

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

**SECOND APPEAL NO.103 OF 2022
WITH CA/2751/2022 IN SA/103/2022**

**RAMBHAU SHIVRAM KURKUTE DIED THROUGH LRS RAMBHAU
SHIVRAM KURKUTE AND OTHERS
VERSUS
KALABAI BALU KURKUTE DIED THROUGH HER LRS LILABI UTTAM
KARANJULE AND OTHERS**

Mr. Suresh P. Salgar, Advocate h/f Mr. N. V. Gaware, Advocate for the appellants

Mr. Santosh Jadhavar, Advocate h/f Mr. S. D. Kotkar, Advocate for respondent No.2.

CORAM : R. M. JOSHI, J.

DATE : 3rd APRIL, 2023

P.C. :-

1. Heard.

2. This appeal is preferred under Section 100 of Code of Civil Procedure by original defendants against the judgment and decree passed in Reg. Civil Appeal No. 153/2016 confirming the judgment and decree in Reg. Civil Suit No. 306/1999 whereby partition, separate possession and declaration was granted in favour of the plaintiffs.

3. Plaintiffs filed suit for declaration, partition and possession of the suit properties. It is the case of the plaintiff No.1 states that she is legally wedded wife of deceased Balaji alias Balu and plaintiff No.2 is

their daughter. It is specifically averred that the suit properties are ancestral properties of Dagadu. Who had four sons including Balu. It is specifically averred that in the year 1999 plaintiffs have sought partition of the suit properties and since the same was denied, this suit came to be filed.

4. The defendants appeared before the Trial Court and resisted the suit with the contention that plaintiff No.1 is not wife and plaintiff No.2 is not daughter of deceased Balu. It is clear contention that Balu was physically and mentally not capable of performing marriage and hence he was never married during his lifetime. In the written statement specific plea is taken raising objection of bar of limitation for filing of the suit.

5. Learned counsel for the appellants/original defendants contends that both Courts below have committed serious error by not considering the evidence on record in his proper perspective while recording the finding that plaintiff No.1 is wife and No.2 is daughter of deceased Balu. By referring to the evidence on record it is contended that testimony of PW-2 Gaubai cannot be considered for proof of marriage for the reason that as per her own statement she could not have been a witness to the said alleged marriage of plaintiff No.1 with

Balu. He also drew attention of the Court to her admission that she came to depose as instructed by the plaintiff No.1 and to assist her to substantiate her case before the Court. As far as the evidence led by the plaintiff about the name of plaintiffs in the ration card is concerned, it is sought to be argued that there are inconsistencies in the entries which indicate that the said evidence is not conclusive and to prove the marriage. It is further argued that in order to prove the marriage plaintiff No.1 ought to have established that for all ceremonies for a valid marriage were duly performed as per Section 7 of Hindu Marriage Act, in order to constitute it to be a lawful marriage between plaintiff No.1 and deceased Balu. Exception is also taken to the entry showing the birth register in the name of plaintiff No.2 by stating that the name of mother of plaintiff No.2 is shown as Rani whereas the plaintiff No.1 is Kalabai. He placed reliance on judgment in case of ***Nitin Omprakash Agrawal Versus Rekha Nitin Agrawal*** reported in ***2017 DGL (Bom.)743***.

6. Learned counsel for the respondents opposed the said contentions with submissions that apart from the oral evidence of plaintiffs witness No.2, there are documents on the record indicating name of plaintiff No.1 as wife of Balu and recording name of plaintiff No.2 as his daughter and the said entries are taken during the lifetime of Balu which indicates that there was no reason for any one to create false

entries at the relevant time. With regard to the name of Rani being shown as mother of plaintiff No.2 it is contended that if it is the case of the defendant that Balu never married, question of plaintiff No.2 being daughter of someone else than plaintiff No.1 does not arise.

7. While appreciating the evidence on record, it cannot be ignored that herein this case plaintiff No.1 is called upon to prove her marriage with deceased Balu after about 50 years. Having considered the lapse of time in between it would be highly improbable that she will remember name of priest who performed marriage and other facts relating to the marriage. She however gives details about the family of her husband Balu. Her witness Gaubai even if is considered to be of age of 9 to 10 years as claimed by defendants, at the relevant time, her testimony cannot be discarded only on the ground that she stated before the Court about having come to the Court to help plaintiff. Unless, otherwise shown to be so, there cannot be presumption that she deposed falsely. Moreover, defendants were unable to show that her testimony is inherently not believable. As far as compliance of Section 7 of Hindu Marriage Act, instant case is not the one where validity of marriage of the plaintiff no. 1 is challenged for reason of non performance of necessary rituals for valid marriage. This is a case where factum of marriage itself is denied. Thus, there was no occasion for

plaintiff no. 1 to prove the rituals performed during marriage. This Court, therefore, finds no substance in the submission made by defendants in this regard.

8. Apart from oral evidence, case of the plaintiffs is supported by the documentary evidence such as entries in ration card and birth register. These documents relate back to the date before the death of Balu. There is no material brought on record to hint that during lifetime of Balu, documents were created to stake claim of wife and daughter of Balu. Testimony of Sagar Sonawane, clerk in Tahsil office shows that the entries in the register of ration card are taken in ordinary course of business of office and entry of plaintiff is not solitary entry but other entries about deletion of other names from record are also reflected. With regard to birth register (Exhibit 196) name of Balu is shown as father of plaintiff No.2. It is sought to be said that name of mother of girl is mentioned as Rani. The question arises as to whether such objection is tenable in the light of case of defendants that Balu never married in his lifetime. Now it is not open for defendants to claim that the plaintiff No.2 is daughter of Rani, someone else, than plaintiff No.1. In any event that does not falsify case of plaintiff that plaintiff No.2 is daughter of Balu.

9. Plaintiffs therefore having discharged initial burden on them to prove their case, onus has shifted upon the defendants to substantiate their claim. While taking stand that Balu never married due to physical and mental incapability, defendants deny marital relationship between plaintiff No.1 and Balu. There is however, absolutely no evidence to show that Balu was not capable of performing marriage. In absence of any material evidence on record to indicate so, defendants case in this regard deserves to be rejected and rightly rejected by both Courts.

10. This appeal is under Section 100 of the Code of Civil Procedure wherein in order to call upon this Court to cause interference in the impugned judgments, it must be shown that the findings arrived at by the Courts below are contrary to the evidence on record or in ignorance of any material evidence which was laid before the Trial Court. On both count appellants were unable to show any perversity in the findings recorded by both Courts. There are concurrent findings recorded by the Courts below and considering the pleadings and evidence on record the view taken by these Courts is probable. Hence, there is no substantial question of law involved in this appeal and resultantly appeal stands dismissed with costs.

(R. M. JOSHI, J.)

11. Learned counsel for the appellants states that the order dated 25/02/2022 restraining the parties from actual delivery of possession be extended for the period of eight weeks.

12. Learned counsel for the respondents opposed the said contentions by stating that for years together the respondents are fighting for their rights and hence it is not the fit case to extend the stay after dismissal of appeal. He further states that the said order was not passed on merit and since the counsel for the cavetor had sought time on first day of appearance the said arrangement was made.

13. For whatsoever reason, there is an order in force since 25/02/2022 whereby the execution proceedings was permitted to be conducted except for delivery of possession. As said order is in existence for last more than a year, this court finds no reason to deny continuation thereof for limited period. Having regard to the facts of the case, the order dated 25/02/2022 is extended for the period of six weeks.

(R. M. JOSHI, J.)

ssp