

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.1648 OF 2005

Kamalabai W/o. Vitthalrao Jadhav
Age : 47 years, Occu : Agriculture,
R/o. Manula, Tal. Hadgaon,
Dist. Nanded

.. Appellant

Versus

1. Darubai W/o. Dajiba
Age : 73 years, Occu : Household,
R/o. Sapti, Tal. Hadgaon
2. Dattatraya S/o. Jalbarao Kadam,
Age : 64 years, Occu : Agril,
R/o. As above.
3. Anusayabai W/o. Ramrao (Died)
Through LRs
- 3-A. Balkrishna S/o. Ramrao Devsarkar
Age : 25 years, Occu : Agril,
R/o. Devsari, Tal. Pusad,
Dist. Yevatmal
4. Tai W/o. Nivruti,
Age : 57 years, Occu : Household,
R/o. Chikhli, Tal. Kalamnuri,
Dist. Parbhani.
5. Prayagabai W/o. Digamber
Age : 50 years, Occu : Household,
R/o. Pophali, Tal. Pusad,
Dist. Yavatmal

.. Respondents

...

WITH

CIVIL APPLICATION NO.1377 OF 2022

IN

SECOND APPEAL NO.1648 OF 2005

Mr. D.R. Shelke, Advocate for the appellant
Mr. P.G. Godhamgaonkar h/f. Mr. M.D. Godhamgaonkar,
Advocate for respondent nos.1 and 2
Mrs. S.D. Shelke, Advocate for respondent nos.3a, 4 and 5
...

CORAM : MANGESH S. PATIL, J.

Reserved on : 21-02-2022

Pronounced on : 31-03-2022

JUDGMENT :

. Heard the learned advocates of both the sides.

2. The Second Appeal was admitted by the order dated 06-04-2009 by formulating the following substantial question of law:

(A) Whether the learned II Additional District Judge, Nanded was right in holding that Survey No.42/B is not available for partition, even though admittedly only agreement of sale is executed by defendant no.1 in favour of defendant no.2 and no sale deed is executed in consequence thereof till filing of the suit?

3. The question arises from the following facts:

(a) The suit properties, which include 4 agricultural lands and two house properties, were the properties of one Dajiba. The suit was filed by his four daughters against their step-mother for partition and separate possession of their share in the suit properties. The step mother having agreed to sell one of the suit properties bearing Survey

No.42/B to respondent no.2, he was arrayed as defendant no.2.

(b) The trial court framed necessary issues including that of legal necessity. It decreed the suit in entirety awarding a joint 4/5th share to the daughters in all the suit properties.

(c) The step mother and the purchaser challenged the judgment and decree before the district court. By the judgment and order under challenge, the appeal has been partly allowed. The share allotted to the daughters in all the suit properties, except Survey No.42/B, was confirmed. It has been held that the step mother had agreed to sell it to the purchaser to meet the legal necessity of the family i.e. marriage of one of the daughters and the medical treatment of Dajiba.

(d) Being aggrieved and dissatisfied with the judgment of the district court, one of the daughters, who was plaintiff no.4 has preferred this Second Appeal arraying her step mother and the purchaser as also the remaining three sisters as respondents.

4. For the sake of convenience, the parties are hereinafter referred to by their status in the suit.

5. Learned advocate Shelke for the plaintiffs would submit that the trial court had given a well reasoned judgment. There was no perversity or illegality. Still, without there being any sufficient and cogent reasons, the lower appellate court has disturbed it to the extent of land Survey No.42/B. He would further submit that since the properties were inherited under Section 8 of the Hindu Succession Act by four daughters and the widow of deceased Dajiba, they would receive the share simultaneously as tenants in common and not as joint owners. Consequently, when the suit properties are inherited by all the women, the step mother could not have legally acted as a *karta* or manager of the family, which concept would be inconsistent with the principle of tenancy in common. In support of his submission, he would rely on the division bench decision of the Madras High Court in the matter of **Thirumalaiswami Gounder Vs. Parvathiammal (died) and others; AIR 1977 MADRAS 40.**

6. Learned advocate Shelke would further submit that even otherwise, the district court had grossly erred in disturbing the finding recorded by the trial court regarding absence of evidence to demonstrate that the step mother - defendant no.1 had agreed to sell the suit property i.e. Survey No.42/B to meet any legal necessity.

7. Per contra, Mr. P.G. Godhamgaonkar h/f. Mr. M.D. Godhamgaonkar, learned advocate for the step mother and the purchaser – the defendants would submit that there was sufficient evidence before the trial court to demonstrate that out of four daughters of Dajiba, three were already married and the fourth daughter, who is the appellant herein, was minor and was being maintained by the step mother - defendant no.1 alone. There was no alternative for her, but to lease out the suit properties to the purchaser and the proceeds were used for meeting for marriage expenses. There was also evidence regarding Dajiba being ill before his death and had to be treated by raising money. In spite of such evidence, the trial court had grossly erred in appreciating the evidence and had recorded a perverse finding, which has been corrected by the district court. There is no error or illegality and this being a Second Appeal, this Court cannot undertake a further scrutiny of facts.

8. I have carefully considered the rival submissions and perused the record and the proceeding. Needless to state that since the plaintiff's step mother and the purchaser having not challenged the judgment and decree of the trial court to the extent it upholds the

plaintiff's claim to have a share in all the suit properties except Survey No.42/B and they also having not put up any challenge to the extent of the decision of the district court, the scope of the Second Appeal is restricted to the dispute regarding Survey No.42/B.

9. There is no dispute about the fact that the suit properties were the separate properties of Dajiba. After his demise somewhere in the year 1966-67 his widow i.e. defendant no.1 and daughters, who are the plaintiffs simultaneously succeeded to his estate in view of Section 8 of the Hindu Succession Act. However, in view of provision of Section 19 of that Act, all these heirs of Dajiba would inherit as tenants in common and not as joint tenants. Once such a devolution is understood, the matter becomes clear like a day light. The very theory of existence of a *karta* and legal necessity presupposes that the sharers are joint, which is not the case in the matter in hand. By virtue of such mode of succession by the widow and four daughters of Dajiba receiving the suit properties as his heirs, they take their individual shares as tenants in common. In the absence of the suit properties being joint, therefore, there was no question of the step mother - defendant no.1 acting as a manager or *karta* of the family. She, therefore, had no right to deal with the suit properties even for legal necessity.

10. It would be apt to rely upon the decision of the supreme court in the matter of **Commissioner of Income-Tax, Madhya Pradesh, Nagpur and Bhandara Nagpur Vs. Seth Govindram Sugar Mills; AIR 1966 SC 24**. It has been held that under Hindu Law coparcenership is a necessary qualification for becoming a manager of joint Hindu family and since a widow cannot be a coparcener she is not legally entitled to become a manager. Conspicuously, this was a position even prior to the coming into force of the Hindu Succession Act. By virtue of Section 19 it has been explicitly made clear that if two and more heirs succeed together to the property and in estate, they take the property as tenants in common and not as a joint tenants.

11. Relying upon this very judgment of the supreme court, the division bench of the Madras High Court in **Thirumalaiswami Gounder** (supra) has held that when all the members who succeed to properties of a deceased are female, the interest received by each of them is as tenant in common.

12. In view of such a legal position, about which, apparently, both the courts were oblivious, the whole dispute regarding there being existence of any legal necessity or otherwise, in fact, was

redundant. Once it is concluded that step mother - defendant no.1 was not entitled to act as a manager or *karta* of the family, there was no question of she having any power to deal with the suit properties to the detriment of the step daughters - plaintiffs. Once having reached such a conclusion the result is inevitable. The judgment and decree passed by the trial court will have to be confirmed by quashing and setting aside that of the district court.

13. Even in the alternative, if it is to be considered as to if the evidence brought on record was sufficient to disclose existence of legal necessity for step mother – defendant no.1 to agree to sell suit property Survey No.42/B, as was rightly noticed by the trial court, there was a material variance between the pleading and the proof led by the defendants step mother and the purchaser. Lower appellate court clearly refused to consider and overlooked this part of the reasoning by the trial Court. The reason that was pleaded was not sought to be proved and the facts regarding which the proof was tendered had no foundation in the pleadings. In spite of the fact that observations and the conclusions of the learned judge of the trial court well founded and legal, the lower appellate court has clearly erred in reversing it.

14. In the result, I answer the substantial question (supra) in the negative and allow the Second Appeal. Since the step mother - defendant no.1 is not disputing about having agreed to sell the suit property i.e. Survey No.42/B to the purchaser defendant no.2, it would have been appropriate to direct adjustment of equities, however in the absence of any cross objection by them even that is not possible in this Second appeal.

15. The Second Appeal is allowed.

16. The impugned judgment and order passed by the district court is quashed and set aside and one passed by the trial court is restored.

17. In view of disposal of the Second Appeal, nothing survives for consideration in the pending Civil Application No.1377 of 2022 and the same stands disposed of.

(MANGESH S. PATIL)
JUDGE