

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

APPEAL AGAINST ORDER (A.O.) NO. 26 OF 2020

APPELLANTS : 1] Smt. Annapurnabai Yadavrao
Vinchurkar (Dead).

2] Ku Usha d/o Yadavrao Vinchurkar,
Aged about 67 years, Occu: Retired,
C/o house of Ashok Tamnes, Behind
Sangh building, Garud Khamb,
Mahal, Nagpur-440032.

...V E R S U S...

RESPONDENTS :1] Sanjay s/o Keshavrao Vinchurkar,
Aged about 53 years, Occu:-
Business, R/o Near house of Dr.
Saratkar Deshmukh, At PO.
Bramhanpuri Tah. Warud,
Dist. Amravati.

2] State of Maharashtra,
through Collector, Amravati.

Shri Narendra Jetha, counsel for the appellants.
Shri Shailesh Sitani, counsel for the respondent No.1.
Ms Shamsi Haider, AGP for respondent for the respondent No.2.

CORAM : ANIL S. KILOR, J.
DATE : 30th NOVEMBER, 2021

ORAL JUDGMENT :

1. This is an appeal arising against the judgment and
decree dated 14th February, 2020 in Regular Civil Appeal

No. 45/2018 passed by the District Judge-7, Amravati, allowing the appeal and thereby setting aside the judgment and decree dated 15th February, 2018 passed by the learned Civil Judge, Senior Division, Amravati in Special Civil Suit No.243/2003 and remanding the matter to the Trial Court with direction to decide the suit afresh on the recasted issues enumerated in the operative order of the learned Lower Appellate Court.

2. The appellant is the original plaintiff No.2 in a suit for declaration, permanent injunction, possession and damages. The brief facts which are relevant and necessary for deciding the controversy involved in the present appeal are as under: (parties are referred as per their status before the trial Court).

3. The original plaintiff no.1 (now dead) along with her daughter has submitted that late Yadavrao Vinchurkar the husband of plaintiff no.1 and father of plaintiff No.2 owned and possessed agricultural land at village Molvan, Tq. Morshi District Amravati. It was in the capacity of Bhumi Swami right. The plaintiff No.1 was given 2 acres 29 guntha of land out of 7.29 acres and adjoining 2 acres land was given to the father of

defendant no.2. Late Yadavrao had executed Will dated 09.12.1973 which was registered on 10.12.1973. As per this Will 2.29 gunthas of land was given to late plaintiff no.1 to meet her needs. But, she has no right to transfer the said agricultural land. Second family arrangement was made in his will regarding marriage of his daughter i.e. plaintiff no.2. Unfortunately, the plaintiff no.2 remained unmarried till today.

4. It is further case of the plaintiff that the father of the defendant No.2 Keshavrao was step son of plaintiff no.1 and by way of another family arrangement the agricultural field towards east side was given to the defendant No.2.

5. Yadavrao died on 02.07.1975 therefore, the family arrangement was to be implemented strictly by late Keshavrao and then defendant no.2.

6. Therefore, the plaintiffs have prayed for declaration and permanent injunction that the Will dated 05.05.2001 is void ab-initio along with permanent injunction. Plaintiffs have also prayed to partition of the suit property amongst the plaintiffs

and defendant no.2 by dividing shares in the property. Hence this suit.

7. The defendant no.1 failed to file written statement. Hence, order passed to proceed without W.S. against him.

8. The defendant no.2 filed his written statement at Exh. 30 contended that the suit is not tenable. After the death of Yadavrao on 02.07.1975 Keshavrao father of defendant No.2 became the owner of the suit field. He had enjoyed it as exclusive owner and the allegations regarding the Will the family arrangement in respect of the suit field are denied by the defendant. The contents of the plaint are denied by the defendant in toto and prayed for dismissal of the suit.

9. The learned trial Court decreed the suit partly and held that the plaintiff No.2 being legal heir of deceased plaintiff No.1 has $\frac{2}{3}$ rd share in the suit property which is fully described in para-2 of the plaint. The learned trial Court further declared that the defendant No.2 has $\frac{1}{3}$ rd share in the suit property which is fully described in para-2 of the plaint.

10. The defendant No.2 being aggrieved by the same, filed an appeal wherein the learned Lower Appellate Court vide impugned judgment and decree, was pleased to remand the matter back to the trial Court by recasting the issues, the same is under challenge in the present Appeal Against Order.

11. I have heard learned counsel for the respective parties.

12. Shri Narendra Jetha, learned counsel appearing for the appellants points out that, the recasted issues and issues those had already been framed at the time of deciding the suit by trial Court are almost similar, except some issues which are relating to Wasudeo Ganpat Gulhane to whom deceased Keshavrao sold out land to the extent of 3 Acres. According to him, in absence of Wasudeo Ganpat Gulhane as party to the suit, the Lower Appellate Court ought to have rejected the challenge raised to the aforesaid sale-deed. But, it was not necessary to recast the issues and remand the matter back to the trial Court for deciding the same afresh.

13. Per contra, Shri Shailesh S. Sitani, learned counsel for the respondent/original defendant No.2 points out, that earlier

the suit was filed claiming ownership over the suit property on the basis of Will dated 09/12/1973 which said to have been executed by Yadavrao in favour of the plaintiff and the father of defendant No.2. The suit was dismissed. In the First Appeal No. 1512/2008 the matter was remanded back to the trial Court for fresh consideration with liberty to the parties to amend there pleadings and to lead additional evidence.

14. It is submitted that thereafter, the plaintiffs claimed share in the suit property by effective partition. It is further pointed out that in the above referred backdrop, even without framing any issue in relation to entitlement of plaintiff to have a share by effecting partition of the suit property, the suit was decreed by the trial Court and 2/3rd share was granted in favour of the plaintiff.

15. Shri Shailesh Sitani, learned counsel appearing for the respondent would submit that even the case of defendant No.2 having exclusive ownership of the suit property by way of adverse possession, has not been considered by the trial Court for the reason that no issue was framed to that effect, and

therefore, the learned Lower Appellate Court recasted the issue in that fashion, so that the case of the defendant no.2 can be considered as regard his ownership by way of his adverse possession.

16. It is further pointed out that, if the plaintiff wants to give up her case against Wasudeo Gulhane, the same can be done before the Trial Court on remand of the matter. For that purpose, this Court may not entertain this appeal.

17. To consider the rival contentions of the parties, I have perused the record and also gone through the judgments of both the Courts below.

18. It is apparent from the record that, this Court in First Appeal No. 1512/2008 set aside the judgment and decree dated 29/07/2008 dismissing the suit filed by the plaintiffs, claiming ownership on the basis of Will dated 09/12/1973 and remanded the matter back to the trial Court for fresh consideration with liberty to the parties to amend their pleadings and to lead additional evidence.

19. After remand, the plaintiffs have amended the suit and claimed the share in the suit property by effecting partition. However, after going through the issues framed by the trial Court, undisputely, no issue to the effect whether the plaintiffs are entitled for partition and separate possession was framed. Similarly, though sale-deed was executed in favour of Wasudeo Ganpatrao Gulhane which is under challenge, the trial Court, has not framed any issue in that regard.

20. Looking to all this discrepancies, the learned Lower Appellate Court has remanded the matter by setting aside the judgment and decree dated 15.02.2018 passed by the learned Civil Judge, Senior Division, Amravati in Special Civil Suit No. 243/2003 and recasted the issue.

21. After considering the reasons recorded by the learned Lower Appellate Court for recast of the issues and remand the matter, I do not find that any error committed by the learned Lower Appellate Court.

22. As far as the contention of Shri Narendra Jetha,

learned counsel for the appellant that the plaintiff does not want to press any relief against the Waduo Ganpatrao Gulhane is concerned, the said request for waiving the claim against the land in possession of Wasudeo Ganpatrao Gulhane, can be made before the learned Lower Appellate Court after remand and that liberty in the law always there to the plaintiff.

23. In that view of the matter, I do not find any merit in the present appeal.

24. Accordingly, I pass the following order :-

ORDER

- a] The parties are at liberty to apply for amendment to the plaint and the written statement. The learned Trial Court may decide the same in accordance with law.
- b] There is no dispute that this is the second occasion, when the matter has been remanded back to the trial Court for fresh consideration. Looking to the fact that the matter is old, a request is made to the

learned trial Court to decide the suit within one year from the date of receipt of certified copy of this order.

- c] The appeal is dismissed. Pending application(s), if any, stand(s) disposed of.
- No order as to costs

[ANIL S. KILOR, J.]

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RAJESH K
NANDURKAR

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by RAJESH K
NANDURKAR
Date: 2021.12.03
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