

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

**SECOND APPEAL NO.644 OF 2022 WITH
CIVIL APPLICATION NO.13074 OF 2022**

Smt. Bhikibai Mahadu Kokani,
Deceased, through L.Rs.
Kantilal Mahadu Kokani & ors.

... APPELLANTS

VERSUS

Smt. Mangibai Suran Kokani,
Deceased, through L.Rs.
Bijubai Tikaram Kokani & ors.

... RESPONDENTS

.....
Mr. Ruchir Subodh Wani, Advocate for appellants
.....

CORAM : R. G. AVACHAT, J.

DATE : 26th SEPTEMBER, 2022.

ORDER :

Heard. The challenge in this Second Appeal is to a judgment and decree dated 24/7/2012, passed by Civil Judge (Senior Division), Nandurbar in Special Civil Suit No.9/2004 and confirmed by the Court of Principal District Judge, Nandurbar in Regular Civil Appeal No.79/2012, by judgment and order dated 6/4/2022. It was a suit filed by one of the three sisters against the others two, for partition and separate

possession of the property inherited on the demise of their mother. The trial Court decreed the suit, holding the plaintiff and both the defendants to have equal share i.e. one third each. The first appellate Court confirmed the said judgment and decree. Hence, the Second Appeal.

2. Mr. Ruchir Subodh Wani, learned counsel for the appellants (legal representatives of original defendant No.1) would submit that, the parties to the suit are Adivasis. In view of Section 2(2) of the Hindu Succession Act, 1956, this Act has no application at all. According to him, the parties to the suit were governed by uncodified Hindu Law that was prevailing in the State of Maharashtra immediately before commencement of the Hindu Succession Act, 1956. He would further submit that, the original defendant No.1 was indigent and unprovided for. She along with her husband was, therefore, being looked after by her parents. As per the law then prevailing, such a daughter excludes her other sisters, who are enriched, from succession. He would further submit that, in the facts and circumstances of the case, it was for the plaintiff to aver and prove how she was entitled to inherit the properties left behind by her mother. There was neither such a pleading nor an issue was framed casting burden on the

plaintiff. The learned counsel took this Court through certain evidence, oral and documentary, to suggest that, both the plaintiff and the defendant No.2 were financially well off, compared to the original defendant No.1. In view of the learned counsel, the judgments passed by both the Courts below are perverse one. He, therefore, urged for issuance of notice and grant of stay of execution of the decree.

3. Considered the submissions advanced. Perused the impugned judgments and the evidence relied on. It is not in dispute that, the parties to the suit are Adivasis. They are not governed by the Hindu Succession Act, 1956. Undisputedly, the Mitakshara Law of Succession prevailing in the State of Maharashtra next before the commencement of the Hindu Succession Act, would be applicable.

4. Admittedly, Ganglya Kokani was the common ancestor. He died on 27/7/1979. He was survived by his three daughters – original plaintiff and defendants No.1 and 2 and their mother Bharjibai as well. The mother passed away on 5/3/2003. The law of succession so far as regards parties to the suit are concerned, is undisputedly as under :

Daughters do not inherit until all the widows are dead. The daughter could not claim to succeed as heir to the father's share as the property would devolve by survivorship and not by succession. In the case in hand, on demise of Ganglya, his widow Bharjibai succeeded to her husband's entire property. She was limited owner thereof. On her demise, the property reverted back for being inherited by heirs of her deceased husband. Admittedly, the plaintiff and defendants No.1 and 2 were the only successors to their deceased mother and even father as well.

5. As between daughters the inheritance goes first to unmarried daughters. Here, all the daughters were married. Then, to daughters who are married and unprovided for i.e. indigent and lastly, to daughters who are married and are enriched.

6. The judgment of this Court in case of **Shivprasad Devidas Agrawal (heir of original defendant) Vs. Jankibai Jugalkishore Agrawal (original plaintiff)** goes against the appellant. It has been observed therein :-

“No authority has been cited before us, nor have we been able to discover any, in which it has been held that where the contest is between two daughters, who are both possessed of wealth and in good financial circumstances, the daughter who is less rich is entitled to succeed in preference to her richer sister. According to the text only the unendowed or nirdhan daughter has a prior right of inheritance. It is only such a daughter who can succeed to the father’s estate to the exclusion of her sisters. Where there is no such daughter, that is one who can be called apratishthita or nirdhan, then succession devolves on the endowed or enriched daughters, i.e., those who are possessed of wealth. Such daughters, being heirs of the same class, must share equally their father’s property.”

7. The original defendant No.1 had come with a case to have succeeded to the entire property in exclusion of her other two sisters. The burden of proof thereof, therefore, was rightly placed on her. It is to be stated that, such a defence was introduced in the written statement while the decree was under challenge in first appeal. The suit was, therefore, remanded back to the trial Court. The original averments in the written statement did not get wiped out. The first appellate Court, in paragraph Nos.33 to 37, has observed as under :

33] In order to determine the controversy as to whether defendant No.1 falls in the category of a

married daughter, who is unprovided for, it is necessary to scrutinize the evidence and pleadings of the rival parties.

34] Before adverting to evidence part, it is necessary to peruse the relevant averments of written statement of defendant No.1. In written statement, defendant No.1 has clearly pleaded that she has constructed suit house by her own earning and income of her son. In addition thereto, from her own earning and income of her husband, she has purchased cows, buffaloes, agricultural implements and ornaments. This piece of pleading goes to show that not only defendant No.1 and her husband but her son was also earning income and from that income they had constructed suit house, purchased lot of movable properties and ornaments.

35] In her written statement, defendant No.1 has also pleaded that her husband is having only one acre land but this fact stands negated from the contents of copies of 7/12 extracts (Exhs.127 and 128), which go to show that husband of defendant No.1 is owner of field survey Nos.100/3 and 85/3 of Mauje Nagsar having area 0.81 H.R. and 0.53 H.R. respectively. In addition thereto, defendant No.1 has also admitted that when her marriage was solemnized, at that time, financial condition of her husband was good. She also admitted that her husband owns house of four blocks in village Navagaon and she is also having pair of bullocks and bullock-cart.

36] From the above material, it is clearly evident that defendant No.1 and her husband are having one house of four blocks, two field properties collectively to the tune of 1.34 H.R. and a pair of bullocks, buffaloes, cows, bullock-cart and ornaments. As against this, defendant No.1 is having no evidence to show that plaintiff is having vast landed properties.

37] In the light of above facts, important question crops up before the Court as to whether defendant No.1 can be categorized as indigent in spite of holding all the above immovable and movable properties. This questions is answered by Division Bench of Hon'ble Bombay High Court in Shivprasad's case (cited supra), wherein the plaintiff had prayed for a declaration that she was sole owner of the property, left behind by Ganpatlal and defendant had no right to them. The said suit was resisted by the defendant and the question arose before the Court as to whether the plaintiff was also well placed in life, that she was not poor or indigent and that she was, therefore, not a sole heir of Ganpatlal. The said question was answered by the Hon'ble High Court, after evaluating the properties held by plaintiff and defendant, in the following words :-

“In this case while it is true that the plaintiff is not as rich as her deceased sister i.e. the original defendant, but, she is also well off financially. In any case the expression 'apratishthita' or 'nirdhan' cannot certainly be applied to her. She is, therefore, not entitled to the whole of her father's property. Both the plaintiff and her sister have an equal claim to it and are, therefore, each entitled to a half share.”

8. From the pleadings itself, it is clear that, the original defendant No.1 wanted to prove that she was not financially well placed, compared to her other sisters, plaintiff and defendant No.2. Such comparison for succession is not

maintainable in view of the Division Bench judgment of this Court in case of Shivprasad Agrawal (supra). The defendant No.1 ought to have proved to have been an indigent when succession opened on the demise of her mother. There is no evidence in that regard. She all along tried to compare her financial status with that of the plaintiff and other sister (defendant No.2). It is reiterated that, all the three sisters had their own properties. The principle on which the appellant/ defendant No.1 relies has no application. The case propounded by the appellant (original defendant No.1) was basically a question of fact. Both the Courts below have concurrently held that, she was neither indigent nor unprovided for. In view of this Court, no substantial question of law arises in this Second Appeal. The appeal thus fails. It is dismissed. Consequently, Civil Application stands dismissed.

(R. G. AVACHAT, J.)

fmp/-