

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3350 OF 2021

Barku Maruti Shinde (Mali)

...Petitioner

versus

Bhamabai @ Kaushalyabai Maruti Shinde (Mali)

Died through his L.Rs.

Mandakini Subhash Bhalerao and others

...Respondents

.....
Mr. S. S. Chapalgaonkar, advocate for the petitioner

Mr. A.S. Bajaj, advocate for respondent Nos. 1 to 4

.....

CORAM : V. K. JADHAV, J.

DATED : 22nd FEBRUARY, 2021

PER COURT:-

1. By consent, heard finally at admission stage.
2. The petitioner is the original plaintiff. The petitioner has instituted the suit bearing R.C.S. No. 783 of 2013 for declaration, partition, separate possession and decree for perpetual injunction. Pending the suit, the petitioner plaintiff has filed an application Exh.147 to restrain the respondents-defendant Nos. 2 to 5 from alienating, creating third party interest in the suit properties 1A to 1C. The respondents-defendants have strongly resisted the said application by filing their say at Exh.150. By order dated 27.9.2019, the trial court has allowed the application Exh.147 and thereby restrained the respondents-defendants temporarily from alienating,

creating, charging in any manner in the suit properties 1A to 1C till the final decision of suit.

3. Being aggrieved by the same, the contesting respondents, who are defendant Nos. 1 to 4 had preferred an appeal bearing Misc. civil Appeal No. 56 of 2019 before the District Court, Kopergaon. The learned District Judge-1, Kopergaon by impugned order dated 09.02.2021 allowed the appeal with costs and quashed and set aside the order passed by the trial court below Exh.147 dated 27.09.2019 and vacated the order of temporary injunction granted by the trial court with further direction that the trial court to decide the suit at the earliest.

4. Learned counsel for the petitioner submits that the petitioner is real son of deceased Maruti Shinde. Deceased Maruti Shinde in his life time married with four women and one of them is mother of the petitioner. It is not disputed that the suit properties mentioned in para 1 is ancestral property of deceased Maruti Shinde. Though respondents-defendant Nos. 2 to 5 denied the relation and marriage of Vacchalabai (mother of petitioner) with Maruti Shinde, however, the trial court has rightly observed that the said contention is triable issue and even there is an issue with respect to the legitimacy or illegitimacy of the petitioner-plaintiff or defendant Nos. 2 to 5, it is also an issue for trial as to the plaintiff and defendant Nos. 2 to 5 are the legal heirs of deceased Maruti Shinde or not. Learned Judge of

the trial court has therefore, considered the *prima facie* case and further observed that the protection is required to be given to the petitioner-plaintiff to protect his interest and right in the suit property.

5. Learned counsel for the petitioner-plaintiff submits that the learned District Judge however, has not considered the contentions raised by both the parties on merits and allowed the Misc. Civil appeal.

6. Learned counsel for respondents-original defendant Nos. 1 to 5 submits that the petitioner-plaintiff has no *prima facie* case. The petitioner-plaintiff is taking undue advantage of similarity of his name and except his bare statement, no documentary evidence is available to substantiate even *prima facie* that the petitioner plaintiff is the son of deceased Maruti Shinde. Even *prima facie* there is evidence on record to indicate that Bhamabai/Vacchalabai was the wife of deceased Maruti Shinde. Learned counsel submits that during his life time, deceased Maruti Shinde himself had filed an application before the Tahsildar, Kopargaon on 18.7.1991 contending therein that he has only one daughter and that the suit properties, as mentioned in the said application, are his self acquired properties. On the basis of said application, mutation No. 8988 came to be sanctioned in favour of the defendants. The said mutation was never challenged by the petitioner-plaintiff. Learned counsel submits that the District Judge has rightly considered the *prima facie* case. The

balance of convenience does not lie in favour of the petitioner-plaintiff. There is no substance in this writ petition. Writ petition is liable to be dismissed.

7. The petitioner-plaintiff has approached the Civil Court with specific pleading that the suit properties, as mentioned in para 1A to 1F of the plaint, are ancestral properties of deceased Maruti Shinde and according to him, Bhamabai was his wife. The said Bhamabai died issue-less. Thereafter, Maruti Shinde got married with Bhamabai/Vacchalabai and the petitioner is the son of said Vacchalabai born from Maruti Shinde. There was matrimonial dispute between Maruti Shinde and Vacchalabai and because of which they got separated. Later on, Vacchalabai got married with some other person and the petitioner-plaintiff stayed with his maternal uncle. According to the petitioner-plaintiff, thereafter Maruti Shinde again got married with a lady viz. Bhamabai i.e. deceased defendant No.1 and defendant Nos. 2 to 5 are the sons and daughter of said Bhamabai.

8. According to the contesting defendants, the suit has been filed on the basis of false facts. The petitioner-plaintiff has made false averments that the mother of the plaintiff was never the wife of deceased Maruti Shinde. The said Maruti Shinde had first wife namely Bhamabai. After her death, deceased Maruti Shinde had married with another lady viz. Chhabubai to whom he had given

divorce in the year 1951. Thereafter, deceased Maruti Shinde got married with defendant No.1 Bhamabai. The petitioner-plaintiff is trying to establish his relations with Maruti Shinde, which never existed.

9. In the backdrop of these pleadings, it appears that the learned District Judge, while considering the *prima facie* case, has made certain observations, those are summarized as follows:-

- i) As per the pleadings, the crucial question is whether Maruti Shinde, who is owner of suit properties, is the same Maruti Shinde, who is the alleged father of the plaintiff. The crucial question is whether the mother of plaintiff viz. Bhamabai/Vacchalabai was the wife of said Maruti Shinde.
- ii) There is no pleading as to when deceased Maruti Shinde got married with mother of the plaintiff and till when she resided with Maruti Shinde. The pleadings in this regard are totally silent.
- iii) The learned District Judge has observed that the specific plea is necessary because deceased Maruti Shinde had three wives.

- iv) In the year 1951, deceased Maruti Shinde gave divorce to his wife Chhabubai and it appears from the copy of divorce deed placed on record that the matrimonial relations between Maruti Shinde and Chhabubai were strained for 10 to 12 years prior to the said divorce deed.
- v) As per the school leaving certificate of petitioner-plaintiff his date of birth is 01.08.1947. *Prima facie*, it appears that the petitioner plaintiff was born during the wedlock of Maruti Shinde with Chhabubai.
- vi) It is not clear from the pleadings as to whether deceased Maruti Shinde got married with the mother of petitioner-plaintiff during continuation of the said marriage with Chhabubai or after the divorce.
- vii) Further, the mother of petitioner-plaintiff got married with some other person and started residing with him, however, no details are placed by way of pleading about the same.
- viii) There is no documentary proof filed on record to show that the said Bhamabai/Vacchalabai is mother of the petitioner-plaintiff.

10. It further appears that deceased Maruti Shinde in his life time had filed an application before the Tahsildar, Kopargaon on 18.7.1991 for effecting the partition. In the said document, he has clearly mentioned that he has only one daughter. He had further mentioned in the said application that the suit properties are his self acquired properties. In view of the same, I find no fault in the impugned order passed by the learned District Judge. The learned District Judge has rightly considered the factual position and observed that there is no prima facie case exists in favour of the petitioner-plaintiff.

11. In view of the same, I find no substance in the writ petition. However, it is hereby made clear that the observations made by the learned District Judge are prima facie in nature and it is for the trial court to consider the pleadings alongwith the evidence led by the parties in respect of their respective pleadings on its own merits without getting influenced by the observations made by the learned District Judge. Hence, the following order:-

O R D E R

Writ petition is hereby dismissed.

(V. K. JADHAV, J.)

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