

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

**APPEAL FROM ORDER NO.52 OF 2019
WITH CA/11738/2019 IN AO/52/2019**

**GAYATRI @ GANGA SHIVAJI GHADAGE
VERSUS
ADINATH WAMAN GHADAGE AND ORS**

Mr. Shoyab Shaikh, Advocate for the appellant

Ms. M. A. Kulkarni, Advocate for respondent Nos. 1, 2/1 to 2/4 and 3.

CORAM : R. M. JOSHI, J.

DATE : 14th MARCH, 2023

ORDER :-

1. This Appeal From Order is filed against the judgment and order dated 19/06/2019 passed by the District Judge-2, Bhoom in Reg. Civil Appeal No. 23/2015 whereby R.C.S. No. 297/2012 is remanded to the Trial Court or fresh adjudication.

2. Appellant is the original plaintiff who claims to be wife of deceased Shivaji. She filed suit for partition and possession against the defendants who are family members of deceased Shivaji. It is contention of the plaintiff that her marriage with Shivaji took place on 20/06/2002. Deceased committed suicide on 04/12/2002. Plaintiff claimed herself to be widow of the deceased and has sought share in the suit properties which are ancestral properties of deceased and his family.

3. Defendants appeared before the Trial Court and denied the

marital relationship between plaintiff and Shivaji. It is specifically pleaded that Shivaji was married to another woman viz., Anita Katale on 05/03/2000.

4. It is the contention of learned counsel for the appellant that parties led evidence before the Trial Court and the suit was decreed by recording findings that plaintiff is legally wedded wife of deceased Shivaji. He further submitted that defendants challenged the said judgment and decree before the First Appellate Court by filing Reg.Civil Appeal wherein an application was moved below Exhibit 23 under Order XLI Rule 27 of the Civil Procedure Code for permitting the defendants to adduce additional evidence in the nature of documents produced along with the application. According to him learned First Appellate Court has committed serious error of law by allowing the application (Exhibit 23) causally without there being any sufficient reason made out by the defendants to lead additional evidence. It is stated that once the plaintiff has proved herself to be legally wedded wife of deceased Shivaji, in absence of any contrary evidence being brought on record by the defendants showing that their subsisted another valid marriage of Shivaji, the First Appellate Court was not justified in remanding the case for retrial.

5. Learned counsel for the respondents/original defendants supported the impugned judgment.

6. Perusal of the record indicates that suit was filed by the plaintiff claiming herself to be legally wedded wife of deceased Shivaji. Her said claim was refuted by the defendants with specific averment that Shivaji had married earlier to another woman. Meaning thereby the defendants have challenged the status of plaintiff to be legally wedded wife of Shivaji. In spite of such specific defence learned Trial Court has not framed issue regarding the burden on the plaintiff to prove that she is legally wedded wife. It is only thereafter the onus would shift upon the defendant to show that at the time of the marriage of plaintiff Shivaji was in a legally valid matrimonial tie with another woman. Be, it as may, the record indicates that before the Trial Court plaintiff led evidence in respect of her marriage. It is also claimed that panchanama recorded on death of Shivaji indicates her presence. It however does not appear from the discussion in the judgment of the Trial Court as to on what basis it is held that the plaintiff is legally wedded wife. Such finding is necessary particularly when in the cross examination of defendant No.2 there was a specific suggestion made to the effect that Shivaji was married to Anita Katale on 24/03/2002. Further cross examination of this witness shows that said Anita is at her parental home for last 10-15 years. In view of

this evidence there is no substance in the contentions that merely because plaintiff was present at the time of death of the deceased she should be treated as his legally wedded wife. Learned Trial Court has totally ignored the said suggestion made to the witness and failed to record proper reasons to decree suit.

7. The judgment of the learned Trial Court indicates that even before Trial Court an attempt was made to produce the documentary evidence in respect of the marriage of Shivaji and Anita. The said documents however were not considered for want of proof thereof. This indicates that it is not the first time in the appeal some documents are sought to be produced on record. It was within domain of the First Appellate Court to consider the facts of the case and to accept or not to the request of any party to lead additional evidence under Order XLI Rule 27 of the Civil Procedure Code. From the circumstances appearing on record and more particularly in view of the fact that an attempt was made to produce those documents during the pendency of trial, this Court finds no perversity in the view taken by the learned First Appellate Court that the defendants needs to be permitted to adduce additional evidence.

8. Aforesaid discussion also clearly indicates that the learned

Trial Court has not taken into consideration vital facts which had bearing on the status of plaintiff as legally wedded wife of deceased. In the circumstances this Court finds no infirmity in the order passed by the First Appellate Court in remanding the suit for trial before the Trial Court afresh.

9. Learned counsel for the appellant has made grievance that at the time of allowing application (Exhibit 23) no cost is imposed upon the defendants. No doubt it is the prerogative of the the First Appellate Court to impose or not to impose any cost depending upon facts and circumstances of case. However, considering the fact that the appellant herein is a woman and she is drawn into further litigation, defendants are directed to pay cost of Rs.3,000/- to the appellant. The cost be paid or deposited in the Trial Court within a period of two weeks.

10. It is clarified that observations made in this order would not come in way of both sides in establishing their respective contentions. Learned Trial Court to decide the suit on its own merits. Considering the fact that the appellant herein is a woman who is fighting for her rights for number of years, the Trial Court is directed to hear and decide the suit as expeditiously as possible and in any event within six months from the date of this order. Accordingly, this Appeal From Order is disposed of.

11. Parties are directed to appear before Civil Judge (Junior Division), Paranda on 20/03/2023. Learned Trial Court not to issue fresh notices to the parties.

12. Pending civil application, if any, stands disposed of.

(R. M. JOSHI, J.)

ssp