

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

17 SECOND APPEAL NO. 562 OF 2018
WITH
CA/16660/2016
IN
SA/562/2018

SAMBHU TUKA BHIL AND ANOTHER
VERSUS
TULSABAI DITYA BHIL

.....

Mr. V.P.Latange, Advocate for Appellants.

.....

CORAM : V.L.ACHLIYA, J.

DATE : 13/08/2019

.....

ORAL ORDER :

1. Being aggrieved by the concurrent decisions rendered by the Courts below, the appellants/original defendants have preferred this second appeal.

2. Heard learned counsel for appellants. Perused the Judgment and decree passed by the trial Court and confirmed in appeal in favour of respondent/original plaintiff.

3. The respondent/original plaintiff filed Suit seeking decree of partition and separate possession as against appellants/defendants. Appellant No. 1 is the real brother of respondent. Appellant No. 2 is the daughter of appellant No. 1. It is submitted that the

suit property agricultural lands G.Nos. 58/1 and 58/2 admeasuring 2 Hecter each situated at village Madkani, Taluka Shahada, District Nandurbar are ancestral properties and the respondent and appellant No. 1 have equal share in said properties. After the death of their father Tuka Vaja Bhil, the suit property was mutated in the name of plaintiff and defendant No. 1 vide mutation entry No. 123. Tuka Bhil died on 20/07/1986. During his life time he was in possession of suit property. After the death of Tuka Bhil, defendant No. 1 was and is in possession of suit land. According to the case set up by the respondent/plaintiff, her father died intestate leaving behind respondent and appellant No. 1 as only legal heir to succeed to the estate of deceased Tuka Bhil and they are entitled to equal share in the suit property. In the year 2009, appellant No. 1/defendant No. 1 approached her and requested to give consent to delete her name in the record of right. She refused to give consent to delete her name in the 7/12 extract. Since then, appellant No. 1 stopped to perform his obligation as brother. He has also stopped paying yield of her share in the suit property. She, therefore, filed Suit for partition.

4. Appellants have appeared and contested the suit claim. They have denied the contention that the suit property is the ancestral property. Defendants have approached with the case that on 31/07/1960 the

land in question was allotted to deceased Tuka Bhil by the State Govt. During his life time, Tuka Bhil given land bearing G.No. 58/3 to his nephew Udam Busara. He allotted land bearing G.No. 58/2 to defendant No. 1. The land bearing G.No. 58/1 was given in possession of defendant No. 1 during life time of his father and he is in possession of suit land as owner thereof. It is further pleaded that as per the custom prevailing in their Bhil community, the married daughters are not entitled for share in the property of their father.

5. On due consideration of rival pleadings and evidence adduced in the case, the trial Court partly decreed the Suit in favour of respondent/plaintiff. The trial Court declared that respondent/plaintiff and appellant No. 1/defendant No. 1 are entitled to have $\frac{1}{2}$ share in the land G.No. 58/1 admeasuring 2 Hecter situated at village Madkani, Taluka Shahada, District Nandurbar and further passed consequential order of partition and separate possession of said property. Being aggrieved, the appellants preferred appeal before the District Court, Shahada, District Nandurbar. The appellate Court confirmed the Judgment and decree passed by trial Court and dismissed the appeal vide Judgment and order dated 16/08/2016. Being aggrieved the appellants have preferred this appeal.

6. The Judgments and decree passed by the Courts below are assailed with the contention that the Courts below have erred in appreciating the evidence in its proper perspective. The Courts below have failed to take into consideration that the parties to the Suit belongs to Bhil community, a scheduled tribe. As per the custom prevailing in their community, the married daughters are not entitled for share in the property of their father. It is submitted that the respondent being the married daughter of deceased Tuka Bhil, she is not entitled to claim share in the suit property. It is submitted that the mutation entry taken in the revenue record showing her name as legal heir of deceased Tuka Bhil along with defendant No. 1 confer no right, title and interest in suit property. It is submitted that the Courts below erred in deciding the case by applying the provisions of Hindu Succession Act. In support of the submission that the married daughters are not entitled to claim share in the property of their father, learned counsel has referred and relied upon the decision in the case of ***Madhu Kishwar and Ors. V/s State of Bihar and Ors. reported in AIR 1996 Supreme Court 1864.***

7. I have carefully considered the submissions advanced in the light of decisions rendered by the Courts below thereby recording concurrent findings in favour of respondent/plaintiff. The Courts below have

consistently held that the respondent/plaintiff is entitled to $\frac{1}{2}$ share in agricultural land G.No. 58/1. The Courts below have turned down the contention of defendant that as per the custom prevailing in Bhil community, the respondent/plaintiff is not entitled to claim share in the property of her father who died intestate.

8. There is no dispute as to the fact that field G.No. 58/1 was owned and possessed by Tuka Bhil, the father of appellant No. 1 and respondent. The fact is also not in dispute that in the year 1986, Tuka Bhil died intestate. After the death of Tuka Bhil, the name of appellant No. 1 and respondent were recorded in revenue record as legal heirs of deceased Tuka Bhil. Since the year 1986 onwards till filing of Suit, the land bearing G.No. 58/1 stands recorded in the joint name of appellant No. 1 and respondent. The land bearing G.No. 58/2 was given to appellant No. 1 during the life time of Tuka Bhil. In view of the undisputed facts that Tuka Bhil died intestate and appellant No. 1 and respondent are sole L.Rs. of deceased Tuka Bhil, the trial Court has held that respondent/plaintiff is entitled to claim equal share i.e. $\frac{1}{2}$ share in the property of her father.

9. Although the appellants have taken plea that as per the custom prevailing in their community, the married daughters are not entitled to claim share in

the property of their father, the appellants have failed to prove their case. The Courts below have found no merit in the case of appellants that by virtue of custom prevailing in their community, the respondent/plaintiff not entitled to claim share in the property of her father. By appreciating the evidence adduced in the case, the Courts below have held that the evidence on record rules out case of appellants that as per the custom prevailing in the community, the married daughters are not entitled to claim share in the property of their father who died intestate. In para Nos. 15, 16 and 17, the appellate Court has observed as under.

"15. It is contention from appellant side that parties belongs to Bhil community and married daughter have no right in property of her father. She can get only amount for "Sadi-Choli". Different questions were asked on this aspect to plaintiff in cross examination. Plaintiff in her evidence stated that earlier defendant was providing to her on that count but he stopped it subsequently. Defendant denied that he was giving anything to plaintiff. It is an argument of appellant that when parties belong to Bhil community and they are tribal, provisions of Hindu Succession Act are

not applicable to them and they will be governed by their own custom. Defendant pleaded in written statement in para No.10 that plaintiff have no right to claim share in property of her father being Aadiwasi lady. Defendant have not pleaded anything more to show that said custom is prevailing in their community for a particular period. On the contrary he himself has given land Gat No.58/2 to his married daughter in partition. Mutation No.237 dated 16-03-2009 vide Exh.20 is on record to that effect. Said mutation is recorded in respect of land Gat No.58 area 2 H. mentioning that Sambhu Tuka has given this land in partition to his real daughter on his own choice and due to his old age. Being family partition said mutation is certified. So it appears that defendant himself have given land to his own daughter in partition. So when custom is not specifically pleaded and proved in that case said custom cannot be made applicable to the property left by deceased father. In present case Gat No.58/1 was hold by Tuka Vaja Bhil after making partition between him and his son and nephew. So it was his

separate property. If the provisions of Hindu Succession Act are not applicable to the parties, then in absence of any specific custom pleaded and proved, the uncodified Hindu Law will be applicable to the parties and in that case daughter will have right in property left by her deceased father. Plaintiff and defendant No.1 are shown as heirs of father and therefore she will have undivided 1/2 share in land Gat No.58/1. She cannot have any share in Gat No.58/2 as it is in the name of defendant No.1 given in partition by his father.

*16. The learned counsel for appellant have submitted that the decision in Pratap Singh Maharu Valvi V/s. Smt. Kamnabai Ramji Gavit and another **1994(1) Mh.L.R.816** is not applicable to present case which is relied by the learned lower court. So far as observations in the Judgment of learned lower court are concern, it has held that property of female Hindu after her death will be devolved upon sons and daughters equally. Admittedly, in present case property is not left behind by any female Hindu but by male*

person belonging to Aadiwasi community. So as per the provisions of old Hindu Law when person died intestate the property will devolve upon by succession and not by survivorship. Therefore, division of Gat No.58/1 will be between sons and daughters of deceased Tuka Vaja Bhil. In view of the above I answer my findings on point No.2 that plaintiff have undivided share in Gat No.58/1 only.

As to point No. 3 :

17. As Gat No.58/1 is left by deceased after his death, that he has not made any Will in favour of anyone, in that case his property will be divided between his legal heirs. Plaintiff will therefore entitle for partition and separate possession of her undivided share in Gat No.58/1. She will entitle for half share in land as the partition between defendant No.1 and his father is already held in respect of Gat No.58 and remaining land Gat No.58/1 was retained by deceased for himself which is now required to be partitioned. So plaintiff will entitle for partition and separate possession of 1/2 share in Gat

No.58/1. Hence, I answer this point accordingly."

10. Thus, the reasons and findings recorded by the Courts below are quite consistent with pleadings and evidence adduced in the case. There is absolutely no perversity in any of the findings recorded by the Courts below.

11. The decision in the case of ***Madhu Kishwar and Ors. V/s State of Bihar and Ors. [supra]*** have no bearing upon the facts of the case. In the cited case basically the virus of certain provisions of Chhota Nagpur Tenancy Act were challenged on the ground that same as violative of Articles 14,15 and 21 of Constitution of India. In the case in hand though appellants have pleaded that as per the custom prevailing in their community, the married daughters are not entitled to claim share in the property of their father, no evidence as such has been adduced.

12. In view of above, the decisions rendered by the Courts below are quite consistent with the pleadings and evidence adduced in the case. The appeal raises no substantial question of law. I am, therefore, not inclined to entertain the appeal. Accordingly, the appeal is dismissed.

13. In view of dismissal of appeal, Civil Application No. 16660 of 2016 deserves no consideration. Accordingly, the application is dismissed.

[V.L.ACHLIYA]
JUDGE

KNP.