

4IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 567 OF 2016
CIVIL APPLICATION NO. 15000 OF 2018
&
CIVIL APPLICATION NO. 9949 OF 2018

Gunwant Kashinathrao Patil & Anr. ...Appellants

Versus

Vanmala Gurunath Rodge ...Respondent

.....
Mr. S. V. Gundre , Advocate for Appellants.
Mr. P. G. Gunale, Advocate for Respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.
DATE : 07-01-2019.

ORDER :

01. Heard the learned Advocate Mr. S. V. Gundre for appellants and Mr. P. G. Gunale, learned Advocate for respondent.

02. Present appellants are the original defendants No. 1 and 2. Respondent is the original plaintiff, who had filed suit for partition and separate possession bearing R. C. S. No. 42 of 2002. It came to be partly decreed by Second Joint Civil Judge, Junior Division, Udgir on 20.9.2011. The said suit was in respect of 1) one agricultural land, 2) two houses – i) land block No.

141 admeasuring 2 hectare 96 R at village Gangapur, ii) another was in village Nideban. According to the plaintiff, the property at Gangapur was ancestral joint property, whereas the house at Nideban was purchased from joint family funds. The defendant No. 1 had given half portion of the suit land to defendant No. 2, who was his wife in lieu of maintenance in a compromise that took place in Cri. Misc Application No. 83 of 1987. According to the plaintiff, the said compromise is not binding on her as it was deliberately made to avoid her share and without her consent, therefore, she prayed for separation of her share. It will not be out of place to mention here that it was pleaded that all those properties were belonging to the father of the plaintiff and defendant No. 1 Kashinathrao Patil. Kashinath have 2 wives and plaintiff and defendant No. 1 are the children of second wife of Kashinath. Kashinath expired in 1976-77. The mother of plaintiff and defendant No. 1 died earlier and defendant No. 3, who was the first wife of Kashinath expired during the pendency of the suit issueless. The defendants No. 1 and 2 challenged the claim in the suit by filing written statement. They did not challenge the relationship, however, it was stated that after the marriage of the plaintiff, she had lost interest in the

suit property. The fact of giving half portion of the suit land to defendant No. 2 in lieu of maintenance in the compromise in the criminal proceeding was known to the plaintiff and therefore, the suit is not within the limitation. According to the defendant No. 2, when that property has been given to her in lieu of maintenance, she has become the absolute owner of the said property and therefore, it is impartible. It was also stated that the defendant No. 2 has stated that her father had purchased the house at Nideban in her name and therefore, it is not the joint family property of plaintiff and defendant No. 1.

03. On the basis of rival contentions issues came to be framed. The parties went to the evidence. After considering the evidence on record, the suit was partly decreed. It was held that plaintiff has 1/3 rd share in land block No. 141 admeasuring 3H 96R situated at village Gangapur. However, the claim of the plaintiff regarding partition and separate possession of both the house properties was rejected. It was also declared that the said compromise in criminal proceeding was not binding on the share of plaintiff.

04. The defendants No. 1 and 2 had filed R. C. A.

No. 33 of 2011 before District Court, Udgir. The said appeal came to be dismissed by learned District Judge-2, Udgir on 29.9.2015. Hence, they intend to file the second appeal.

05. When the matter was heard by this Court on 19.10.2018, three substantial questions of law were canvassed by the appellants and therefore, the notice for admission was issued to the respondents. It will not be out of place to mention here that there was no specific order of admitting the appeal, at that time, or any indication that this Court is inclined to admit the appeal.

06. The learned Advocate appearing for the appellants vehemently submitted that the learned Trial Court has failed to take into consideration that the compromise had taken place between defendants No. 1 and 2 way back in the criminal proceeding in 1987, yet, she did not raise any kind of objection at that time. But, then she says that when she want to take out the 7x12 extract of the suit land in 2002, she came to know about the said fact. Under such circumstance, when the compromise had taken place long ago, the suit that was filed for partition and separate possession was barred by

limitation. Another fact that was not considered is that after the marriage of plaintiff she has lost all the rights and even if she had some right, it can be treated as she had relinquished the same when she did not challenge it even after coming to know about the compromise decree. When in the compromise decree the half portion of the land was given to defendant No. 2 in lieu of maintenance, but, it had become her absolute property and therefore, not liable to be partitioned subsequently by the plaintiff.

07. Per contra, the learned Advocate for the respondents submits that when the relationships are admitted, immediately after the death of Kashinath in 1976-77 the plaintiff had inherited her share being daughter of Kahsinathrao. Without her consent half portion from the said land could not have been given by defendant No. 1 to defendant No. 2. The said compromise was not known to the plaintiff as she was not party to that proceeding. Therefore, the said compromise is not binding on her. When plaintiff still had share in the property, she was entitled to get her share carved out by filing suit for partition and separate possession. It can not be said to have been barred by limitation.

08. It is to be noted that the suit was partly decreed, plaintiff was not given any share in the house properties and she has not challenged that part of decree. Therefore, as regards that part is concerned, it has achieved finality. We are only concerned with the landed property and therefore, scope is limited. What is not in dispute is that agricultural land was belonging to Kashinath. He had two wives and it is undisputed that the marriage between Kashinath and two wives was prior to 1956. Plaintiff and defendant No. 1 are the children of second wife. The first wife died during the pendency of the suit issueless. Kashinath expired in 1976, therefore, the partition was opened on that day. According to the notional partition, it would have been divided between Kashinath and his two wives as one unit, son. Thereafter, share of Kashinath that is 1/3 rd would have been divided between his legal heirs that is two wives as one unit, son i.e. defendant No. 1 and daughter i.e. plaintiff. Plaintiff got married prior to 1994. Further, it has come on record in the oral evidence that the land is an ancestral land or joint family property. Therefore, in 1976 itself plaintiff had got her share in the suit land which could not have been disposed of by any manner by defendant No. 1. Unless he would have shown in specific

that she had relinquished the same, the relinquishment should be expressed. He has not come with that kind of evidence.

09. Now, turning towards the compromise decree, it is to be noted that the plaintiff was admittedly not a party to that proceeding. On what basis defendants No. 1 and 2 were saying that the plaintiff had knowledge about the said compromise is not clarified. On the contrary, the learned First Appellate Court has reproduced the facts which have been extracted in the cross of the plaintiff in para No. 15 of its Judgment, which clearly shows that the plaintiff had no knowledge about the proceedings between the defendants No. 1 and 2. Interesting point to be noted is that the address of defendants No. 1 and 2 is of same village. They had filed joint written statement and challenged the decree jointly. Therefore, the preponderance of probability allows us to draw the inference that there might have been a collusion in giving half share in the suit land to defendant No. 2. Though Section 14 of the Hindu Succession Act makes a provision that if the property is received by a female in maintenance then it will become absolute property. However, it is to be noted that in this case it is the fraudulent transfer that too without the consent of one of

the share holder. Therefore, it can not be said that the said compromise is binding on the share holder, whose consent is not obtained. Therefore, taking into consideration all these facts, the suit can not be said to be beyond the period of limitation. It is well within time after the knowledge. Further, it can not be stated that the said suit property to the extent of half share it become the absolute property of defendant No. 2 by virtue of the Section 14 of the Hindu Succession Act. Both the Courts have considered all the legal points involved in the same and have arrived at a concurrent finding. No reasonable ground or points have been shown to disturb the said concurrent finding. Hence, no case is made out to admit the second appeal. It is dismissed. Both the civil applications also stand disposed of in view of the dismissal of the second appeal.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-