

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

**SECOND APPEAL NO.203 OF 2019
WITH
CIVIL APPLICATION NO. 391 OF 2019
WITH
INTERIM APPLICATION NO. 881 OF 2020**

Kondiba Ramchandra Shinde & Ors.

...Appellants

Versus

Durga Shivaji Shinde & Ors.

...Respondents

Mr. R. V. Bansode, for the Appellants.

Mr. V. R. Gaikwad, for Respondent No.1.

CORAM : MADHAV J. JAMDAR, J.

DATED : 15th MARCH 2023

P.C. :

1. Heard Mr. Bansode, learned counsel appearing for the Appellants i.e. Original Defendant Nos. 1A, 1B, 2 and 3 and Mr. Gaikwad, learned counsel appearing for the Respondent No.1 i.e. Original Plaintiff.

2. By the present Second Appeal, the Appellants are challenging the legality and validity of the Judgment and Decree dated 8th March 2016 passed by the learned Civil Judge, Junior Division, Mhaswad, Tal - Man, Dist - Satara and

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Judgment and Decree dated 12th October 2018 passed by the learned District Judge-1, Vaduj, at Vaduj in Regular Civil Appeal No.79 of 2017. By the impugned Judgment and Decree, the learned Trial Court partly decreed the suit filed by the Plaintiff, who is the daughter-in-law of deceased Defendant No.1. The Plaintiff is the widow of deceased son- Shivaji of the Defendant No. 1. The said suit was filed for partition and separate possession and for *mesne* profits. The present Appellants are the legal heirs of Defendant No.1 and the Original Defendant Nos. 2 and 3. The learned First Appellate Court dismissed the Appeal filed by the Defendant Nos. 1A, 1B, 2 and 3.

3. It is the contention of the Respondent No.1 i.e. the Plaintiff that Defendant No.1-Ramchandra Dnyanu Shinde had three sons i.e. Kondiba, Shivaji and Bharat. The Plaintiff is widow of said Shivaji who passed away on or about 5th February, 1999. The Plaintiff has come up with the case that, suit properties are ancestral properties and therefore, she has got a share in the properties through Defendant No. 1's son Shivaji. However, both the Courts have concurrently held that Plaintiff has failed to prove that properties are ancestral

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properties. Both the Courts concurrently held that the said properties are self acquired properties of deceased Defendant No.1. However, it is admitted position that during the pendency of the suit, Defendant No.1-Ramchandra passed away on 15th August 2008 and therefore, learned Trial Court has held that as the properties are of Defendant No.1, all the heirs and legal representatives including Plaintiff and heirs of Defendant No.1 are entitled to the share and therefore, decreed the suit. Learned First Appellate Court has confirmed the decree passed by the learned Trial Court.

4. In the light of above facts, it is the contention of Mr. Bansode that following three substantial questions of law are involved in this Second Appeal:-

- i. Whether suit filed on 12th August 2005 can be said to have cause of action seeking partition in the properties of the Defendant No. 1 who passed away on 15th August, 2008 ?
- ii. Whether the Plaintiff is entitled for any relief as she has come up with false case that the properties are ancestral properties ?
- iii. Whether the Plaintiff is entitled to share in the suit properties as she has entered into the compromise in Criminal Maintenance Application

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No.211 of 1992 on 19th March 1993 and accepted Rs.20,000/- as full and final amount towards her maintenance and therefore, in effect given up her share in the suit properties and also right of maintenance ?

5. As far as the first substantial question of law that whether any cause of action was there in filing the suit, it is admitted position that the suit was filed on 12th August 2005. In the said suit Defendant Nos.1 to 3 filed joint written statement *inter alia* raising contention that the suit properties are exclusive and self acquired properties of Defendant No.1. They have also come up with the case that Laxmi was the first wife of said Shivaji and therefore, Plaintiff is not legally wedded wife of said Shivaji and not entitled for any share. They have also come up with the case that in the said criminal proceeding, compromise was arrived at and she has given up her share.

6. It is admitted position that during the pendency of the suit, the Defendant No.1, who is the owner of the suit properties passed away on 15th August 2008. It is admitted position that Defendant No.1 i.e. Ramchandra passed away without leaving any Will. Admittedly said Ramchandra left behind him two sons

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namely Kondiba and Bharat i.e. Defendant Nos. 2 and 3 and Plaintiff is daughter-in-law i.e. widow of pre-deceased son Shivaji. Therefore, it is apparent that, the Defendant Nos. 2, 3 and Plaintiff are the class-1 heirs of Deceased Defendant No.1- Ramchandra and therefore, she is entitled for share in the properties of Defendant No.1. Both the Courts have concurrently held that the properties are of exclusively ownership of Defendant No.1. In fact, that is the case of Defendant Nos. 1, 2 and 3.

7. It is settled legal position that the Court has got power to mould the relief. In the present case, the suit was filed seeking share in the suit properties and for partition. It is true that the finding of both the Courts is that suit properties are not the ancestral properties or the properties acquired by Deceased Shivaji but the exclusive properties of said Ramchandra and therefore, suit for partition on the ground that, properties are ancestral properties could not have been decreed as the finding is that Ramchandra is exclusive owner of the properties. However, admittedly, during the pendency of the suit, said Ramchandra passed away on 15th August 2008 as set out

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hereabove. The Appellants alongwith Respondent No.1 are the class-1 heirs of said deceased Ramchandra and therefore, entitled for share in the properties of Ramchandra. Therefore, no illegality is committed by the Courts below by granting partition decree.

8. The Supreme Court in the decision of **Gaiv Dinshaw Irani & Ors. Vs. Tehmtan Irani & Ors.**¹ held that, it is permissible for Civil Court to mould the relief in view of subsequent developments. The relevant portion of paragraph No. 48 reads as under :

“Considering the aforementioned changed circumstances, the High Court taking note of the subsequent events moulded the relief in the appeal under Section 96 of the Code of Civil Procedure and the same has been challenged by the appellants before us. In ordinary course of litigation, the rights of parties are crystallized on the date the suit is instituted and only the same set of facts must be considered. However, in the interest of justice, a court including a court of appeal under Section 96 of the Code of Civil Procedure is not precluded from taking note of developments subsequent to the commencement of the litigation, when such

1. (2014) 8 SCC 294.

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events have a direct bearing on the relief claimed by a party or on the entire purpose of the suit, the courts taking note of the same should mould the relief accordingly.....”

Thus, in the facts and circumstances of this case the learned Trial Court and the learned Appellate Court has not committed any illegality in passing the decree of partition.

9. Mr. Bansode also relied on Order 6 Rule 7 of the Code of Civil Procedure, 1908 Order 6 is regarding pleadings. Order 6 Rule 7 provides that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. In the present case, suit has been filed for partition claiming separate share by taking contention that suit properties are ancestral properties of the Plaintiff and Defendant Nos. 1, 2 and 3. Both the Courts have concurrently held that suit properties are self acquired properties of Defendant No.1. However, as Defendant No.1 has in the meanwhile during pendency of the suit passed away on 15th August 2008 without executing any will, therefore, the suit for partition is decreed. Therefore, it is clear that the nature of the

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suit remained the same and Court has taken only cognizance of subsequent event and moulded the relief accordingly.

10. Mr. Bansode, learned counsel appearing for the Appellants raised second substantial question that, as the Plaintiff has come up with the false case that the suit properties are ancestral properties and as both the Courts have found that the suit properties are self acquired properties of deceased Defendant No.1 therefore, she is not entitled for any relief. There is no substance in the said contention. The fact that, the Plaintiff failed to prove that, the suit properties are ancestral properties cannot *ipso facto* prove that, she has come with false case. In fact, the Appellants have come up with the specific case that, the Plaintiff is second wife of said Shivaji and Laxmi is first wife of said Shivaji and therefore, marriage between deceased Shivaji and the Respondent No. 1 is not legal. Both the Courts have concurrently held that Appellants have failed to prove the same. Thus, both the Courts have concurrently held that, the Respondent No. 1 is legally wedded wife of deceased Shivaji and therefore, she is entitled to inherit share of deceased Shivaji. The suit was for partition and after the death

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of Defendant No.1, Appellants and Respondent No.1 are entitled to respective shares in the properties of the Ramchandra as per the provisions of the Hindu Succession Act, 1956 and therefore, there is no substance in the second substantial question of law raised by Mr. Bansode.

11. As far as the third substantial question of law raised by Mr. Bansode, learned counsel appearing for the Appellants that, compromise has been arrived at in the said Criminal Maintenance Application No. 211 of 1992 and that the Plaintiff has given up her share in the suit properties, it is significant to note that, the said compromise is dated 19th March 1993 arrived at in Criminal Maintenance Application No.211 of 1992. The suit has been filed on 12th August 2005. Said deceased Shivaji, the husband of the Plaintiff was not the owner of these properties and he was not having any share at that time in the suit properties. Suit properties are of the ownership of the Defendant No.1 as concurrently held by both the Courts and the husband of the Plaintiff got right in the suit properties only after demise of Defendant No.1. Admittedly Defendant No.1 passed away on 15th August 2008 and Shivaji, husband of the

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Plaintiff, pre-deceased him on 5th February, 1999. Said compromise at Exhibit-66 clearly shows that what is given up by the Plaintiff is the right to claim maintenance and not right to share in the property. Both the courts have concurrently held that, by said Compromise Deed what was given up by the Respondent No. 1 was right to maintenance and not right to share in the properties. Admittedly, Defendant No.1 has not left any Will. Therefore, the Respondent No. 1 is entitled in the share of property of her father-in-law through her deceased husband. Therefore, there is no substance in the third substantial question of law raised by Mr. Bansode.

12. In view of above discussion, the Second Appeal is dismissed, however with no order as to costs.

13. As the Second Appeal is dismissed, nothing survives in the Interim Application/Civil Application and the same are dismissed as such.

14. At this stage, Mr. Bansode, learned counsel appearing for the Appellants states that a learned Single Judge by order dated 2nd May 2019 directed that although execution proceedings may go on, however, actual possession shall not be

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delivered to the parties and said order be continued for some reasonable period. Mr. Gaikwad strongly opposes the above request. However, in the interest of justice operation of said order dated 2nd May, 2019 is continued up to 31st August, 2023.

[MADHAV J. JAMDAR, J.]