

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 803 OF 2016

Prabhakar s/o Sakharam Tejbhand,
Age 51 years, Occupation Agriculture,
R/o Wassa Tq. Jintur Dist. Parbhani. ...Appellant.

VERSUS

1. Shakuntalabai w/o Prabhakar Tejbhand,
Age 47 years, occupation Household,
R/o Wassa Tq. Jintur Dist. Parbhani.
2. Kum. Bala alias Shanta d/o Prabhakar
Tejbhand, Age 21 years, occupation
Household, R/o Wassa Tq. Jintur Dist.
Parbhani.
3. Kum. Sarika d/o Prabhakar Tejbhand,
Age 11 years, occupation Nil,
R/o Wassa Tq. Jintur Dist. Parbhani.
U/G of real mother respondent No.1. ...Respondents.

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Mr. P. S. Paranjape, Advocate for appellant.
Mr. P. N. Kalani, Advocate for respondents No.1 to 3.

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**WITH
CIVIL APPLICATION NO. 2355 OF 2017
WITH
CIVIL APPLICATION NO.3572 OF 2018**

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
07-02-2019.**

**Date of Pronouncing the Order :
20-03-2019.**

ORAL ORDER :

1. Present appeal has been filed by the original defendant
challenging the Judgment and decree in Regular Civil Appeal No.77

of 2013 by learned District Judge -1, Parbhani dated 29-07-2016 whereby his appeal was dismissed in which he had challenged the Judgment and decree passed in Regular Civil Suit No.102 of 2007 by Civil Judge, Junior Division, Jintoor Dist. Parbhani dated 30-03-2011 wherein the suit for partition and separate possession came to be decreed.

2. From the pleadings as well as evidence that has been adduced on record what is not in dispute is that original defendant is the husband of plaintiff No.1 and plaintiffs No.2 and 3 are their children. Further it is not in dispute that, defendant has performed second marriage and has two sons and three daughters out of the said wedlock. It is further not in dispute that, earlier in a compromise 3 Acres of land was given to plaintiff No.1 for maintenance and also a room to stay.

3. With the above said admitted facts, the plaintiffs had come with a case that, the marital tie between defendant and plaintiff No.1 is still subsisting. There used to be quarrels between plaintiff No.1 and second wife of defendant, and therefore, she was given a room to reside with her children and 3 Acres land for maintenance. Agricultural land Gut No.18 admeasuring 4 Hectares 87 R is the ancestral property of plaintiff and defendants and they have 1/4th share each in the same. Plaintiffs came to know that, defendant is

planning to sell out the land and therefore they demanded their share to be carved out by executing partition, however he refused and hence suit was filed.

4. Defendant resisted the claim by filing written statement wherein he had come with a case that, part of para No.1 of plaint is correct. When there was a compromise, it was decided that plaintiffs will not ask anything else and they had given up their right to claim partition. It was also stated that, the suit property is the self acquired property of his father and during his lifetime, his father has given the suit land by way of partition to his two sons begotten from the second wife, and therefore, it was stated that the suit is not maintainable.

5. Taking into consideration the rival contentions, issues came to be framed. Plaintiff has led oral as well as documentary evidence whereas defendant preferred not to lead oral and or documentary evidence. After hearing both sides the learned trial Court has decreed the suit. It was declared that, the plaintiffs have 1/4th share each in the suit property. It was also stated that, 3 Acres land which plaintiffs got earlier should be deducted from their share.

6. The said Judgment and decree was challenged by the original defendant in Regular Civil Appeal No.77 of 2013 and as aforesaid the said appeal was dismissed by learned District Judge -1, Parbhani on

29-07-2016, hence present second appeal.

7. Heard learned advocate Mr. P. S. Paranjape for appellant and learned advocate Mr. P. N. Kalani for respondents No.1 to 3. The matter is finally heard at the stage of admission itself taking into consideration the scope of the second appeal. Therefore, it is now required to be seen as to whether any substantial question of law has been raised by the appellant to be formulated in view of provisions of Section 100 of Code of Civil Procedure. Taking into consideration the fact that, there is concurrent finding given by the Courts below, it would be appropriate to rely on the observations in, *Gurnam Singh (D) By LRS. & Ors. Versus Lehna Singh (D) By LRS., Civil Appeal No.6567 of 2014*, decided by Hon'ble Apex Court on 13-03-2019, in which after taking into consideration the catena of Judgments on the Hon'ble Supreme Court pronounced earlier, it was observed that,

"15. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that the High Court has erred in re-appreciating the evidence on record in the second appeal under Section 100 of the CPC. The High Court has materially erred in interfering with the findings recorded by the First Appellate Court, which were on re-appreciation of evidence, which was permissible by the First Appellate Court in exercise of powers under Section 96 of the CPC. Cogent reasons, on appreciation of the

evidence, were given by the First Appellate Court.”

Further reliance can be placed and so it was also relied in the aforesaid Judgment on the decision in, *Ishwar Dass Jain (Dead Through LRS. Versus Sohan Lal (Dead) By LRS.*, reported in (2000) 1 Supreme Court Cases 434, in which it was laid down,

“Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.”

Therefore, taking into consideration these pronouncements it is now required to be seen as to whether any substantial question of law arises in this matter.

8. The learned advocate appearing for the appellant submitted that, from the pleadings itself it was very much clear that, defendant had performed second marriage and he has two sons and three daughters from the second marriage. It was also pleaded by him

that, his father has given the suit land by way of partition/ gift deed to the sons of defendant begotten from second marriage. Therefore, definitely they were the necessary parties to the suit. So also in the cross-examination of the plaintiff No.1 Shakuntalabai it had come on record that, defendant has sister and she has filed suit for partition against the defendant, therefore definitely her right was also involved in the matter. When these parties have not been added as defendants then definitely the matter requires remand. The 7/12 extract has been produced on record which shows the name of the sons of defendant from second marriage as owner of the property. Therefore, whether to remand the matter or not is a substantial question of law in this case.

9. Per contra, the learned advocate for the respondents No.1 to 3 has submitted that, perusal of the written statement would show that, no averment was made regarding non-joinder of necessary parties. So also no document showing that the grandfather had transferred the land to illegitimate sons of defendant by way of partition was ever produced. Mere mutation entry will not create any right in favour of those sons. Further the sister of the plaintiff though had filed suit for partition and separate possession, compromised the said suit with brother i.e. defendant, and she relinquished her share in favour of brother. Therefore, she could not be said to be the necessary party to the present suit. He placed

reliance on the decision of this Court Bench At Nagpur in, *Sk. Ibrahim s/o Sk. Mohamood And Others Versus Sk. Mehmood s/o Sk. Vazir*, reported in *AIR 2003 Bombay 357*, wherein this Court observed that,

“Order of reminding matter for fresh trial by giving suo motu direction to parties to amend pleading which parties themselves have not sought cannot be said to be a proper order.”

10. The first and the foremost fact that is required to be considered is that, defendant himself has not entered the witness box and led any oral or documentary evidence to support his contention. He now comes with a case for the first time in second appeal that, the sister and sons of defendant were the necessary parties to the suit for partition. As regards sister is concerned, she has already compromised the suit with present defendant and relinquished her share in favour of him. Under such circumstance she cannot be said to be a necessary party to the suit. Now as regards the sons in whose name the 7/12 extract is standing, are the illegitimate sons i.e. sons born out of second wedlock but their names have been mutated on the basis of Ferfar i.e. mutation only. No document of transfer that is either by way of 'gift deed' or 'Will' etc. has been produced on record. The word used in mutation entry is 'Vatni' (वाटणी), that means partition. It could not have been done by the grandfather leaving behind the plaintiffs. Therefore, only on

the basis of mutation entry it cannot be said that, grandfather had created any right, title or interest in favour of the two sons of defendant begotten from second marriage.

11. The written statement is totally silent in respect of non-joinder of necessary parties. In fact by virtue of Order I Rule 13 of Code of Civil Procedure,

“All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, **and any such objection not so taken shall be deemed to have been waived.**”
(Stress placed by me).

Therefore, when such objection was not taken though was required to be taken as per aforesaid provision, it will have be taken to have been waived, it cannot be raised for the first time in second appeal.

12. The shares have been properly carved out. Further it can also be appreciated that, the earlier 3 Acres of land which was given to plaintiffs was allowed to be deducted from their share in order to have partition by metes and bounds. Therefore, in view of the aforesaid rulings in *Gurnam Singh (D) By LRS and Ors. Versus Lehna Singh (D) By LRS.*, and *Ishwar Das Jain (Dead) Through LRS. Versus Sohan Lal (Dead) By LRS. (Supra)*, no case of substantial question of law has been pointed out, hence following order.

ORDER

- 1) Second appeal is disposed of as not admitted.
- 2) The Civil Applications No.2355 of 2017 and 3572 of 2018 stand dismissed in view of the fact that the second appeal has not admitted.
- 3) Interim relief stands vacated.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.