

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.543 OF 2018
WITH CA/8650/2018 IN SA/543/2018

Namdeo s/o Rambhau Dhumal and another **... Appellants**

Versus

Ashabai w/o Kachruba Dhumal and others **... Respondents**

.....
Mr. B. S. Kudale, Advocate for appellants.
Mr. P. M. Shinde, Advocate for respondent No.1.
.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29th January, 2021

ORDER :-

. Present appeal has been filed by original defendant Nos.1 and 2 to challenge the judgment and decree passed in Regular Civil Appeal No.13 of 2013 by learned District Judge-1, Majalgaon on 06.10.2017, thereby partly allowing their appeal and only modifying the share granted to the plaintiff in suit for partition and separate possession in Regular Civil Suit No.24 of 2008 by learned Civil Judge Junior Division, Dharur, taluka Dharur, district Beed on 15.01.2013. Present respondent No.1 is the original plaintiff. Hereinafter, parties are referred by their status before the Trial Court.

2. It is not in dispute that the original plaintiff is the sister-in-law of defendant Nos.1, 2, 4 and 5 and daughter-in-law of defendant No.3. Plaintiff's husband Kachruba, who was the son of defendant No.3 and brother of defendant Nos.1, 2, 4 and 5 expired on 16.06.1984. He was serving in military. Father-in-law of the plaintiff had expired about 13 years prior to the suit. Two agricultural lands i.e. Survey No.220 admeasuring 3 H 3 R and Survey No.221 admeasuring 3 H 16 R respectively situated at village Telgaon, taluka Dharur, district Beed, are the joint family properties of Kachruba and the defendants.

3. The plaintiff had come with the case that after death of Kachruba, she has got share in the suit properties which could have come to Kachruba. After death of her father-in-law and husband, defendant Nos.1 and 2 were cultivating those lands. In spite of the knowledge that she had the equal share in the suit lands, defendant Nos.1 and 2 had illegally got a mutation entry effected on 10.05.1989 vide M.E. No.328, whereby she was ousted. In fact, at that time, she was the part of the joint Hindu family. She was ousted from the house by defendant Nos.1 to 3 in the year 2007 and was sent to her parental house. Thereafter, she had prayed for the partition and separate possession of her share, but it was refused and, therefore, she had filed the suit.

4. The defendants resisted the claim by filing written statement. It will not be out of place to mention here that initially the suit was filed only against defendant Nos.1 to 3. The suit then came to be decreed, however, when the appeal was preferred, the matter was remanded to make the sisters of Kachruba party to the proceeding. Thereafter, defendant Nos.4 and 5 were added and once again the matter was decided. In their written statement, the defendants have contended that after Kachruba had expired, the plaintiff got his pension, provident fund and other benefits from central government and gave up/relinquished her share from the suit properties. Thereafter, there was a partition between them in the year 1990. The effect was given in the mutation register to which the plaintiff did not raise any objection. It is also contended that within 15 days of the marriage of the plaintiff with Kachruba, Kachruba had expired. They have no issues and, therefore, the plaintiff has no share in the suit properties.

5. Parties have led oral as well as documentary evidence. After hearing both sides, the learned Trial Judge has decreed the suit and held that the plaintiff and the defendants have 1/6th share each.

6. The appeal was preferred by the present appellants and it came to be partly allowed by the learned first Appellate Court. It was held that

the plaintiff would get 4/30th share in the suit properties, whereas defendant Nos.1 and 2 would get 7/30th share each. Defendant No.3 would get 10/30th share i.e. 1/3rd share and defendant Nos.4 and 5 would get 1/30th share each. Hence, the present appeal has been filed by original defendant Nos.1 and 2.

7. Heard learned Advocate Mr. B. S. Kudale for appellants and learned Advocate Mr. P. M. Shinde for respondent No.1.

8. It will not be out of place to mention here that the original plaintiff has not filed any appeal and, therefore, the scope of the second appeal is restricted to the points raised by defendant Nos.1 and 2. It has been vehemently submitted by the learned Advocate for the appellants that both the Courts below have failed to consider that defendants had specifically contended that in view of the fact that plaintiff had received huge amount after death of Kachruba and, therefore, as per the oral settlement, she has relinquished her share in the suit property. No issue was framed to that effect and opportunity to lead evidence was not given. Further, both the Courts below have not considered the service dues of deceased Kachruba from the military service would also amount to joint family property. When issues have not been properly considered, it raises substantial question of law and, therefore, he

prayed for admitting the second appeal.

9. Per contra, learned Advocate for respondent No.1 – original plaintiff relied on the reasons given by both the Courts below and submitted that well reasoned orders have been given, which do not require any interference. They do not raise any substantial question of law.

10. Learned Advocate appearing for the appellants has relied on the decision in *Sitabai wd/o Pandurang Yerne Vs. Durgabai wd/o. Khushal Yerne and Ors.*, [2016 (4) ALL M.R. 316], wherein for non framing of issues it was found by the learned First Appellate Court, that the matter deserves to be remanded and the High Court found nothing wrong in directing the Trial Court to frame specific issue. He submitted that on the basis of this legal position, he can canvass at the time of final hearing that in absence of framing of specific issue how both the Courts erred.

11. When most of the facts are admitted, it is then required to be considered, as to whether the matter deserves admission. Unless substantial question of law as contemplated under Section 100 of Code of Civil Procedure is pointed out, the second appeal cannot be admitted/entertained. Here, in this case, the relationship is not in dispute.

Plaintiff was the wife of Kachruba. Merely because the marriage has taken place just 15 days prior to the death of Kachruba, it does not change the relationship. Kachruba was admittedly serving in military at that time. It is not in dispute that he expired due to accident. Whatever benefits have been received by the plaintiff from the government due to the service of Kachruba, it is received in the capacity as widow. Nothing can be said to be permissible or can be said to be due from central government to the brothers, sisters of Kachruba. Some portion could have been received by the mother, however, unless it would have been specifically proved by the defendants that plaintiff had relinquished her share, they could not have non-suited the plaintiff. The learned Trial Judge has specifically framed issue No.2. While dealing with issue No.3, the learned Lower Court has specifically considered the contents of the defendants regarding relinquishment. Specific questions were asked to witness – Namdeo i.e. present appellant No.1 as to whether any written document was executed by the plaintiff in respect of relinquishment. He as well as other witnesses, who were examined, have specifically stated that no such document came to be executed. The learned Trial Judge has rightly considered the law on the point also. When it is a relinquishment of the share from the immovable property, then it should be in writing and it should be compulsorily registered under Section 17

of the Indian Registration Act. Definitely, the value of the share of Kachruba was more than Rs.100/- and, therefore, such relinquishment could not have been only on the basis of mutation entry. It is well settled law that mutation entry or especially the revenue records do not create or extinguish any title or share in the immovable property. Therefore, it was not necessary to have a specific issue to that extent and it was covered in the other issues those were already framed. There was no attempt by the defendants when the matter was before the learned Trial Judge to get a specific issue framed in respect of point of relinquishment. Now, they cannot be given advantage of their own wrong and when they had led evidence in spite of non framing of issue and the point has been dealt with by both the Courts below, it does not raise any substantial question of law. The decision in *Sitabai's* case (Supra) will not be helpful to the appellants for the simple reason that the said decision is based on the facts in that case. This Court bench at Nagpur had come to a specific conclusion that framing of that issue, which was in respect of customary divorce, was important. The directions were given for the remand. In fact, in this case also earlier the matter had proceeded and it was decreed. After the appeal, it was again remanded. Even after the remand, atleast there ought to have been a request by the defendants to frame such a specific issue in

respect of relinquishment, if they had the intention to lead any further evidence. It appears that even after the remand of the matter only defendant Nos.4 and 5 came to be added and they have filed pursis adopting the written statement filed by defendant Nos.1 to 3. No further evidence was given on the contrary. Defendant Nos.1 to 3 have filed a pursis at Exhibit-87 after remand and stated that the evidence that was led by them earlier i.e. prior to remand, should be considered. Under such circumstance, now just to protract the litigation, it appears that this appeal has been filed. Since it is not raising any substantial question of law, it deserves to be dismissed. Accordingly, present second appeal is dismissed at the admission stage and in view of this, no order as to costs.

12. In view of dismissal of second appeal, Civil Application No.8650 of 2018 stands disposed of.

[SMT. VIBHA KANKANWADI, J.]

scm