

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.549 OF 2018

WITH
CIVIL APPLICATION NO.1282 OF 2018
IN
SECOND APPEAL NO.549 OF 2018

Chandrakant Narayan Salvi
Age: 53 Yrs, Occupation:Service,
R/o. Kumbharwadi, A/P. Lanja
At present, R/o. Kho. Kara. 678,
Shahid Bhagatsing Nagar,
Dharavi, Kumbharwada,
Mumbai

...Appellant

vs.

1. Chandrakant Krushna Kumbhar
Age: Adult, Occup: Agriculture
R/o. A/p. Kumbharwadi,
Ap/P. Lanja,
District: Ratnagiri
2. Dhondur Hari Kumbhar,
Age: Adult, Occu: Agriculture,
R/o. A/P. Kumbharwadi,
A/P. Lanja,
District: Ratnagiri
3. Mrs. Bhagirathi Janu Vadvalkar,
Age: Adult, Occu: Housewife,
R/o. A/P. Kumbharwadi Saundal,
Taluka: Rajapur,
District Ratnagiri

4. Mrs. Sushila @ Ranjana Krushna Kumbhar
 Age: Adult, Occup: Housewife,
 R/o. A/P. Kumbharwadi,
 Taluka : Lanja,
 District: Ratnagiri

5. Mrs. Aasha @ Vilasani Vijay Salvi
 Age: Adult, Occup: Housewife,
 R/o. Thisari Kholi,
 Mangalmurti Welfare Society,
 Kushal/Kurda Village,
 Aappapada, Malad (East),
 Mumbai – 400 097.

6. Mrs. Aarati @ Manisha Dilip Salvi
 Age: Adult, Occup: Housewife,
 R/o. At and Post Fungus,
 Taluka : Sangameshwar,
 District: Ratnagiri

...Respondents

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Mr. Surel S. Shah, for the Appellants.

Mr. Aniket P. Ranade, for the Respondents.

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CORAM : S.M. MODAK, J.

DATE : 26 AUGUST 2022

ORAL JUDGMENT :

Heard learned Advocate Mr. Shah for the Appellant/plaintiff and learned Advocate Mr. Ranade for the Respondents/defendants. The present plaintiff filed a suit claiming partition of certain properties described in para no.2 of the trial court judgment. They are situated at Village Dhundare, Taluka Lanja,

District Ratnagiri. The plaintiff claimed share in those properties through his mother. The plaintiff claims that one Hari Mahadu Kumbhar is his maternal grand-father. The said Hari was having two sons by name Krushna and Dhondur and two daughters and one of them is Heera @ Bhagirathi Narayan Salvi, who is mother of the plaintiff, who expired on 13 September 2004. Whereas Krushna Hari Kumbhar, the son of Hari expired in the year 1989 and defendant nos. 1, 4, 6 are his LRs. Husband of Bhagirathi expired. She was residing at her maternal home and she shifted to Mumbai in the year 1997. Plaintiff claims that the suit properties were acquired by grand-father of the plaintiff under the Tenancy Act. The partition is denied and that is why the suit is filed.

2. The defendants have contested the suit. Even they have denied the genealogy mentioned in the plaint. Furthermore, they have contended that one Bhagirathi Narayan Salvi has filed Regular Civil Suit No.18 of 2003 before Lanja Civil Court and the said suit was decided on merits on 16 January 2009. The court held that the suit properties therein are not the ancestral properties. That suit was dismissed. The defendants pleaded that the present suit is barred as per the principles of *res judicata*.

3. They have further pleaded that in the earlier suit one Pandurang Balu Kumbhar appeared and pleaded about registered will dated 3 May 1992 executed by Bhagirathi Narayan Salvi and she had

bequeathed all the properties to Pandurang Balu Kumbhar. He has further pleaded that the present plaintiff has supported the said will by filing an affidavit. They have placed reliance on the provisions of Section 115 of the Evidence Act about estoppel.

4. The trial court framed the issues about nature of properties being ancestral joint properties or not. There is also an issue framed as to whether the present suit is barred by principle of *res judicata* in view of the decision in RCS 18 of 2003. The issue of nature of property was answered in the negative whereas the issue of *res judicata* was answered in the affirmative. The plea taken by the defendants on the basis of principle of *estoppel* was answered in the negative (Page 21).

5. When the plaintiff filed first appeal, the findings are confirmed by the first appellate court and that is how second appeal is filed by the plaintiff.

6. On the basis of these findings it needs to be seen whether those findings are perverse so that whether any substantial question of law do arises so that the appeal can be admitted. With this view in mind I have perused the findings. The points which are raised are whether the findings by the trial court about not proving the identity by the plaintiff of his mother is correct or not. Another question is raised whether the findings recorded by both the courts below on the point of *res judicata* are correct or not. Both the learned Advocates read over the

relevant observations in both the judgments.

7. While answering issue no.1 about nature of property, the trial court observed the identity of Bhagirathi Narayan Salvi was not proved in earlier RCS No.18 of 2003. One heirship enquiry register extract at Exhibit 84 was referred. There name is referred as Bhagirathi Nana Salvi whereas in Exhibit 85, heirship enquiry register extract name is referred as Bhagirathi Gopal Harchikar @ daughter of Hari Mhadu Kumbhar. So the trial court observed the burden of proof of that Bhagirathi Narayan Salvi/Bhagirathi Nana Salvi/Bhagirathi Gopal Harchikar are different names of one person and she is daughter of Hari Mahadu Kumbhar (internal page no.17).

8. Except referring Bhagirathi Narayan Salvi as his mother, no evidence was adduced. There is reliance of Government Gazette at Exhibit 38. In that Gazette, old name referred was Bhagirathi Narayan Salvi and the new name is Bhagirathi Govind Harchikar. The trial court emphasized on the fact that this change of name is not pleaded in the plaint. Even the plaintiff, being the son of said Bhagirathi, in his examination-in-chief has not clarified that these are the different names of his mother.

9. The trial court, in para no. 22, has referred about the findings in earlier another Suit No.14 of 1994. That suit was withdrawn. Bhagirathi Narayan Salvi alleged mother of the plaintiff was

not party to that suit. On that basis, the trial court has also raised doubt about identity of mother of the plaintiff.

10. There is reference of a mutation entry no. 3740 in para no.23. Name of Bhagirathi Narayan Salvi was entered as a co-sharer. However, there is a reference that the said entry was rejected. There is further reference of rejection of RTS Appeal No. 36/06 against rejection of mutation entry no. 3740 by Pandurang Balu Kumbhar the donee of the land but it was also rejected. Furthermore, there is reference of filing of RTS Appeal No. 15/2003 by Bhagirathibai. However, the said appeal was also rejected.

11. Though the defendants attempted to rely upon the certified copy of the affidavit filed by the present plaintiff in the earlier suit thereby mentioning about execution of will deed by his mother in favour of Pandurang Balu Kumbhar. The said contention was not accepted by the trial court (para no. 24).

12. The trial court observed “ in the present suit the defendant has not proved execution of will deed strictly and hence the suit is not hit by the principle of estoppel”. It is rightly contended by learned Advocate Mr. Shah that there is no cross-objection by the defendants so far as the findings are concerned.

13. Lastly, the trial court observed that nature of the property as

ancestral joint family properties between the deceased mother and the defendants was not proved. (internal page no. 24).

14. In para no.25, the trial court has discussed the evidence on the point of bar to the present suit on the basis of principle of *res judicata*. There was a contention raised that the parties in the earlier suit and present suit are not the same. It was rejected by the trial court for the reason that plaintiff of the present suit has claimed through mother and the earlier suit was filed by the mother . Furthermore, the trial court has also considered one of the ingredients of principles of *res judicata* that is to say, whether the issues in between the earlier suit and present suit whether they are the same or not. Trial court observed that except the property at Village Dhundare all the other suit properties involved in the suit are the same. The trial court also taken note of the fact that the decision in RCS 18 of 2003 was not challenged.

15. In nutshell, the suit was dismissed, as the plaintiff could not prove the relationship in between one Bhagirathi and Hari Kumbhar. Furthermore, it was dismissed in view of the findings given in the earlier suit filed by his mother.

16. When the judgment given by the first appellate court are perused, we may find that there is a discussion in para no.10. The first appellate court observed that the only difference in between the earlier suit and present suit is that in the earlier suit plaintiff's mother was

represented by power of attorney holder whereas in the present suit it is the son of said Bhagirathi, who is the plaintiff. After considering the ingredients of Section 11 of the Civil Procedure Code, the first appellate court confirmed the findings and thought it fit not to interfere in those findings.

17. On the basis of these findings when the substantial questions raised before this Court are considered, this Court finds that there is no perversity in the findings recorded by the earlier courts. There is no perversity so far as the findings on the point of the identity of said Bhagirathi. There is no perversity so far as the findings on the principle of *res judicata* is concerned. So this Court feels that no substantial question of law is made which requires admission of the appeal.

18. Hence, the appeal stands dismissed. Civil application stands disposed of.

(S.M. MODAK, J.)