

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

928 SECOND APPEAL NO.32 OF 2019

Bhagwan Ramrao Deshmukh

.. Appellant

Versus

Virbhadra Bhagwan Deshmukh and another

.. Respondents

...

Mr. Amol Joshi, Advocate for the Appellant

...

WITH

CIVIL APPLICATION NO.1462 OF 2019

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CORAM : MANGESH S. PATIL, J.

DATE : 19-01-2022

PER COURT :

. This is an appeal under Section 100 of the Code of Civil Procedure by the original defendant aggrieved by the dismissal of his first appeal by the District Court by the Judgment and order under challenge confirming a decree for partition and separate possession of respondents - plaintiffs share in the suit lands.

2. Respondent nos.1 and 2 posing themselves to be the legitimate son and legally wedded wife, respectively, of the appellant filed a suit for partition *inter alia* averring that he was addicted to

vices and their share in the suit lands, which are ancestral and joint family properties, would be at risk.

3. The appellant did not dispute the fact that the suit lands are the ancestral properties. However, he denied that respondent no.2 was his legally wedded wife. He contended that he was already married to one Vachalabai and the marriage was still subsisting, albeit he admitted to be having illicit relations with respondent no.2 and also admitted to have fathered respondent no.1 through her.

4. Based on such pleadings, the issues were framed and evidence was led. The trial court concluded that appellant no.2 was the legally wedded wife of the appellant and respondent no.1 was their child. Having reached such a conclusion, it decreed the suit by working out share of each of the parties to be 1/3rd in all the suit lands.

5. The appellate court has concurred with such observations and conclusions.

6. Mr. Joshi, learned advocate for the appellant would vehemently submit that the fact that the appellant was already

married to one Vachalabai, was duly established on the record. In view of such eventuality, the onus had shifted to the respondents to prove that the matrimonial relation between the appellant and Vachalabai were severed by some legally acceptable mode. He would further submit that since admittedly, there was not a formal divorce between the duo, it was for the respondents to have established a custom prevailing in the community as is required by Section 29 of the Hindu Marriage Act. He would further submit that a half-hearted attempt was made to prove such custom, but that was not proved by leading relevant evidence as is required by Section 48 of the Indian Evidence Act. Though the witnesses of the respondents simply stated about there being a customary divorce by executing a bond, the custom was not proved in the strict sense. Both the courts below had grossly erred in reaching a conclusion about there being legal severance of marital status between the appellant and Vachalabai.

7. Furthermore, learned advocate Mr. Joshi would submit that once it is found that there was no divorce between the appellant and Vachalabai the logical consequence would be that there could not have been a legal marriage between the appellant and respondent no.2. As a consequence, respondent no.1 also would be their illegitimate child. If that be so, by virtue of Section 16 (3) of the

Hindu Marriage Act, being an illegitimate child, respondent no.1 would be entitled to inherit a share in the parents property which cannot happen during the life time of the appellant. He would therefore submit that all these facts, circumstances and material give rise to substantial questions of law as formulated in the appeal memo which need an answer at the hands of this court.

8. I have carefully considered the submissions and perused the papers.

9. As has been cursorily mentioned herein above, the entire dispute revolves around the fact as to whether the respondent no.2 can be said to be the legally wedded wife of the appellant. If the answer to this question is in the affirmative, as has been concurrently found by the courts below, the matter ends. Inasmuch as the logical and legal corollary would be that the respondents would be entitled to partition and separate possession of the suit lands. If the answer to this question is in the negative, the submissions of the learned advocate will have to be accepted.

10. Bearing in mind the fact that the matter in hand is a civil dispute, the parameters of which for proof of facts are well settled.

The facts are expected to be proved on the preponderance of probabilities as against a strict proof as is required in a criminal case.

11. One need not delve deep to find out as to whether strictly speaking there was enough evidence before the courts below in concluding that there was a custom of effecting divorce by executing a bond in the community to which the parties belong. Some attempt was made to prove such custom by examining the father of respondent no.2 namely Sangram Manika Noubate (PW-2) and father of Vachalabai namely Digambar Mahaduppa Kornule (PW-3). Keeping aside even the evidence in this respect, there is one clinching circumstance which, in my considered view, seals the fate of the second appeal.

12. As has been pointed out by the courts below, though the suit was filed in the year 2004 wherein the appellant filed the written-statement in the year 2008 denying the fact that respondent no.2 was his legally wedded wife and respondent no.1 was their legitimate child, in the year 2010 he filed a petition for dissolution of marriage under Section 13 of the Hindu Marriage Act against respondent no.2 attributing her to be his legally wedded wife. Not only that but even he subsequently stepped into the witness box and

testified about such relation being legitimate and legal. Based on such clinching circumstance, the courts below have rightly taken a plausible view that the fact as to whether respondent no.2 is a legally wedded wife of the appellant was duly established in view of such implied admission and conduct of the appellant. Pertinently, he did not file a proceeding for declaration of nullity of marriage as is contemplated under Section 12 of the Hindu Marriage Act, but had chosen to file a petition for dissolution of marriage under Section 13 of the Hindu Marriage Act.

13. Interestingly, in spite of such happenings, the appellant was bold enough while recording his testimony in the present proceeding before the trial court which was recorded in the year 2012 in denying the fact of respondent no.2 being his legally wedded wife, albeit he admitted to have recorded his testimony in the Hindu Marriage Petition. In view of such state-of-affairs, irrespective of the fact as to whether the custom of obtaining a divorce by executing a deed of divorce was duly established, aforementioned circumstances clearly demonstrate that both the courts below have rightly reached a conclusion based on the available evidence about the respondent no.2 being legally wedded wife of the appellant and respondent no.1 being their legitimate child.

14. Once having reached such a conclusion, the further discussion is certainly obviated inasmuch as suit lands being ancestral and joint family properties and respondent no.1 having a birth right to claim a partition during the life time of his father - the appellant. The shares worked out by the trial court and confirmed by the appellate court declaring each of them to be entitled to 1/3rd share is certainly legal and unassailable.

15. No substantial question of law as is being propounded in fact arises for the determination in this second appeal. Second Appeal is dismissed.

16. In view of disposal of Second Appeal, nothing survives for consideration in the Civil Application and the same stands disposed of.

(MANGESH S. PATIL)
JUDGE

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