

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

**907 SECOND APPEAL NO.341 OF 2018
WITH
CA/6127/2018 IN SA/341/2018**

**SAYYED YUNUS PACHULAL PATEL AND ANOTHER
VERSUS
SAYYED SHAMIM PACHULAL PATEL AND OTHERS**

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Advocate for Appellants:

Mr. Mahesh P. Kale and Mr. M. M. Patil Beedkar

Advocate for Respondent No.1:

Mr. Avinash A. Khande h/f. Mr. G. V. Sukale

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CORAM: ARUN R. PEDNEKER, J.

DATE: 10th NOVEMBER, 2022

PER COURT:

1. The present second appeal arising out of a suit for partition filed by the plaintiff, who is son of defendant no.1. Defendant nos.2 to 5 are brothers of the plaintiff, defendant nos.6 to 8 are the sisters of the plaintiff and defendant no.9 is the cousin brother of the plaintiff. The said suit for partition was allowed by the trial court and the appeal filed against the said decree of the trial court was also dismissed and hence the present second appeal is filed by the defendant nos.2 and 9.

2. The learned counsel appearing for original defendant nos.2 and 9 submitted the following 4 substantial questions of law for consideration:-

“(i) The trial court has grossly erred in declaring the share of plaintiff only in the operative part of the Judgment, especially when in the suit for partition it is necessary to declare the shares of all respective shares also in the operative part of the Judgment. The said vital aspect is also not considered by the lower appellate court. Therefore, whether the impugned Judgment and decree declaring share of plaintiff only in the operative part of the Judgment is just, legal and proper? It involves the substantial question of law.

(ii) The trial court did not consider the material fact that, the defendant No.1 Mariyambee w/o. Panchulal Patel was expired on 04/12/2004 i.e. during pendency of suit. Therefore, the Judgment and Decree of the trial court suffers from the material defect that, it is passed without considering the effect of death of Mariyambee and the devolution of her share after her death on her legal heirs. The said material aspect is also not considered by the lower appellate court which involves the substantial question of law.

(iii) The courts below have lightly brushed aside the decrees i.e. RCS No.81/2004 and RCS No.2003/2004 i.e. suit for partition, especially when certain rights under the said compromise decrees are created in favour of persons, some of whom are not parties to the present suit. Even the plaintiff in the present suit i.e. RCS No.153/2004 has not sought any declaration about the said compromise decrees. Hence, the impugned Judgment and Decrees suffer from said illegality and irregularity which involves the substantial question of law.

(iv) The courts below have not correctly appreciated the effect of partition deed at Exh.72, which has resulted in drawing perverse finding on issue No.4 by the trial court and point No.2 by the lower appellate court. Therefore, the said perversity of finding involves substantial question of law."

The learned counsel submits that the grounds raised in the appeal memo may also be treated as the questions of law in the present second appeal.

3. With regard to the question of law (i) at para 2, that the trial court has not declared the shares of the respective sharers in the operative part of the judgment is concerned, it is

noticed that the trial court at paragraph no.27 of the judgment has determined the share of each of the co-sharers, as such, this question of law does not arise for consideration. The share is mentioned by the trial court in it's judgment at paragraph no.27 of the co-sharers. The judgment of the trial court mentioning only the plaintiff's share in the operative part of the judgment is not violative of any law and no substantial question of law arises for consideration as shares of the other defendants is mentioned at paragraph no.27 of the trial court judgment.

4. The second question of law relates to death of Mariyambee – defendant no.1. Mariyambee has expired on 04.12.2004 i.e. during the pendency of the suit. The learned counsel submits that the death of Mariyambee is not reflected in the trial court's judgment and, therefore, the trial court's judgment suffers from inferiority and thus involves a substantial question of law.

5. The learned counsel for the original plaintiff submits that the issue of death of Mariyambee was not brought to the notice of the court by any of the parties and that her share has to devolve upon the plaintiff and the defendants except defendant no.9.

6. The trial court's decree is modified to the extent that defendant no.1 share has to devolve upon the plaintiff and the defendant no.2 to 8 as per the apportionment determined by the trial court and thus this question of law also does not survive for consideration.

7. The third question of law relates to the creation of rights under the decrees in RCS No.81 of 2004 and RCS No.2003 of 2004. The rights have been created in favour of cousin defendant no.9 in the above said Regular Civil Suit numbers. It has been noticed by the courts below that in the aforesaid RCS numbers compromise was effected between the parties and the plaintiff was not party to the compromise and that the rights in the

suit property has devolved upon the plaintiff prior to the filing of the above RCS Nos.81 and 2003 of 2004 and as such the decrees passed in the above Regular Civil Suits is not binding on the plaintiff. The plaintiff's share is not affected by the compromise decree. Thus, this question of law also does not arise for consideration.

8. As regards the 4th question of law relating to the partition between the parties at a prior point of time, both the courts have consistently held that there was no partition between the parties. The submission made by the appellants that there were properties at 2 places and property at one of the place i.e. at Ausa was given to the plaintiff and property rights of plaintiff at Wangjewadi is extinguished by he being granted property at Ausa. However, this contention has been specifically rejected and it is purely a finding of fact recorded by the courts below based on the material available. I do not see any perversity in the the same. The plaintiff's rights at Wangjewadi is not affected

and the plaintiff is entitled to his share in the property at Wangjewadi.

9. The learned counsel for the appellants submits that the admissions of the plaintiff that he was given property at AUSA has to be taken into consideration. Analysing the admissions made, it is reflecting that the property at AUSA was separately partitioned between the father of the plaintiff and the other family members and the plaintiff's father had got 1/4th share, but there is no mention of any properties at Wangjewadi being granted to or the plaintiff having surrendered his right at Wangjewadi and, therefore, both the courts rightly appreciated that the plaintiff's share in Wangjewadi property is not affected by oral partition at AUSA.

10. As regards the submission of the learned counsel for the appellants to treat all the grounds mentioned in the second appeal also as questions of law, some of the grounds are reflecting the above said 4 questions of law and

some are purely on findings on fact and as such does not arise for consideration as substantial questions of law in the second appeal.

11. The present second appeal is disposed of. No order as to costs.

12. In view of disposal of the Second Appeal, the Civil Application does not survive and disposed of.

[ARUN R. PEDNEKER, J.]

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