

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.160 OF 2015
WITH
CIVIL APPLICATION NO.4374 OF 2015
IN SA/160/2015**

BHIVSAN S/O SHENFAD AMBHORE AND OTHERS
VERRSUS
ANITA W/O RAOSAHEB SONONE

.....
Advocate for Appellants : Mr. D. D. Choudhary
Advocate for Respondent : Mr. S. A. Ambilwade

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 30-09-2021.

ORDER :

1. Present appeal has been filed by the original defendants to challenge the concurrent Judgment and decree. Present respondent is the original plaintiff who had filed R.C.S.No.52 of 2008 before Joint Civil Judge, Junior Division, Bhokardan Dist.Jalna, for partition and separate possession. The said suit came to be decreed on 27-02-2012 thereby declaring that the plaintiff is having 1/4th share in the suit land and she would be entitled to get it partitioned and separate possession thereof through Collector. The present appellants challenged the said Judgment and decree by filing R.C.A.No.47 of 2012. The said appeal came to be dismissed on 05-08-2014 by Judgment and decree passed by learned Principal District Judge, Jalna. Hence, this second appeal.

2. Heard learned Advocate Mr. D. D. Choudhary for appellants and learned Advocate Mr. S. A. Ambilwade for respondent.

3. It has been vehemently submitted on behalf of the appellants that both the Courts below have failed to consider the facts. In fact, though the relationship between the parties was not denied by the defendants, it was specifically pleaded that since the marriage of the plaintiff had taken place prior to 1994, she had no right or interest in the suit land either under Section 6 of the Hindu Succession Act as amended in 2005 by the Central Enactment or by Section 29-A of the Hindu Succession Act (Maharashtra Amendment). Further, another plea was taken that there was already a partition amongst the defendants in the year 2003 and the mutation entry No.961 to that effect has been sanctioned. Plaintiff had relinquished her share, therefore, the suit ought to have been dismissed and when learned Trial Judge failed to consider those facts, the appeal filed by the present appellants ought to have been allowed by the First Appellate Court. Under such circumstances, the decree that has been passed is perverse giving rise to substantial questions of law requiring admission of the second appeal.

4. Per contra, the learned Advocate appearing for the respondent

supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case.

5. At the outset, it is to be noted that it is not in dispute that plaintiff and father of defendant expired when plaintiff was a child. He left behind daughter plaintiff, defendant No.3 and sons i.e. defendants No.1 and 2. Further, the defendant No.5 is the wife of defendant No.1. The said Shenfad who was the father of plaintiff left behind land bearing Gut No.154 admeasuring 4 H 45 R which was admittedly the ancestral property. Plaintiff herself had stated that her marriage was performed in the year 1987. She had come with a case that there was no partition by metes and bounds and, therefore, she had demanded the partition on 10-03-2008 which was refused by the defendants, hence the suit.

6. Both the Courts also did not take into consideration the fact that plaintiff's first marriage had taken place in the year 1973 with one Dadarao, but thereafter, her second marriage was performed with one Raosaheb in the year 1987. Since both these marriages were prior to 1994, it was the contention of the defendants that she was not entitled to get any share in the suit property. To this point,

the learned Trial Judge has taken a note of the fact that since Section 6 of the Hindu Succession Act has been amended in 2005 and the suit for partition has been filed in the year 2008, the said law prevailing at that time, would be applicable. Both the Courts below have held that the defendants have failed to prove that there was partition effected prior to 2004 between the defendants which could have been protected in view of Section 6 (4) proviso of Hindu Succession Act as stood amended in the year 2005. Mere entry in the mutation will not be sufficient to support the contention of the defendants that there was such partition. The mutation entry No.961 showed that he had partitioned it between his wife defendant No.5 and his brother defendant No.2 which was effected on a stamp paper of Rs.100/-. However, during the trial, that document was not produced before the Trial Court and it was not got proved. When the partitions effected prior to 2004 which could be protected under the above said provision should be in writing only, the oral partition cannot be protected. Another fact that is required to be noted is that exact date of partition has not been stated by the defendants which could have been brought on record if the said partition deed would have been produced. When the defendants had withheld the vital document, then no interference in their favour can

be drawn. The admission given by plaintiff in her cross-examination has been relied by the appellants. In her cross-examination plaintiff has stated that about seven to eight years after the partition between the defendants, defendant No.3 had relinquished her right and the defendant No.2 has sold 20 R land to defendant No.1. It is to be noted that if defendant No.3 who was also the daughter left behind by Shenfad had right in the suit property, then why the another daughter i.e. the plaintiff can be singled out or left behind. Her date or year of marriage is not coming on record. Therefore, it cannot be said that another rule would be made applicable to plaintiff who is claiming her right than the rule that was made applicable to defendant No.3. both being daughters, would be governed by the amended section and they would become coparceners. Further, in view of *Vineeta Sharma vs Rakesh Sharma and others, reported in (2020) 9 Supreme Court Cases 1*, Which has overruled in *Prakash and Ors. v. Phulvati and Ors., [(2016) 2 SCC 36]* would make it clear that it is not even necessary that the father should be alive when the partition is demanded and the case would be still governed by the amended section.

7. In fact, it is to be noted that the suit property which was admittedly the ancestral property was originally owned by one

Runjaba who is stated to have been expired in the year 1993. He had two sons Shenfad and Bhaurao. Shenfad predeceased Runjaba but then it appears and it is not in dispute that the suit property had come to the share of Shenfad. In the partition between him and Bhaurao, Shenfad had in all received 11 Acres 2 Gunthas of land. It is not the case of the defendants that any other property has been left out from bringing it into the common hotch-pot for the suit. Therefore, when Shenfad had expired long back, yet the family continued its jointness and defendants have put that only in the year 2003 the partition had been effected then it was for them to prove that such partition could be protected under Section 6 (4) of the Amended Hindu Succession Act. Since they have failed, the plaintiff should succeed. Both the Courts have taken correct view. There is absolutely no perversity or illegality. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case requiring admission of the second appeal. The second appeal, therefore, stands dismissed. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-