

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

21 APPEAL FROM ORDER NO.25 OF 2019
WITH
CIVIL APPLICATION NO. 4189 OF 2019

RAIBAI SANDU SATPUTE (DIED) SAINATH TUKARAM KAKADE
VERSUS
KASHINATH KISAN SATPUTE AND OTHER

...
Advocate for Appellant : Mr. R.R. Ashtekar
Advocate for Respondent Nos.1 to 5: Mr. D.G. Nagode

...
CORAM : V. K. JADHAV, J.
DATED : 02nd March, 2020

PER COURT :-

1. Heard finally with consent of the parties at admission stage.
2. The appellant is original plaintiff. She had instituted the suit bearing Regular Civil Suit No.505 of 2005 before the 11th Jt. Civil Judge, Junior Division, Aurangabad for partition of joint Hindi family property, namely, agricultural land Gut Nos.6, 7, 9 and 12, situated at Gadiwat, Tauka & District Aurangabad and for separate possession of half share of plaintiff and for perpetual injunction not to alienate the same. By judgment and decree dated 04.04.2009, the 11th Joint Civil Judge (JD) Aurangabad has decreed the suit in respect of Gut Nos. 6, 7 and 9 and dismissed the suit in respect of Gut No.12 and further held that the plaintiff is entitled to the extent of 1/3 share in respect of Gut No.7 & 9 and also entitled to the

extent of 1/2 share in respect of Gut No.6 and perpetually restrained the defendant no.1 from alienating the suit properties of Gut Nos.6, 7 & 9. Being aggrieved by the same, respondents – defendants have preferred Regular Civil Appeal No.84 of 2013 before the learned District Judge-2, Aurangabad. However, by judgment and order dated 15.02.2019, the learned District Judge-2 partly allowed the said Appeal and quashed and set aside the judgment and decree passed by the trial Court and remanded the suit to the trial Court with certain directions. Hence this appeal.

3. Learned counsel for the appellant – original plaintiff submits that the remand order is unwarranted and uncalled for. Learned counsel submits that the first appellate court would have decided the appeal on its own merits. The trial Court has framed issues and discussed the evidence and accordingly, decreed the suit. Learned counsel submits that during pendency of this appeal before the District Court the decree has been executed and therefore, the impugned order would be meaningless.

4. Learned counsel for the respondents submits that the respondents – original defendant nos. 2 and 3 have not filed their written statement and the suit came to be decided ex-prate against them. The trial Court has not framed any

specific issue as per plea raised by the defendants. There is a specific pleadings by defendant no.1 to the effect that the suit property is self acquired property. However, the trial Court has neither framed the issue nor recorded any finding to that effect. Furthermore, the trial Court while dealing with the suit for partition has not worked out the share of each of the parties. Even the trial Court has not discussed as to whether respondent – original defendant Nos. 4 and 5 are entitled for share in the suit property or not. Respondent – original defendant no.4 claims to be the second wife of deceased husband of plaintiff and respondent no.5 is the daughter. Learned counsel submits that in view of the same, the first appellate court has rightly remanded the matter. No interference is required. This appeal against the order is liable to be dismissed.

5. On going through the judgment and decree passed by the trial Court, it appears that the trial Court has not considered the defence raised by defendant no.1 and failed to frame any specific issues on the plea raised by him. Apart from the same, defendant nos.2 and 3 who are the married daughters of defendant no.1, failed to file the written statement before the court and in consequence therefore, the suit was decreed ex-parte as against them. Apart from that, there is no discussion in the judgment and order passed by the

trial Court as to their share whether they are entitled or not and if entitled to what extent. Furthermore, no issue has been framed as to whether defendant nos. 4 and 5 are entitled for share in the suit property. Consequently, there is no finding with regard to the same. So far as the submissions on behalf of the appellant that during pendency of the first appeal, the decree came to be executed, the first appellate court has rightly referred the provisions of Section 144 of the Civil Procedure Code which speaks about the restitution of decree. Thus, considering the entire aspects of the case, I find no fault in the direction given by the first appellate court about framing of additional issues in Paragraph No.36. Furthermore, the first appellate court has rightly granted opportunity to defendant nos.2 and 3 to file written statement and further directed to the trial Court to frame appropriate issues in addition to the issues as directed in Paragraph No.36 of the impugned judgment and order. Hence, I proceed to pass the following order:

ORDER

- (I) The appeal is hereby dismissed.
- (II) In view of dismissal of Appeal, pending civil application is disposed of.

(V. K. JADHAV, J.)