

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.39 OF 2021

SAMBHAJI VASUDEO PATIL AND ORS
VERSUS
AYODHYABAI BHASKAR PATIL AND ORS

...
Mr. P. P. Dhorde and Mrs. V. P. Dhorde, Advocates for appellants.
Mr. U. S. Patil, Advocate for respondent Nos.1, 2-A.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07.09.2021

ORDER :-

. Present appeal has been filed by the original defendants challenging the concurrent judgment and decree. Present respondents/ original plaintiffs had filed Regular Civil Suit No.270 of 2003 before learned Civil Judge Junior Division, Chalisgaon, Dist. Jalgaon for partition, separate possession, declaration and permanent injunction. The said suit came to be partly decreed on 30.10.2012. It was directed that the suit properties be divided in three equal parts. Two parts be given to defendant Nos.1 and 2 and from rest of the part, four parts be divided between plaintiff Nos.1, 2 and defendant Nos.1 and 2. Further, defendant No.2, who was then dead, the share of her was directed to be again divided between plaintiff Nos.1, 2 and defendant No.1. The

original defendants then challenged the said judgment and decree by filing Regular Civil Appeal No.1721 of 2012. It was heard by learned District Judge-3, Jalgaon. The appeal was partly allowed. Cross objections were dismissed. It was held that plaintiff Nos.1 and 2 have $\frac{4}{27}$ th share each, whereas plaintiff No.3 – Bhagirathi was holding $\frac{1}{6}$ th share in the suit properties. Defendant No.1 – Sambhaji and deceased Parvatabai are having $\frac{10}{27}$ th and $\frac{1}{6}$ th share each in the suit properties. Plaintiffs were directed to pay Court fee. The said judgment and decree is under challenge before this Court in this second appeal.

2. Heard learned Advocate Mr. P. P. Dhorde and Mrs. V. P. Dhorde for appellants and learned Advocate Mr. U. S. Patil for respondent No.1, 2A.

3. It has been vehemently submitted on behalf of appellants that plaintiff No.3 had, in fact, filed Regular Civil Suit No.95 of 1981 in the past. There was mutual settlement between them. Accordingly, decree was passed. The respondents had filed Execution Proceedings i.e. Regular Darkhast No.56 of 1989, however, the said proceedings were dismissed on 21.10.1995 as no steps were taken. Under such circumstance, the subsequent suit was hit by the law of limitation and was barred. Both the Courts below, therefore, wrongly held that plaintiff No.3 is entitled to get $\frac{1}{6}$ th share in the suit properties. In fact,

documents regarding the earlier suit and the execution proceedings had never filed before the Courts below and, therefore, there is miscarriage of justice. Substantial questions of law are arising in this case and, therefore, he prayed for admission of the second appeal.

4. Per contra, the learned Advocate appearing for respondent No.1 and 2A supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case as both the Courts below have considered oral as well as documentary evidence and the law points.

5. At the outset, it is to be noted that if defendants were having knowledge about earlier decisions and they had so contended it in their written statement also, then if plaintiffs had not produced those documents on record, that had not estopped defendants from producing those documents i.e. the judgment in Regular Civil Suit No.95 of 1981 Exhibit-1 in Execution Proceedings and the orders passed thereon. The certified copies of all these documents could have been definitely produced by defendants when the matter was before both the Courts below and when they have not done the said fact, it cannot be raised for the first time before this Court. Another fact is that, that suit was filed only by plaintiff No.3. Plaintiff Nos.1 and 2 were not party to that

proceedings. It is also stated in the appeal memo that, that suit was compromised between plaintiff No.3, one Parvatabai and one Vasudeo Dnyandeo Patil, who is not party in the suit. Naturally, when plaintiff Nos.1 and 2 were not party to that proceedings, that decree was not binding on them. At the most, it could have effected the share or contention of plaintiff No.3. However, plaintiff No.3 expired during pendency of the suit itself and the first Appellate Court in paragraph No.11 of its judgment has clearly stated that there is no share of plaintiff No.3 in the suit properties. Though the first Appellate Court has stated that plaintiff No.3 - Bhagirathi is entitled to get 1/6th share in the suit properties, it appears that the fact of her death were not considered, but it is further stated that the parties whose shares have been so carved out, if dead, their legal heirs would be entitled to get respective shares of such party. Definitely, in the final decree, the changes can be made. For that purpose, plaintiff Nos.1 and 2, whose shares have been carved out, their suit or claim cannot be dismissed.

6. Plaintiffs had proved that the suit properties are their ancestral properties and this fact appears to have been not much disputed by respondents. If that was their ancestral property, then definitely they have right and share in the suit properties. Therefore, taking into consideration the amendment to the Hindu Succession Act in 2005, the

shares have been carved out, which is correct and it requires no interference. No substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case requiring admission of the second appeal. Second appeal, therefore, stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

scm