



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

SECOND APPEAL NO. 213 OF 1997

Baburao s/o Karbhari Ghodke
(Deceased through LRs)

- i) Smt. Santabai w/o Bhaurao Ghodke
age 75 years, occ. Household
w/o Wadgaon Dhok, Tq. Georai
Dist. Beed.
- ii) Kalyan s/o Bhaurao Ghodke
age 58 years, occ. Agriculture
r/o Wadgaon Dhok, Tq. Georai
Dist. Beed.
- iii) Shivaji s/o Bhaurao Ghodke
age 45 years, occ. Agriculture
r/o Wadgaon Dhok, Tq. Georai
Dist. Beed.
- iv) Sau. Suvarna w/o Bhimrao Muley
age 40 years, occ. Household
r/o Georai, Tq. Georai
Dist. Beed.

.. Appellants

Versus

- 1. Radhabai w/o Pandurang Warule
(Deceased through LRs)
 - 1-a) Radhakisan s/o Pandurang Warule
age 60 years, occ. Agril.
r/o Wadgaon Dhok, Tq. Georai
Dist. Beed.
 - 1-b) Narayan s/o Pandurang Warule
age 48 years, occ. Agril.,
r/o Wadgaon Dhok, Tq. Georai
Dist. Beed.

- 1-c) Chandrakala w/o Sahebrao Borde
age 42 years, occ. Household
r/o Wadgaon Dhok, Tq. Georai
Dist. Beed.
2. Godhabai w/o Vinayakrao Pawar
(Deceased through LRs)
 - 2-a) Rakhmabai w/o Ramkisan Lene
age 50 years, occ. Household
r/o Talwada, Tq. Georai
Dist. Beed.
 - 2-b) Babu s/o Vinayak Pawar
age 48 years, occ. Agriculture
r/o Talwada, Tq. Georai
Dist. Beed.
 - 2-c) Dwarkabai w/o Balbhim Lakhe
age 45 years, occ. Household
r/o Talwada, Tq. Georai
Dist. Beed.
 - 2-d) Bandu s/o Vinayak Pawar
age 43 years, occ. Agri.
r/o Talwada, Tq. Georai
Dist. Beed.
3. Sudamati w/o Sarjerao Zengadhar
age 32 years, occ. Agri.
r/o Malegaon Bk. Tq. Georai
Dist. Beed.
4. Dadasaheb s/o Bapurao Pawar
age 26 years, occ. Agri
r/o Telwada, Tq. Georai
Dist. Beed.
5. Kausalyabai w/o Vishnu Kanke
age 32 years, occ. Agri
r/o Bhambri, Tq. Ambad

Dist. Jalna.

6. Ram s/o Bapurao Pawar
age 29 years, occ. Agri
r/o Talwada, Tq. Georai
Dist. Beed.

.. Respondents

Mr. M. M. Patil (Beedkar), Advocate for the appellants.

Mr. P. P. Pangal, Advocate holding for Mr. H. V. Tungar, Advocate for respondents No. 3 and 6.

CORAM : R. M. JOSHI, J.

RESERVED ON : 12th FEBRUARY, 2024.

PRONOUNCED ON : 23rd FEBRUARY, 2024.

JUDGMENT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the judgment and decree passed by the First Appellate Court in Regular Civil Appeal no. 241/1998 whereby Regular Civil Suit no. 120/1987 came to be decreed by reversing judgment and decree passed by the Trial Court dismissing the suit for partition and separate possession of the suit lands.

2. Parties are referred to by their nomenclature in the proceeding for the sake of convenience.

3. Facts which led to filing of present appeal can be narrated in short as under :-

Plaintiffs are daughters of Hanwanta. Their ancestor Tatya had three sons; Hanwanta, Karbhari and Haribhau. Hanwanta had four daughters namely Tulsabai, Gangabai, Godhabai and Radhabai. Tulsabai and Gangabai are deceased. Karbhari has one son namely Bhaurao (defendant). Haribhau died issueless. It is the case of plaintiffs that when Hanwanta was visiting holy places by taking pilgrims defendant took disadvantage of possession of suit properties and mutated same in his name in the record of rights. It is also alleged that he has obtained will with regard to Gat No. 63 which stood in the name of Haribhau and after his death his wife Parubai. It is further case of plaintiffs that defendant used to give their share from the yield of the cultivation of the suit properties however, subsequently he refused to give the same and when they demanded for partition he did not concede to it. With these averments, suit for partition and separate possession came to be filed.

4. Defendant by filing written statement has admitted description of the suit properties so also did not raise any dispute

with regard to the genealogy and relationship between him and plaintiffs. It is the case of defendant that he being the only surviving coparcener, the suit properties devolved upon him and were rightly recorded in his name. He also claims that Parubai, on her own through will, had bequeathed Gat No. 63 to him and pursuant thereto he has become the exclusive owner thereof. The contention of plaintiffs about any share being provided in the crop cultivated in the suit lands is denied by defendant.

5. Trial Court framed issues casting burden on defendant to prove that Hanwanta died in the year 1947 and his wife Anusayabai died thereafter in the year 1948. Issue was also framed with regard to validity of will executed by Parubai on 17th September, 1974, apart from right of plaintiffs to get partition and separate possession of suit land.

6. Plaintiffs examined plaintiff No. 1 at Exhibit 46 and also led evidence of Rustam (Exhibit 49), Ashruba (Exhibit 51) and Vaishnav (Exhibit 52). Rustam and Ashruba were examined in order to prove that Hanwanta died after 1955 whereas witness Vaishnav was examined in order to prove the certificate issued by Gram

Panchayat indicating death of Hanwanta. Defendant examined himself and also led other oral and documentary evidence. Learned Trial Court dismissed the suit by holding that defendant substantiated the fact of death of Hanwanta in the year 1947 and as such being sole surviving coparcener has become the exclusive owner of the suit properties. The will executed by Parubai was also upheld. With these observations, the suit came to be dismissed.

7. Plaintiff, being aggrieved by said judgment and decree preferred appeal being Regular Civil Appeal No. 241/1989. Learned First Appellate Court allowed the appeal by setting aside impugned judgment and decree passed by the Trial Court. It is held that plaintiffs are entitled for 1/3rd share in the suit lands bearing Gat No. 63 and 442. They were also held to be entitled to claim mesne profit as determined in inquiry under Order 20 Rule 12(1)(c) of Code of Civil Procedure. Defendant, being aggrieved by this judgment and decree, preferred this appeal.

8. Learned counsel for defendant submits that the First Appellate Court has committed error in not considering the evidence led by defendant on record so also admissions of witnesses examined

by plaintiffs with regard to death of father of plaintiffs. It is his contention that on the basis of said evidence, it is absolutely clear that father of plaintiffs i.e. Hanwanta died prior to 1955. It is his submission that before coming into effect of Hindu Succession Act, 1956, the ancestral properties used to be devolved upon the co-sharers by survivorship and not by succession and since Tatya's three sons died prior to 1955, defendant being son of Karbhari is the sole owner of the suit properties. It is his submission that it was not open for the First Appellate Court to ignore the findings recorded by the Trial Court on this fact. By drawing attention of Court to the documents placed on record, it is sought to be argued that mutation entries do not confer any right or any authority and as such they are irrelevant for deciding the factum of death of Hanwanta and findings recorded by First Appellate Court are perverse. It is also sought to be canvassed that even if any share was given to mother of plaintiffs, it was limited to her maintenance under the provisions of Women's Right to Property Act, 1937. It is his submission that the burden was wrongly placed on defendant to prove that Hanwanta died in 1947 as it is incumbent on the part of plaintiffs to prove their right in the suit properties by pleading the time of death of their father Hanwanta.

9. Learned counsel for plaintiffs supported the impugned judgment and decree. It is submitted that Section 157 of Maharashtra Land Revenue Code provides for presumption of correctness of entries in the revenue record. It is submitted that there is no challenge to these entries by defendant and in fact the defendant has relied upon these entries in support of his contention. It is argued that the entries taken in Exhibit 30 to 35 are taken on yearly basis and entry in the year 1957-1958 in the name of wife of Hanwanta i.e. Anusayabai shows that she was alive till that time. It is submitted that since there is no dispute about the fact that Hanwanta died prior to about six months of death of Anusayabai, there is more than sufficient evidence on record in order to show that he was alive after 1956 and as such there is no substance in the contention of defendant that he became sole owner of the suit properties by survivorship. In support of his submissions, he placed reliance on following judgments :-

- i) Karewwa and others vs. Hussensab Khansaheb Wajantri and others
(2002) 10 Supreme Court Cases 315
- ii) Gurbaksh Singh vs. Nikka Singh and another
AIR 1963 SC 1917
- iii) Bai Vajia (Dead) by LRs vs. Thakorbbhai Chelabhai and others
(1979) 3 Supreme Court Cases 300

10. There is no dispute about the fact that the suit properties are ancestral properties and Tatya was the original ancestor of plaintiffs and defendant. There is further no denial of the fact that Tatya had three sons Hanwanta, Karbhari and Haribhau. Plaintiffs are legal heirs of Hanwanta whereas defendant is the son and legal heir of Karbhari. Haribhau did not have any issue. Perusal of the evidence and case sought to be made out by both sides clearly shows that Anusayabai i.e. wife of Hanwanta died after about six months of the death of Hanwanta. In the light of this admitted facts, the disputed facts between the parties need to be ascertained on the basis of evidence on record.

11. Plaintiffs as well as defendant examined witnesses in order to lead oral evidence with regard to death of Hanwanta. It is the claim of witnesses of plaintiffs that Hanwanta died after 1955 whereas witness Bansi Pandit (Exhibit 42) claims about death of Hanwanta in or around 1947. Thus, there is word against word with regard to time of death of Hanwanta. Pertinently, oral evidence is tentative from both sides. In such circumstances, the Court is required to look for corroboration from other evidence on record as it would not be safe to place reliance on oral evidence. Defendant has

placed on record 7/12 extracts of the suit properties (Exhibits 25 to 29) and also Khasra Patrak of the year 1955-1956 to 1959-1960 (Exhibits 30 to 35). Section 157 of Maharashtra Land Revenue Code provides for presumption of correctness of entries in the revenue record until disproved. Since defendant himself has relied upon these entries, the question of genuineness thereof is not involved in the present case.

12. Perusal of Exhibits 30 to 35 shows that name of Anusayabai appears in the Khasara Patrak indicating her share in the suit properties. Entry with regard to Survey No. 6 shows that Karbhari was in possession and in column No. 14 his status of possession was to the effect that of brother-in-law of Anusayabai. Similar entries are found in case of Survey No. 7. These entries therefore clearly indicate that even in the year 1954-1955, father of present defendant was shown in possession of portion of suit properties for and on behalf of Anusayabai. Khasara Patrak for year 1954-55 shows 5 anna share of Karbhari in well whereas Anusayabai having 2 anna share therein. Record indicates that it is after death of Karbhari in the year 1959, by way of a pencil entry (Exhibit 30), name of defendant was brought on record. This entire documentary

evidence runs contrary to the case of defendant that father of plaintiffs died in 1947 and as there is no dispute about the fact that prior to about six months of death of Anusaya Hanwanta died, the only conclusion which can be drawn from evidence on record is that Hanwanta did not die in the year 1947 as claimed by defendant. In order to deny right to the plaintiffs in ancestral properties, there must be cogent and reliable evidence indicating death of father of plaintiffs prior to coming into force of Hindu Succession Act, 1956. In absence of any such evidence and merely on unreliable oral evidence, such right can not be denied. In fact, oral evidence led by defendant is contradicted by revenue record. Learned Trial Court did not consider the said evidence on record in proper perspective and by ignoring the said material evidence has based its findings on the ocular unreliable/inconclusive evidence of the witnesses. Learned First Appellate Court was within its right to reconsider the evidence afresh and record findings thereon independently. No fault can be found with such exercise being done by the First Appellate Court.

13. There is documentary evidence to show that on behalf of Anusaya, wife of Hanwanta, the suit lands to the extent of her share shown, were held by Karbhari i.e. father of defendant.

Having regard to provisions of Section 14 of Hindu Succession Act, this Court finds no substance in the contention raised by counsel about limited right created in her favour under Act of 1937.

14. It is thus clear that defendant's claim of being sole owner of the suit properties by survivorship is not supported by material evidence on record. As such, right of plaintiffs to the extent of their share derived from their father Hanwanta cannot be denied.

15. This Court, by order dated 7th December, 2023, has framed substantial questions of law. The outcome of discussion made hereinabove, results into answering said substantial questions of law in favour of plaintiffs. This Court finds no error being committed by the First Appellate Court by relying upon Khasara Patrak and revenue entries relied upon by defendant. As far as framing of issues casting burden upon defendant to prove death of father of plaintiffs is concerned, perusal of pleadings shows that it was defendant who has come out with specific case about death of Hanwanta in the year 1947. In view of Section 101 of Evidence Act, Trial Court has rightly cast burden on defendant to prove the said fact. It is pertinent to note that the defendant has never challenged

the issues framed by the Trial court and after accepting said issues has proceeded to lead evidence to substantiate the same. In such circumstances, now it would not be open for the defendant to make any grievance in that regard.

16. In view of above discussion, defendant has failed to make out any case to cause interference in the impugned judgment and decree. In the result, appeal stands dismissed.

17. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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