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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.559 OF 2018
WITH
CIVIL APPLICATION NO.352 OF 2018

Rambhau K. Baste	...Appellant
V/s.	
Kailas D. Baste & Ors.	...Respondents

Mr.Milind M. Sathaye for the Appellant.

Mr.R.M. Gite for the Respondent No.3.

CORAM : R.D. DHANUKA, J.
DATE : 10TH OCTOBER, 2019.

P.C. :-

1. By this second appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant no.2) has impugned the judgment and decree dated 6th October, 2017 passed by the District Judge – 1, Niphad in Regular Civil Appeal No.116 of 2012 confirming the judgment and decree dated 8th February, 2011 passed by the Civil Judge, Senior Division, Niphad in Regular Civil Suit No.17 of 1996.

2. The plaintiffs Kailas Daulat Baste, Kum. Popat Daulat Baste and Sau.Jayabai Daulat Base had filed a suit for partition and separate possession. The original plaintiffs were claiming through Daulat Baste, who was one of the son of Kisan Baste, whose property was sought to be partitioned in the said suit. The suit filed by the plaintiffs was resisted by all the defendants including the

defendant no.2 on various grounds. Insofar as the plaintiff no.3, who claims to be the wife of Daulat Baste is concerned, it was the case of the defendants that there was no divorce between the plaintiff no.3 and her husband from first marriage and thus the alleged marriage between the plaintiff no.3 and said Daulat Baste was illegal or was even otherwise not proved. Insofar as the plaintiff nos.1 and 2 are concerned, it was the case of the defendants that none of them could prove that they were born out of the alleged wedlock of the plaintiff no.3 with Daulat Baste.

3. Learned Trial Judge framed three issues including the issue 'whether the plaintiffs prove that the plaintiff nos.1 and 2 were born to plaintiff no.3 from the deceased Daulat Kisan Baste'.

4. After considering the oral and documentary evidence, the learned Trial Judge rendered a finding that the plaintiffs proved that the plaintiff nos.1 and 2 were born to the plaintiff no.3 from the deceased Daulat Baste, who was one of the son of Kisan Baste. However, in so far as the plaintiff no.3 is concerned, the learned Trial Judge held that the marriage between the plaintiff no.3 and the said Daulat Baste was not proved and thus the plaintiff no.3 was not entitled to receive any share in the property of Kisan Baste. Insofar as the plaintiff nos.1 and 2 are concerned, the learned Trial Judge rendered a finding that both those plaintiffs had proved that they were born to the plaintiff no.3 from the deceased Daulat Baste.

5. The plaintiff no.3 did not file any appeal against the said judgment and decree passed by the learned Trial Court. The defendant no.2 however, filed an appeal bearing Regular Civil Appeal No.116 of 2012 before the learned District Judge – 1, Niphad. By a judgment and decree dated 6th October, 2017, the lower Appellate Court dismissed the said appeal preferred by the defendant no.2. The defendant no.2 has thus preferred this second appeal under section 100 of the Code of Civil Procedure, 1908.

6. Mr.Sathaye, learned counsel appearing for the defendant no.2 submits that though in the documents produced by the plaintiff nos.1 and 2 including the school leaving certificate name of the father of plaintiff no.1 and 2 did not match with the name of Daulat Baste, learned Trial Judge as well as the lower Appellant Court wrongly held that both these plaintiffs were born to the plaintiff no.3 through Daulat Baste.

7. The next submission of the learned counsel is that under section 16(3) of the Hindu Marriage Act, 1956 even if the plaintiff no.1 and 2 were entitled to share in the property of the said Daulat Baste, since the said Daulat Baste expired before effecting any partition of the suit property, the share of the said Daulat Baste, if any, would come to other coparceners by survivorship and thus there was no question of the plaintiff nos.1 and 2 getting any share in the alleged share of Daulat Baste, who was one of the son of Kisan Baste.

8. Learned counsel for the original plaintiffs does not dispute that the plaintiff no.3 did not file any appeal against the judgment and decree passed by the learned Trial Judge. He however, submits that the two Courts below have rendered various findings of fact after considering the documents produced by the plaintiff nos.1 and 2 and has rightly held that the plaintiff nos.1 and 2 were born to the plaintiff no.3 who were however declared as illegitimate though they would still have share under section 16(3) of the Hindu Marriage Act, 1956 in respect of the property in which their father deceased Daulat Baste was entitled to share. He submits that the findings of fact rendered by the two Courts below being not perverse cannot be interfered with by this Court in this second appeal.

9. Learned counsel for the original plaintiffs also invited my attention to the specific finding rendered in paragraph 20 of the judgment and decree passed by the learned Trial Court holding on interpretation of section 16 of the Hindu Marriage Act, 1956 and section 3(1) (j) of the Hindu Succession Act, that even illegitimate children are entitled to ask for partition and separate possession left by their father.

10. A perusal of the judgment and decree passed by the learned Trial Court indicates that insofar as the plaintiff nos.1 and 2 are concerned, the learned Trial Court has considered various documentary evidence including copy of Attendance Register of the

Primary School where the plaintiff nos.1 and 2 had taken primary education, various other documents referred in paragraph 15 of the judgment and decree passed by the learned Trial Judge and has rightly held that it was established that both those plaintiffs were born to the plaintiff no.3 out of the wedlock with the deceased Daulat Baste. I am thus not inclined to accept the submissions made by the learned counsel for the defendant no.2 that the birth of the plaintiff nos.1 and 2 to the plaintiff no.3 from the original defendant no.1 was not proved.

11. Insofar as the submission of the learned counsel for the defendant no.2 that unless and until the learned Trial Court would have rendered a finding that the said Daulat Baste was entitled to specific share in the property of Kisan Baste, no decree could have been passed in favour of the plaintiff nos.1 and 2 is concerned, a perusal of paragraph 20 of the judgment and decree passed by the learned Trial Court clearly indicates that there was no dispute that the said Daulat Baste was one of the legal heir of Kisan Baste. Learned Trial Court after considering these facts has held that the plaintiff nos.1 and 2 jointly would be entitled to 1/5th share in the suit property which was coming to the share of said Daulat Baste in the ancestral property of Kisan Baste. There is thus no merit in this submission of Mr.Sathaye, the learned counsel for the defendant no.2. The defendant no.2 does not dispute that even the illegitimate children of the plaintiff no.3 born from the said Daulat Baste, Kisan Baste would be entitled to the share in the property of Daulat Baste.

In my view since it is rightly held that the said Daulat Baste was entitled to the share in the property of Kisan Baste consequently upon the death of the said Daulat Baste, plaintiff nos.1 and 2 would be entitled to the share in the property.

12. A perusal of the judgment and decree rendered by the lower Appellate Court clearly indicates that the lower Appellate Court has considered oral and documentary evidence and has independently coming to the conclusion that the plaintiff nos.1 and 2 were born to the plaintiff no.3 through the said Mr.Daulat Baste. The findings of fact rendered by the Courts below being not perverse cannot be interfered with by this Court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908. No substantial questions of law arises in this second appeal. The second appeal is dismissed. There shall be no order as to costs.

13. The application for stay of the operation of the order passed by the two Courts below is rejected.

14. In view of dismissal of the second appeal, Civil Application No.352 of 2018 does not survive and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)