

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

919 SECOND APPEAL NO.244 OF 2021
WITH
CIVIL APPLICATION NO.5559 OF 2021
WITH
CIVIL APPLICATION NO.5561 OF 2021

HARICHANDRA NARAYAN DHAWADE
VERSUS
SAKHARCHAND NARAYAN DHAWADE AND OTHERS

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Mr. D.R. Bhadekar, Advocate for the appellant

Mr. A.D. Sonkawade, Advocate h/f Mr. A.D. Shinde, Advocate for the
respondent No.1

Mr. P.K. Palve, Advocate for the respondent Nos.2 to 5

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20th AUGUST, 2021.

ORDER :

1 Present appeal has been filed by the original defendant No.4 to
challenge the concurrent Judgment and Decree of the Courts below.

2 Present respondent No.1-original plaintiff filed Regular Civil Suit
No.41/2011 before Civil Judge Junior Division, Jamkhed, Dist. Ahmednagar

for partition and permanent injunction. The said suit came to be decreed on 05.07.2014. It was held that plaintiff has $1/6^{\text{th}}$ share and it be separated by metes and bound by sending precept to District Collector, Ahmednagar. The defendants were permanently restrained from alienating suit property until $1/6^{\text{th}}$ share is given to the plaintiff. The present appellant-original defendant No.4 challenged the said Judgment and Decree before the First Appellate Court i.e. District Judge-1, Shrigonda, Dist. Ahmednagar, by filing Regular Civil Appeal No.99/2019. It came to be dismissed on 06.02.2021. However, the decree was modified to the extent that plaintiff and defendant No.1A, legal heirs of defendant No.1B Taibai (jointly) and defendant Nos.2 to 4 are entitled for $1/6^{\text{th}}$ share each by metes and bound. That means, the Trial Court had only carved out the share of the plaintiff, however, the First Appellate Court had carved out the shares of the defendant Nos.1 to 4. Now, the original defendant No.4 has filed the Second Appeal.

3 Heard learned Advocate Mr. D.R. Bhadekar for the appellant, learned Advocate Mr. A.D. Sonkawade holding for learned Advocate Mr. A.D. Shinde for the respondent No.1 and learned Advocate Mr. P.K. Palve for respondent Nos.2 to 5.

4 It has been vehemently submitted on behalf of the appellant-original defendant No.4 that plaintiff had come with a case that in all six

properties, which were the suit properties, are ancestral properties of himself and defendant Nos.1 to 5, however, he had not included property, which was standing in his name and then he had sold it. A clear admission was given by the plaintiff that Sy.No.108/2 and Sy.No.115/1/2/2 were purchased in the name of plaintiff and he has sold those properties. Therefore, the suit was bad for non inclusion of all the properties belonging to the family. Further, entries in the mutation register taken have been misinterpreted. Even the learned First Appellate Court has stated that the partial partition of certain properties is acceptable and, therefore, the suit is not bad for non inclusion of joint family properties. This is wrong concept of law. Another fact, that was required to be noted, is that the suit had proceeded *ex parte* against sister – defendant No.1B. She had expired during the course of the suit; yet, it proceeded without bringing her legal representatives on record. In spite of the said fact, the learned First Appellate Court, instead of dismissing the suit, has wrongly considered that since the intimation about her death was not given, that is not fatal. The facts have been conveniently twisted and, therefore, the Judgments in both the Courts were perverse.

5 The appellant/applicant has filed Civil Application No.5559 of 2021 for allowing him to produce additional evidence. That means, it was under Order XLI Rule 27 of the Code of Civil Procedure, 1908. By this

application, the applicant wanted to produce on record the documents regarding purchase of land Sy.No.108/2 and Sy.No.115/1/2/2. The plaintiff sold land Sy.No.108/2, which was purchased in the name of plaintiff on 07.07.2000 and it was sold by him to one Ankush Kolekar on 31.10.2003. If, according to the plaintiff, all were joint on the date of the suit, then unless he proves that he had separate income, it cannot be said that the said land, which was purchased in his name, was his self acquired property. He had no right to sell that property. He ought to have included that property as well as the person to whom he had sold that property as party to the suit. Similarly, the sale deed in respect of land Sy.No.115/1/2/2 shows that it has been re-purchased in the name of plaintiff's minor son, jointly with one Mohan Namdeo Chormale, on 03.06.2011. All these documents could not be produced before the Courts below and they are now available with the applicant. Production of these documents is necessary, as it will show that those properties were required to be included in the common hotch pot. If those documents are allowed to be brought on record, then definitely, the Court would consider the plea taken by the defendant No.4 that the suit is bad for non inclusion of those properties and non joinder of the purchasers. He, therefore, prayed for allowing those documents to be produced on record.

6 Per contra, the learned Advocate for the respondent No.1 and learned Advocate for respondent Nos.2 to 5 supported the reasons given by both the Courts below and submitted that the documents could have been made available by the defendant No.4 before the Trial Court, however, since he is not giving any reason for non production of the same at the trial stage, it cannot be allowed under Order XLI Rule 27 of the Code of Civil Procedure, 1908. No substantial questions of law are arising in this case.

7 At the outset, it is to be noted that the relationship between the parties is not disputed. Original defendant No.1 was the father of plaintiff, defendant Nos.2 to 4 and defendant No.1B Tai. It is also not in dispute that the suit properties were the ancestral properties of Narayan-original defendant No.1. Defendant No.1 had given application to Tahsildar and then divided Sy.No.109/1/1 under Section 85 of the Maharashtra Land Revenue Code on 01.01.2008 amongst defendant Nos.1 to 3. But no share was given to plaintiff. No doubt, the old Hindu Law permits father to effect partition between the co-parceners, however, he cannot leave any co-parcener or keep him away from his share. Though there were six lands, as stated in the suit; yet, it appears that by application dated 01.01.2008 the partition was allegedly effected by defendant No.1 only in respect of one property. Defendant No.4 i.e. present appellant is not explaining, as to why there was

no partial partition at that time, if he wants to rely on the said Mutation Entry No.2675. Same is the case when another application was moved by deceased defendant No.1 on 02.11.2008 and the division of Sy.No.115/1/2/2 between defendant Nos.1 and 5. Again there is no explanation on behalf of the defendant No.4 about this subsequent partial partition. Another fact to be noted is that the powers given to Tahsildar under Section 85 of the Maharashtra Land Revenue Code are very much limited. He cannot usurp the powers of Civil Court to effect partition in absence of a co-parcener. Therefore, definitely, when the plaintiff is not party to that partition, the said act on the part of the original defendant No.1 Narayan was not binding on the plaintiff. That action taken by the defendant No.1 and its reflection in the mutation entry will not take away the rights/share of the plaintiff from the suit properties. Since the suit properties are admittedly ancestral properties, plaintiff has birth right in the same. Both the Courts below have, therefore, given concurrent findings and there is no requirement of any kind of interference in the same. For the said reasons, the partition effected by the defendant No.1 is void, as he has single daughter and he has deprived the plaintiff of his share.

8 Much more submissions have been made on two points i.e. non inclusion of two lands, which plaintiff had admittedly sold to one Ankush

Kolekar and Mohan Chormale and non joinder of necessary parties. Now, as regards non joinder of necessary parties is concerned, it appears that mother of the plaintiff i.e. defendant No.1A and sister defendant No.1B were not initially included as party to the suit. They came to be added after demise of Narayan. Learned Advocate for the appellant submits that they have been included as legal representatives of Narayan and not in their independent capacity and, therefore, he has harped upon that on this count substantial question of law is arising. It is to be noted that though there was a defect in the suit as mother and sister were not made party to the suit; yet, after demise of Narayan they have been added as party. They have taken part in the proceedings and their share has also been carved out by the First Appellate Court. Another fact to be noted is that during the pendency of the suit, it appears that defendant No.1/B Tai expired and her legal heirs were not brought on record. The matter proceeded and the decree has been passed, which has been then modified by the First Appellate Court. It cannot be said that both the Courts have passed any decree against a dead person. In fact, that decree is in favour of a dead person. Reliance can be placed on the decision in **Raddulal Bhurmal and others vs. Mahabirprasad Bisesar Kalwar and others, AIR 1959 BOMBAY 384**. The Division Bench of this Court (Nagpur Bench) has held thus -

“Under O.22 R.3 Civil P.C. the Court has to find the following facts (i) that one of several plaintiffs had died and (ii) that the right to sue does not survive to the surviving plaintiff. The question as to when a plaintiff died is one of fact and has to be alleged and proved. Similarly, the question whether the right to sue does not survive to the surviving plaintiff is also one of fact and has to be decided by the Court. Unless these questions are raised before a Court at the appropriate time, it is not possible for it to decide them. If in such a case the Court proceeds with the case in ignorance of the fact of the death of a person and passes a decree, that decree cannot be treated as a nullity. It may be a wrong decree but it will have to be set aside by taking appropriate proceedings as would have been the case had the points been raised but wrongly decided by the Court. It cannot be simply ignored nor can the Court refuse to make it final. Where a decree is passed by a Court certain rights accrue to the party in whose favour the decree has been passed and those rights cannot be set at naught except by following the procedure which is by way of an appeal or a review.

Consequently, where a preliminary decree in a suit for foreclosure is passed in ignorance of the death of one of the plaintiffs, the court cannot refuse to pass a final decree on the application of the remaining plaintiffs merely because the Legal representatives of the deceased plaintiff have not been brought on record within the period of limitation.”

9 Further, at the most the legal representatives of defendant No.1B can question the decree, if it would have been prejudicial to their interest.

The position, whether a suit or appeal abates, would be different when there is only the sole plaintiff or respondent, but when there are more than one defendants, then the position would be different. Even if we consider that plaintiff being the brother of original defendant No.1B would have had knowledge of her death; yet, that fact of knowledge is equally applicable to the present appellant as well as other parties to the suit. There was absolutely no intimation about her death placed on record. Thus, neither the plaintiff brought the said fact on record nor there was compliance of Order XXII Rule 4 and 10A of the Code of Civil Procedure. Therefore, the learned First Appellate Court has correctly held that the suit is not bad for non joinder of the necessary parties.

10 Now, as regards the non inclusion of the properties is concerned, it can be seen that there was absolutely no documents produced on record before the Courts below to show that those properties are the joint family properties or ancestral properties. Now, separate application has been filed for production of documents, but there is absolutely no proper explanation, as to why those documents were not tried to be produced before the Trial Court. All those documents could have been brought on record by way of certified copies thereof or even calling the Sub Registrar's witness, either for production of those documents or along with the same to come and depose in

respect of those documents. No such attempt was ever made when the matter was before the Trial Court.

10.1 The Three Judge Bench of the Hon'ble Apex Court has held in **H.S. Goutham vs. Rama Murthy and Anr. Etc. in Civil Appeal No.1844 of 2010** with companion matter decided on 12.02.2021 that -

“Even otherwise, it is required to be noted that as per the provisions of Order XLI, the appellate court may permit additional evidence to be produced whether oral or documentary, if the conditions mentioned in Order XLI Rule 27 of CPC are satisfied after the additional evidence is permitted to be produced in exercise of powers under Order XLI Rule 27 of CPC.”

10.2 Further, Hon'ble Supreme Court in **A. Andisamy Chettiar vs. A. Subburaj Chettiar, (2015) 17 SCC 713** held that parties to a civil litigation are not entitled to produce additional evidence whether oral or documentary, in the Appellate Court, but for the three situations contemplated under Order XLI Rule 27 of the Code of Civil Procedure, 1908. Reference can be made to sub-rule (1) of Rule 27 of CPC, which reads thus :

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if -

(a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate court may allow such evidence or document to be produced, or witness to be examined.

From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacuna at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27 of CPC. Those conditions are not fulfilled here and, therefore, the said civil litigation for production of additional evidence cannot be considered at all.

11 The position remains that there was no documentary evidence before the Courts below to show that the properties, which plaintiff had sold, were in fact, ancestral properties and, therefore, the defendants could have had share in the same. No objection appears to be raised by the present

appellant with the plaintiff when those transactions had taken place. Now, he cannot raise such points.

12 Taking into consideration the evidence on record and the facts which were almost admitted, both the Courts below have taken correct view. The assessment of the evidence adduced by the parties is correct and legal. Therefore, no substantial questions of law is arising in this case, requiring interference. Hence, the Second Appeal stands dismissed. Pending Civil Applications stand disposed of.

(Smt. Vibha Kankanwadi, J.)

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