

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.312 OF 2021

VILAS S/O FRANSIS SHIRSATH
VERSUS
SMT. MERI FRANCIS SHIRSATH AND ORS.

...
Mr. P. S. Dighe, Advocate for appellant.
Mr. V. S. Bedre, Advocate for respondent Nos.3 to 5.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 12.08.2021

ORDER :-

. Present appeal has been filed by the original defendant challenging the judgment and decree passed in Regular Civil Appeal No.170 of 2017 by learned Adhoc District Judge-1, Ahmednagar thereby the appeal filed by present respondents/original plaintiffs came to be allowed on 16.07.2021. Present respondents original plaintiffs had filed Regular Civil Suit No.358 of 2012 before the learned Joint Civil Judge Junior Division, Rahuri for declaration and perpetual injunction. The said suit came to be dismissed on 03.05.2017 and the original plaintiffs had filed the said appeal, which then came to be allowed by the first Appellate Court and, therefore, the original defendant has filed the present second appeal.

2. Heard learned Advocate Mr. P. S. Dighe for the appellant and learned Advocate Mr. V. S. Bedre for respondent Nos.3 to 5.

3. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge had considered all the documentary as well as oral evidence and held that the plaintiffs have failed to prove that they are the only legal heirs left by one deceased Francis Bhaga Shirsath and the defendant is having no concern over the suit property. It was also held that the plaintiffs have failed to prove that they are possessing the suit property and their possession has been threatened by the defendant. However, the learned first Appellate Court by reappreciating the same evidence has come to contrary conclusion. It has been held that plaintiffs have proved that they are the only legal heirs left by deceased Francis. Plaintiffs are entitled to the relief of declaration as well as injunction thereby the status of the defendant being the son of deceased Francis has been negated and, therefore, the case requires consideration by formulating substantial questions of law.

4. Per contra, the learned Advocate appearing for respondent Nos.3 to 5 supported the reasons given by learned first Appellate Court and submitted that the evidence was not properly appreciated by the learned Trial Judge and, therefore, plaintiffs were required to file the first

appeal. The evidence led by the defendant to prove that he is the son of late Fransis and one Kaushalyabai cannot be considered, as the sister of Kaushalyabai, who has been examined by the defendant, is unbelievable. Though the birth certificate has been produced, it is also not reliable because Fransis Bhaga Shirsath was Christian by community, however, in the birth certificate it has been stated that Fransis Bhaga Shirsath is Harijan by community and DW-5 Lilabai, who was the sister of Kaushalyabai, has stated that her parents were Hindu by community. The marriage between Fransis and Kaushalyabai has not been properly established. All the documents which were produced by the defendant and the oral evidence that was led by him has been duly considered by the first Appellate Court and that evidence being fact cannot be raised as substantial questions of law and, therefore, the case is not giving rise to substantial questions of law. It cannot be also stated that the appreciation of evidence by first Appellate Court is perverse.

5. At the outset, it is to be noted that plaintiffs contended that they are the legal heirs of deceased Fransis Bhaga Shirsath, who was Christian by community. He expired in the year 1982. Plaintiff No.1 has stated that she got married prior to 1960 as per Christian rites. It is also stated that the suit property was awarded as per Mahar Vatan Inaam Class 6-B to their ancestors, thereby they have also stated that the suit

property was ancestral property and Hindu joint family property of their father. But then in view of Fransis getting married to plaintiff No.1 as per Christian rites, the property has devolved on them after his demise. It is contended that plaintiffs had moved application for getting their name mutated to the suit land, however, it was objected by the defendant. It is also contended that deceased Fransis used to reside at Nashik and served in Ozar Mig Aeroplane Company for about 20 years. Defendant has no concern with the deceased as well as plaintiffs. According to plaintiffs, one Kamal Padmakar Shirsath posed defendant as son of deceased Fransis in order to grab the suit property and got the Mutation Entry No.549 sanctioned in his favour by taking disadvantage of illiteracy of plaintiff No.1. Mother of the defendant was never married to Fransis and when the obstruction was raised by the defendant they filed suit. Defendant had put his written statement denying the claim of plaintiffs and establishing his own status. He has stated that deceased Fransis and his mother Kaushalyabai were married and they used to reside at Nashik. Fransis used to get the suit land cultivated through others. He is the only legal heir left by Fransis. It has been further submitted that the defendant has produced his birth certificate, electoral roll/voters list of the defendant and his family members. All throughout his life, the defendant is known as son of

Fransis Shirsath. He is enjoying the property since last more than 30 years. Fransis expired in the year 1982, however, the suit has been filed in the year 2012. This shows that plaintiffs have no concern with the property and at any earlier point of time, they were never in possession of the same. The defendant has also examined mother of deceased Kaushalyabai to show that Kaushalyabai was married to Fransis. Kaushalyabai expired when defendant was 2 to 3 years old and thereafter, he has been brought up by his maternal uncle Bhagwan Gajabapu Gaikwad. Thereafter, after the death of Fransis, the suit property has devolved on the defendant as his son. Accordingly, the Mutation Entry No.549 has been sanctioned. It was never challenged by the plaintiffs and, therefore, the defendant is possessing the suit land since last 30 years.

6. Though the learned Trial Judge has dismissed the suit, yet, the first Appellate Court has appreciated the evidence once again which was definitely within its powers to see whether the appreciation of evidence by the learned Trial Judge is perverse. It was found by the learned first Appellate Court that the plaintiffs have proved that deceased Fransis got married to plaintiff No.1. They have produced evidence in respect of death of Fransis i.e. original School Leaving Certificate of Fransis, then School leaving certificate of the children born to plaintiff No.1 and

Fransis. It appears that there is no dispute as regards the fact that Fransis was serving in the Ozar Mid Aeroplane Company. Though School Leaving certificate has been believed by both the Courts, taking into consideration the documentary as well as oral evidence of the plaintiffs, the learned first Appellate Court has come to the conclusion that they are legal heirs of deceased Fransis.

7. Defendant had not only denied the claim of plaintiffs, but had put specific defence that except him, there is no other legal heir left by Fransis. He has produced his birth certificate on record at Exhibit-75 and it has been found that the said extract does not show the name of defendant. Definitely, in the earlier times, there was no such column or no insistence that the name should be written. Only the gender was required to be written and the names of the parent were supposed to be included. In Exhibit-75, it has been found by the first Appellate Court that the name of the father/grandfather has been written as Fransis Bhaga Shirsath and the religion has been shown as Harijan. In the evidence of defendant, his birth date is stated to be 15.04.1956, but in extract Exhibit-75, the year 1956 is hand written at the top of the extract and the other anomalies have been noted by the first Appellate Court, which are not considered by the Trial Court. In the cross examination, the defendant has admitted that Fransis was Christian by religion, but

his own school record as well as the other documents do not show that Fransis has been shown as Christian. Even the school leaving certificate of Fransis has been produced on record by the plaintiffs at Exhibit-45 and also produced by defendant as Exhibit-57, which shows his religion as Christian. At the cost of repetition, it can be said that in the school leaving certificate of the defendant, his religion has been mentioned as Harijan. The testimony of DW-5 Lilabai, who claimed to be the sister of Kaushalyabai – mother of the defendant, has been scrutinized by the first Appellate Court and in categorical terms, she has stated that her parents were not Bouddha by community. The question then arises, under which provisions of law, the alleged marriage between Fransis and Kaushalyabai would have taken place. Admittedly, the said alleged marriage is not registered anywhere. If it would have taken place as per the Christian religion, then it would have been in Church and the Church record could have revealed the fact of marriage. No evidence in such form has been produced by the defendant. Further, the other evidence on record especially the oral evidence adduced by the defendant has been mutually scrutinized by the first Appellate Court for coming to the conclusion that the defendant has not proved his case.

8. The scope of the second appeal is limited in a sense only substantial questions of law are required to be considered and in that

process no doubt this Court can consider the evidence if it is shown that the appreciation of evidence by the Lower Court/Lower Courts is perverse. Reliance can be placed on the decision of the Hon'ble Supreme Court in ***Ramathal Vs. Maruthathal and Ors., [(2018 18 SCC 303)]***, wherein the issue considered was as to whether the High Court was wrong in interfering with the question of fact in the Second Appeal. The Hon'ble Supreme Court indicated in the said case that the restraint against interference is not an absolute rule but when there is perversity in findings of the Court which are not based on any material or when appreciation of evidence suffers from material irregularity, the High Court would be entitled to interfere on a question of fact as well. Further, in ***P. Velayudhan and Ors. Vs. KurunGot Imbichia Moidu's son Ayammad and Ors., [(1990) Supp. SCC 9]*** and ***Tapas Kumar Samanta Vs. Sarbani Sen and Anr. [(2015) 12 SCC 523]***, it has been held that, in a Second Appeal the High Court would not be justified in interfering with the finding of fact made by the first Appellate Court since such finding rendered would be based on evidence. On this aspect there can be no doubt that the same is the settled position of law, however, as aforesaid in ***Ramathal's case (Supra)***, the law has been interpreted that this Court can consider the facts, if it is shown that the Courts below have shown perversity in arriving at the finding by Lower Courts. Here, in

this case, there is absolutely no perversity rather the perversity which was committed by the Trial Court has been corrected by using its legal powers by the first Appellate Court under Section 96 of the Code of Civil Procedure and, therefore, no substantial questions of law are arising in this case, as contemplated under Section 100 of the Code of Civil Procedure. Hence, second appeal stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

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