants. Section 85 deals with partition. It provides, subject to the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, a holding may be partitioned on the decree of a Civil Court or an application of co-holders in the manner hereinafter provided. That means, the Tahsildar or the revenue Officer would get jurisdiction under Section 85 of the MLR Code if the partition is to be effected between the co-holders.

16. At the cost of repetition, it can be said that the second wife or wife whose marriage is void under Section 11 of the Hindu Marriage Act, cannot be said to be a co-sharer or co-holder and, therefore,

the order passed by the Tahsildar on 15-03-2010 cannot be said to be a legal order and no right or interest has been created in favour of defendant no.03 by virtue of the said mutation entries.

17. It is also to be noted that the learned first appellate Court went on a wrong notion that the declaration relief in respect of the said mutation entry was time barred. In fact, the suit was for partition and one of the consequential relief was the declaration in respect of the mutation entry. Therefore, declaratory relief which was sought could not have been segregated by holding that the said relief was time barred.

18. When all the suit properties were ancestral properties of Shankarrao, his legally wedded wife and legitimate children were entitled to get share in the suit properties and the said right arose for them after death of Shankarrao on 23-08-2010. Even if that mutation entry had taken place in the year 1973, yet, it has not created any right, title or interest in favour of defendant no.01. Therefore, the learned trial Court has rightly partly decreed the suit. Learned first appellate Court on wrong assumption of application of Section 85 of the MLR Code and the order passed by the Tahsildar, held that Shankarrao has given those properties to defendant no.03 and, therefore, she is the owner. In fact, the provisions

of MLR Code are not applicable to "transfer" of properties between persons who are not 'holders' or 'joint holders' or 'co-sharers' and, therefore, the entries those were taken and the order that was passed by the revenue authority was void *ab initio* and without jurisdiction. They were not required to be challenged because mere mutation entry in favour of a person will not grant him any right, title or interest. The Hon'ble Apex Court once again in *Smt. Bhimabai Mahadev Kambekar (D) through L.Rs. Vs. Artur Import and Export Company & others* (Civil Appeal No. 1330 of 2019), on 31-01-2019, has reiterated that *"This Court has consistently held that mutation of a land in the revenue record does not create or extinguish title over such land nor it has any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question."* Therefore, the judgment and decree passed by the learned first appellate Court in Regular Civil Appeal No.35 of 2013 deserves to be set aside and the judgment and decree passed by the learned trial Court deserves to be restored.

19. In Second Appeal No. 562 of 2015, which was arising out of judgment and decree in Regular Civil Appeal No.145 of 2013, the only issue was in respect of not granting mesne profits by the trial Court. In fact, the first appellate Court ought not to have delivered two separate judgments in which there was challenge to a single decree. But then again by re-

appreciating everything, a separate detailed judgment has been given. Though it appears that it was also in respect of challenge to some of the portion in land Gut no.206, now in this appeal, no submissions have been made on behalf of the appellant in respect of the same and as aforesaid, the said transaction was made by Shankarrao himself and thereafter after about 13 years, there was no challenge by anybody, no such relief could have been granted in respect of sale deed which was executed by Shankarrao in favour of defendants no.04 and 05.

20. Though the mutation entry was carried out in 1973 and it is brought on record that since 1973, defendant no.03 is taking income from the suit lands, plaintiff is not entitled to get mesne profits since 1973. Shankarrao and defendant no.03 were residing together till his death. Shankarrao expired on 23-08-2010 and thereafter the right to claim partition or right in the property arose for the plaintiff and the suit has been filed on 16-10-2010, that means, within two months. Under such circumstance, plaintiff is entitled to get mesne profits only from the date of the suit till actual possession.

21. This point as regards mesne profits is concerned, can be viewed from another angle. Definitely other lands are admittedly in possession of defendant no.03 and she is taking the yield after

death of Shankarrao. As aforesaid, she was not at all entitled to any of the share in the property since she is the second wife and her marriage with Shankarrao is void. Her possession over the lands, except 04 gunthas from Gut no.206 is a "wrongful possession" and, therefore, the learned trial Court ought to have granted mesne profits. There is no discussion at all by the learned trial Court in respect of mesne profits. Plaintiff is entitled to get mesne profits only from the date of the suit till actual possession. Therefore, Second Appeal No.0562 of 2015 deserves to be allowed by setting aside the judgment and decree passed by the learned first appellate Court in Regular Civil Appeal No. 145 of 2013.

22. Hence, the following order :-

(a) Second Appeal No. 561 of 2015 and Second Appeal No. 562 of 2015 both are allowed.

(b) The judgments and decrees passed by the learned Ad hoc District Judge-2, Ahmednagar, in Regular Civil Appeal No.35 of 2013 as well as Regular Civil Appeal No. 145 of 2013, dated 30-06-2015, are hereby quashed and set aside.

(c) The judgment and decree passed in Special Civil Suit No.258 of 2010, by 5th Joint Civil Judge (Senior

Division), Ahmednagar, on 31-12-2012, is hereby restored, with following modification :-

(c-1) Enquiry into the mesne profits under Order XX Rule 12 of C.P.C. be held from the date of the suit till actual possession of the suit properties as against defendant no.03.

(d) Parties to bear their cost of proceedings.

(e) Decree be drawn accordingly.

(Smt. Vibha Kankanwadi)

JUDGE

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Date : 29th April 2019

23. After pronouncement of the judgment, learned Advocate appearing for respondent no.03 has prayed for stay to the decree passed by this Court today.

24. It is to be noted that, the learned trial Court as well as the learned first appellate Court had held defendant no.03 i.e. present respondent no.03 as the second wife of deceased Shankarrao. Under such circumstance, in fact, she was not entitled to get any property by way of inheritance left by Shankarrao only because of some mutation entry she possesses the property and the said mutation entry was held to be

correct by the learned first appellate Court and the said view has not been accepted by this Court today.

25. Under such circumstance, no case is made out to grant stay to the decree passed by this Court.

(Smt. Vibha Kankanwadi)
JUDGE

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