

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.28 OF 2022
WITH
INTERIM APPLICATION NO.319 OF 2021
WITH
INTERIM APPLICATION NO.317 OF 2022**

Shri. Shankar Vithoba Bodake & Ors. ..Appellants/Applicants
(Org. Defts Nos.1 & 3 to 9)

Versus

Mr. Jalinder Shankar Bodake ..Respondents
(Dead) Through his legal heirs (Org. Plaintiffs & Org. Deft
Swapnil Jalinder Bodake & Ors. No.2)

Mr. Suresh M. Kamble i/by Nirmala Gopal, for the Appellants/
Applicants.

Mr. Sugandh Deshmukh, for the Respondents.

CORAM : NITIN W. SAMBRE, J.

DATE : 15th NOVEMBER, 2022

PC.

1. This second appeal is by the defendants questioning the concurrent findings delivered by the Courts below thereby granting decree for partition and separate possession in favour of the plaintiffs/respondents herein.

2. The parties hereto are referred to as per their nomenclature in the plaint.

The plaintiffs claim to be sons of defendant No.1 who was married to defendant No.2. The suit property is consisting of ancestral land. According to plaintiffs, the defendant No.1, their father had performed second marriage with defendant No.8/Sarubai, which is void, through which the children, namely defendant Nos.3, 4, 5, 6, 7 and 9 came to be born.

3. According to plaintiffs, since they are legitimate children of the defendant Nos.1 and 2 they are entitled for partition and share in the ancestral land.

4. The defendant No.1 filed his written statement at Exh.21, whereas defendant Nos.3 to 8 placed their written statement at Exh.40. The stand of the appellants/defendants is that marriage between defendant No.1 and defendant No.2 took place before 55 years back and defendant No.2/Kaushabai left the company of defendant No.1 within short time, as a consequence there was no cohabitation between the defendant Nos.1 and 2.

5. It is claimed that divorce proceedings were instituted in the Court of Nashik against defendant No.2 by defendant No.1 and accordingly an agreement dated 10th December, 1958 was entered into thereby agreeing for divorce. As such, it is claimed that a valid divorce took place between the defendant No.1 i.e. appellant No.1 herein and defendant No.2 on 10th December, 1958.

It is also claimed in the written statement that the plaintiffs were not born out of marriage of defendant No.1 with defendant No.2. It is claimed that the defendant No.2/Kaushabai initiated proceedings for maintenance in the Court of Judicial Magistrate, First Class, Manmad, wherein stand was taken by defendant No.1 denying the paternity of the plaintiffs. As such, that being so, the application was not preferred for maintenance on behalf of plaintiff Nos.1 and 2. It is claimed that the application for enhancement of maintenance was moved only by defendant No.2.

6. It is further claimed that defendant No.1 after the divorce with defendant No.2 on 10th December, 1958, entered into wedlock with defendant No.8/Sarubai who had given birth to defendant Nos.3 to 7 and 9.

7. The defendant No.1 expired during pendency of the suit.

8. Considering the rival claims, the Trial Court framed issues at Exh.22 which reads thus :-

Sr. No.	Issue	Findings
1.	Whether plaintiffs prove that they are legitimate sons of defendant No.1 ?	..In affirmative.
2.	Whether plaintiffs are entitled for partition and separate possession ? If yes, what would be their share ?	..In affirmative.

The Trial Court accordingly decreed the suit vide judgment and order dated 25th January, 2011.

9. The appellants herein feeling aggrieved approached the Court of Extra Joint District Judge, Niphad, who vide judgment and order dated 10th August, 2021 delivered in Regular Civil Appeal No.31 of 2011 dismissed the same. As such, this second appeal.

10. Heard Mr. Suresh Kamble, learned counsel appearing for the appellants and Mr. Sugandh Deshmukh, learned counsel for the respondents.

11. Mr. Suresh Kamble, learned counsel would urge that the Appellate Court has committed error in modifying decree in absence of their being challenge to the same on behalf of the plaintiffs. He would claim that the provisions of Section 3(i) (j) of the Hindu Succession Act are not taken into account by the Appellate Court. He would urge that the divorce dated 10th December, 1958 ought to have been exhibited and considered and as such the Appellate Court has committed error in accepting and interpreting the evidence.

12. I have appreciated the rival claims.

13. The suit property consists of agricultural land bearing Gat No.788/2 (Old Gat No.866 admeasuring 02 Hectare 47 Are) situated at village Vinchur, Taluka Niphad, District Nashik and a

house building in the said property. The right to draw water from the well is also claimed in the suit with decree for partition and separate possession. The appellants have not denied the marriage of defendant No.1 with defendant No.2, however, what was claimed is the divorce proceedings executed on 10th December, 1958 and the denial of paternity of the plaintiffs.

14. If we appreciate the theory put forth by the present appellants in their defence, what is to required to be noted is that the appellants have come with a case that marriage with defendant No.1 and defendant No.2 and thereafter execution of divorce proceedings dated 10th December, 1958. The Trial Court, so also the Appellate Court while appreciating the validity of the aforesaid deed of divorce have rightly inferred that such deed cannot be relied on for inferring that there was valid divorce between the defendant No.1 and defendant No.2, particularly, when the provisions of Section 13B of the Hindu Marriage Act, 1955 prescribes for procedure for divorce by mutual consent. While recording such findings, both the Courts have relied on the law laid down by this Court in the matter of ***Ramesh Chandra Rampratapji Daga Vs. Rameshwari Ramesh Chandra Daga*** reported in ***LAWS (SC)-2014-12-24*** and also in the case of ***Jatina Samir Shah and Samir Mohit Shah*** reported in ***LAWS (BOM)-2008-10-133***. The fact remains that in the case in hand, there was neither the decree for divorce by mutual consent nor registered deed of divorce. The fact about the subsistence of marriage between defendant Nos.1 and 2 as such can

be inferred and as such during such subsistence, the defendant No.1 appears to have performed second marriage with defendant No.8. As such, both the Courts below were justified in recording findings as regards subsistence of marriage between defendant Nos.1 and 2.

15. As far as the issue about the denial of paternity is concerned, once the marriage between defendant No.1 and defendant No.2 was not disputed, it is for the appellants/defendant No.1 or the other defendants to prove the fact about the plaintiffs being not children of defendant Nos.1 and 2. Such burden can be casted on the appellants having regard to the provisions of Section 112 of the Evidence Act. The said provision in express terms prescribes that a person born during the continuance of a valid marriage has to be presumed in favour of such children to be legitimate.

16. In the aforesaid background, what can be noticed is, both the Courts have concurrently held that the marriage between defendant Nos.1 and 2 not only was subsisting but there was absence of valid and legal divorce proceedings between the said parties. As a sequel of above, the findings recorded that the defendant No.1 has performed marriage with defendant No.8 during subsistence of his marriage with defendant No.2 appears to be quite justified and based on legal provisions.

17. Apart from above, the alleged divorce proceedings was

not proved by the appellants by adducing sufficient and cogent evidence. That being so, the said deed was not exhibited by both the Courts below and accepted in evidence.

18. Apart from above, it is also not in dispute that the suit property is an ancestral property. That being so, the second appeal which is against concurrent findings, lacks involvement of any question of law.

19. The appeal as such stands dismissed.

20. As a consequence, pending interim applications also stand disposed of.

[NITIN W. SAMBRE, J.]