



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

**SECOND APPEAL NO.342 OF 2017
WITH CA/6070/2017 IN SA/342/2017
WITH CA/15452/2017 IN SA/342/2017**

1. Ishwar S/o Madhav Malshette,
Age : 55 Years, Occu. Agriculture,
R/o. Limboti Tq. Loha,
District. Nanded.
2. Shivabai w/o Venkati Awade,
Age : 30 Years, Occ. Household,
R/o. Opp. Rural Hospital,
Gangakhed Tq. Gangakhed,
Dist. Parbhani
3. Hawaji S/o Ishwar Malshette,
Age : 35 Years, Occ. Agriculture,
4. Shivling s/o Ishwar Malshette,
Age : 33 Years, Occ. Agriculture
5. Shivsamb s/o Ishwar Malshette,
Age : 28 Years, Occ. Agriculture

All R/o. Limboti,
Tq. Loha, District Nanded.

Appellants
(Original Defendants)

VERSUS

1. Sushma Nagnath Malshette,
Age : 19 Years, Occ. Nil
2. Naginbai w/o Nagnath Malshette,
Age : 48 Years, Occ. Household,

Both R/o At post Limboti,
Tq. Loha, Dist. Nanded.

.. Respondents
(Original Plaintiffs)

...
Advocate for Appellants : Adv. Prayadhnya Talekar
Advocate for respondent Nos. 1 and 2 : Mr. U. L. Telgaonkar h/f Mr.
S. V. Kurundkar
....

CORAM : S. G. MEHARE, J.
DATE : 04.12.2023

PER COURT :

1. Heard the learned counsel for the appellants and the learned counsel for respondents.
2. Considering the arguments advanced by the respective counsels, the pleadings from both sides appear deficient. Both counsels argued that the findings recorded by the first appellate Court and the Court of first instance were without framing any issues and points for determination. A few points they have raised are new.
3. The appellants have a case that the Doctor who had examined the deceased father of the plaintiff No.1 in the proceedings under Section 125 of the Cr. P.C. had proved that he was impotent. However, the learned Court of First Instance held that the Doctor ought to have been examined to prove the impotency of the deceased father of the plaintiff. The learned counsel for the appellants would submit that apart from the finding recorded by the Magistrate under Section 125 of

the Cr.P.C. in an interim application, there was oral evidence that the deceased father of plaintiff No.1 had no access to his mother. The learned counsel for the appellants has also argued that the First Appellate Court has erroneously granted 1/3rd share each to the daughter and the wife of the deceased. She also argued that the deceased husband and father of plaintiff No.1 had got his share in the year 1988, and it was mutated in the year 1991. The father-in-law and grandfather of plaintiff No.1 partitioned the lands during his lifetime. The father and husband of the plaintiffs sold his share. Therefore, nothing remained for partition, at least for the plaintiffs. It is also the question raised that the pleading as regards the nature of the acquisition of the properties involved in the suit is vague. It has also been pleaded that the properties described in the plaint were ancestral and joint family. However, it has also been argued that few of them were purchased and few of them were ancestral, but no detailed description was given.

4. The learned counsel for the plaintiffs would submit that the findings of the First Appellate Court are legally correct and proper. In the absence of the issue of the earlier partition, the plaintiffs had no opportunity to cross-examine the witnesses on this point. The issue as

regards the incomplete description of the suit lands was also not framed.

5. The learned counsel for the appellants also raised a similar objection about not framing the relevant issues.

6. Perusal of the impugned judgments and decrees of both the Courts reveals that the issues as regards the earlier partition and defect in the description of the properties were not framed. The issue whether the evidence of the Doctor, recorded in the proceeding under Section 125 of the Cr. PC was admissible in the civil suit, was also not framed. The legitimacy of the child and potency of plaintiff No.2/husband and father of plaintiff No.1 was the core question that goes to the root of the rights of the plaintiffs. It appears that the wife of the deceased, Nagnath filed the proceeding under Section 125 of the Code of Criminal Procedure, and some orders were passed. Both the learned counsels have no complete information, whether that proceeding under Section 125 of the Cr. PC was finally adjudicated or not. The father and husband of the plaintiffs died during the pendency of the first appeal. The grandfather and one grandmother also died during the pendency of the first appeal. Thereafter, their daughters were brought on record as legal representatives. In view of the fact

situation, what would be the share of the daughters is also another question that needs to be determined. It was a suit of partition. *Prima facie*, it appears that the First Appellate Court erred in determining the shares of the plaintiffs. The question as regards the paternity and potency of the deceased father and the husband of plaintiffs were to be determined. There are two conflicting opinions of the two Courts on the core questions involved in the case. *Prima facie*, it appears that the issues were required to be framed. Therefore, this Court is of the view that this is a fit case to exercise power under Order XLI Rule 23 of the Code of Civil Procedure. Hence, the appeal is remitted to the trial Court for fresh decision on the following points/ issues.

- (i) Whether the suit properties were correctly described?
- (ii) Was there a partition in 1988 between the grandfather and the father and husband of the plaintiffs?
- (ii) Whether the evidence of a doctor recorded in the proceeding under Section 125 of the Cr.P.C was sufficient to prove the potency of the husband and father of the plaintiff and was it admissible in evidence in the absence of his fresh evidence.
- (iii) Did the father and husband of the plaintiff sell the suit lands for medical treatment of his impotency?

- (iv) Whether plaintiff No.1 Sushma was the legitimate child of her father Nagnath.
- (v) Whether the plea of the deceased husband and father of the plaintiffs that his wife Naginabai had illicit relations with someone else and whether such a defence was admissible in the absence of naming the person specifically with whom she had an illicit relationship?

7. It is made clear that the parties are at liberty to lead the fresh evidence and amend the plaint and written statement wherever the law permits. Hence, the following order:-

ORDER

- (i) The appeal is allowed.
- (ii) The judgment and decree of the learned passed in R.C.S. No. 88 of 2006 decided on 14.03.2008 and the judgment and order passed in R.C.A. No. 9 of 2008 dated 15.02.2017 are set-aside.
- (iii) The trial Court is directed to try the suit afresh considering the issues framed by this Court and other relevant issues if required.
- (iv) The learned Court of First Instance shall decide the suit within one year from the date of appearance of both parties before the Court of First Instance.

- (v) Both parties are directed to appear before the Court of First Instance on 04.01.2024.
- (vi) Record and proceeding be returned to the Court of the first instance.
- (vii) All civil applications stand disposed of.

(S. G. MEHARE)
JUDGE

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