



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

SECOND APPEAL NO. 300 OF 2021

1. Manga Bhoju Rajput,
Decesed Through Legal Heirs

1-A) Rajkorbai Manga Rajput,
Age : 87 Years, Occ. Agriculture

2-B) Chandrasing Manga Rajput,
Age : 65 Years, Occ. Agriculture

3-C) Rajenrasing Manga Rajput,
Age : 52 Years, Occ. Agriculture

Appellants 1 to 3 R/o. Dhamod,
Tq. And District Nandurbar

4-D) Kalabai Lalsing Rajput,
Age : 50 Years, Occ. Agriculture,
R/o. Deur Tq. & Dist. Dhule

.. Appellants
(Orig. Defendants
1A to 1D)

VERSUS

- 1) Chandanbai Lotansing Rajput,
Age : 90 Years, Occ. Household,
R/o. Shanimandal, Dist. Nandurbar

- 2) Daulat Ratansing Rajput,
Age : Major, Occ. Agriculture
R/o. Dhamod,
Talua and Dist. Nandurbar

.. Respondents
(R. No.1 Original plaintiff
and R. No.2 Orig. Def. No.4

....

Advocate for the Appellants : Mr. S.P. Wani holding for
Mr. Ruchir S. Wani

Advocate for Respondent No.1 : Mr. A.S.Abhayankar a/w
Mr. Navin S. Shah i/b Mr. S.V. Natu
Respondent No.2 served.

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CORAM : SANDIPKUMAR C. MORE, J.
Reserved for Judgment : 18.07.2024
Judgment pronounced on : 07.10.2024.

JUDGMENT :

1. The appellants, who are the legal representatives of original defendant No.1 Manga Bhoju Rajput, have preferred this Second Appeal against the judgment and decree dated 26.02.2021 passed by the learned District Judge-1 Nandurbar i.e. the learned First Appellate Court in RCA No. 7 of 2011, whereby judgment and decree dated 09.12.2010 in Regular Civil Suit No. 4 of 2000 passed by the learned Civil Judge, Senior Division Nandurbar i.e. the learned trial court for partition and separate possession, has been confirmed. Under the judgment and decree of the learned trial court, the partition of the suit lands namely Gut Nos. 3, 199 and 208 of village Dhamod, Taluka and District Nandurbar and suit houses namely Gram Panchayat No. 157 and 159 of the same village has been granted in favour of the present respondent No.1 i.e. the original plaintiff. Thus, the Second Appeal is filed against the concurrent finding of both the learned Courts below :-

Briefs facts are as under :-

2. The respondent No.1/plaintiff filed the aforesaid suit for

partition and separate possession of the suit properties mentioned above, by contending that one Bhoju Krishna Rajput was having four children namely Manga, Lotansing, Ladkorbai and Bhavanbai. Out of them, Lotansing was her husband with whom she got married prior to 25 years of filing the suit, as per Hindu rites and ceremonies. Then she started residing in the joint family of her husband Lotansing and the original defendant No.1 Manga. She is having two daughters namely Sangita and Sujata from the said wedlock. However, on instigation by original defendant No.1 Manga, Lotansing deserted her and therefore, she was compelled to reside at her parental house at village Shanimandal. She tried to cohabit with Lotansing, but could not succeed and therefore filed an application for maintenance in the criminal Court. The said application was allowed and maintenance was also granted to her from Lotansing. However, her husband Lotansing thereafter died on 15.03.1995.

3. She further contended that during the lifetime her father-in-law Bhoju Krishna Rajput, had given land Survey No. 95/1 to his widowed daughter Ladkorbai for maintenance during her lifetime and also given the house properties to another daughter i.e. original defendant No.2 Bhavanbai for her residence. The Gram Panchayat house No. 160 was

subsequently recorded in the name of son of defendant No.2 i.e. the present respondent No.2. Bhoju Krishna Rajput had kept all the remaining properties in his joint family and the members of his joint family were cultivating those properties. However, after the death of Bhoju Krishna, name of original defendant No.1 Manga, being the elder son, was recorded in the record of rights of the suit properties as manager of joint family. After death of Lotansing, the plaintiff had asked for partition in the suit properties to the extent of half share of her husband, but the original defendant No.1 Manga refused to effect the partition as demanded. Therefore, respondent No.1/plaintiff was constrained to file the aforesaid suit for the relief mentioned above.

4. On the contrary, only original defendant No.1 Manga resisted the suit by filing written statement at Exh.13 and the suit proceeded ex-parte against rest of the defendants. The defendant No.1 denied the contentions made against him by the plaintiff. According to him, respondent No.1/plaintiff was not legally wedded wife of his deceased brother Lotansing and therefore, not entitled for asking partition and separate possession. During the pendency of the suit, the original defendant No.1 Manga died and the present appellants being his legal representatives, were brought on record. One of them

i.e. appellant No.2 Chandrasingh had filed additional written statement contending that the suit is bad for non joinder of the necessary parties namely son Pravin, Daulat i.e. the present respondent No.2 original defendant No.4 and a daughter Kavita of Bhavanbai. He further contended that out of suit lands, land Gut No. 199 and 208 were allotted to deceased Manga as Inam, since he was rendering services to provide water for cattle of Gram Panchayat. He further claimed that land Gut No. 3 out of the suit lands was self acquired property of Manga and therefore, plaintiff i.e. present respondent No.1 is not entitled for partition of the suit properties.

5. The learned trial Court, after conducting the trial, decreed the suit partly by observing that the plaintiff and defendant No.1 are entitled for 5/12th share each in the suit properties, whereas defendant Nos. 2 and 3 were held entitled to get 1/12th share each in the suit properties. The learned trial Court rejected the claim for partition in respect of movable properties as mentioned in schedule (B). Against the said decree, the present appellants had preferred Regular Civil Appeal No. 7 of 2011 before the learned First Appellate Court, but it also got dismissed. Hence, the present Second Appeal.

6. The learned counsel for the appellants/defendant Nos.

1A to 1D submits that both the learned Courts below have definitely erred in granting partition in the suit properties. According to him, the learned trial Court did not consider the additional written statement filed by the present appellants wherein they had claimed that suit properties were self acquired properties of Manga. According to him, the land Gut No. 208 could not be part of the suit properties as it was earlier Survey No. 95/1 which was given to Ladkorbai by Bhoju Kirshna for her maintenance. He further submitted that the learned First Appellate Court has written a cryptic judgment contrary to order XLI Rule 31 of the Code of Civil Procedure. Moreover, written arguments on behalf of the appellants was also not considered. In support of his contention he relied on the following judgments :-

- (I) **Malluru Mallappa (Dead) Through Legal Representatives Versus Kuruvathappa And Others (2020) 3 Supreme Court Cases 313**
- (II) **G. Saraswathi And Another Vs. Rathinammal And Others (2018) 3 Supreme Court Cases 340**
- (III) **Sumtibai And Others Vs. Paras Finance Co. Rg. Partnership Firm Beawer (Raj.) Through Smt. Mankanwar W/o Parasmal Chordia (Dead) & Others 2007 SAR (Civil) 859 Supreme Court**
- (IV) **Vidyawati Vs. Man Mohan and Others AIR 1995**

Supreme Court 1653

- (V) **Subhash Dhanraj Sankla Vs. Kaikhushroo @ Keki Phirozen Noble (since deceased) through his Heirs and L.Rs. Mrs. Zubil P. Noble Dennis 2020(5) Mh.L.J.**

7. On the contrary, the learned counsel for the respondent No.1 supported the impugned judgments and submitted that no substantial questions of law as formulated are involved in this matter, since the learned trial Court has properly appreciated the evidence on record and the judgments and decree passed by the learned trial Court has also been confirmed by the learned First Appellate Court. He submitted that re-appreciation of evidence is not permissible in the Second Appeal. He also placed reliance on the following judgments

- (I) **Raja Gounder and Others Vs. M. Sengodan and Others 2024 SAR (Civ) 318 2024 SAR Online (SC)45 2024 INSC 47 Supreme Court**
- (II) **Nazir Mohammed Vs. J. Kamala and Others 2020 Supp. SAR (Civ) 1001 2020 SAR Online (SC) 386 Supreme Court**
- (III) **Gurnam Singh (Dead) By Lrs. & Others Versus Lehna Singh (Dead) by Lrs. 2019 Supp.(1) SAR (Civ) 810**

8. Heard rival submissions and also perused the

documents on record along with the impugned judgments and record and proceedings and the judgments cited supra.

9. It is significant to note that this Court, vide order dated 06.09.2021, has formulated following substantial questions of law while admitting the appeal.

- (I) Whether the Judgment of the First Appellate Court is complying with the requirements of Section 96 and Order XLI Rule 31 of the Code of Civil Procedure ?
- (II) Whether the learned Trial Judge was justified in ignoring the pleadings of the legal representatives of defendant No.1 while considering issue Nos. 4 and 5 before it ?
- (III) Whether the plaintiff was legally wedded wife of deceased Lotansing ?
- (IV) Whether the order of the First Appellate Court in allowing the appellants before him to join the daughters of plaintiff in the original suit as additional plaintiffs and refusing to give a chance to the defendants to file additional written statement requires matter to be remanded ?
- (V) Whether the claim of partition of two daughters of the plaintiff could relate back to the date of the suit and make the suit within limitation as against them ?
- (VI) Whether the suit could have proceeded without joining necessary parties before the Trial Court ?
- (VII) Whether the Courts were justified in carving out share

of the plaintiffs in house properties as well as Gat No. 208, when no such prayer was made in the plaint ?

10. However, on going through the record, the substantial questions of law at Serial No. (IV) and (V) appears unnecessary whereas substantial question of law at Sr. No. (VII) needs no a consideration, as the plaintiff has already made prayer in the plaint for partition of house properties as well as Gut No. 208. Thus, there remains only substantial questions of law at Sr. Nos. 1 to 3 and 6.

11. So far as substantial question of law at Sr. No.(III) is concerned, the plaintiff is claiming herself as legally wedded wife of deceased Lotansing. Admittedly, original defendant No.1 and the present appellants have challenged such contention by claiming that she was not wife of deceased Lotansing. However, it appears that the learned trial Court as well as the learned First Appellate Court have considered the litigation between respondent No.1 plaintiff and her husband Lotansing for grant of maintenance vide Misc. Criminal Application No. 32 of 1979. Moreover, the deceased Lotansing had even filed Criminal Revision Application No. 172 of 1981 against the order of maintenance granted to his wife i.e. the present respondent No.1/plaintiff. It is significant to note that deceased Lotansing himself had not denied his relationship

with the plaintiff being his wife. Thus, in view of such concurrent findings which is based on the documentary evidence, it cannot be a substantial question of law in this appeal as it is successfully answered by both the learned Courts below.

12. So far as second substantial question of law is concerned, the learned counsel for the appellants has submitted that the learned trial judge did not consider the pleading in the additional written statement of present appellants and decided issue Nos. 4 and 5 erroneously. He also placed reliance on the judgment in the case of **Vidyawati Vs. Mn Mohan and others** (supra) wherein it is observed that the legal heirs of the petitioner are having independent right, title and interest in the properties and therefore, can set up their own right, title and interest. He also relied on the observations of this Court in the case of **Subhash Dhanraj Sankla Vs. Kaikhushroo @ Keki Phirozen Noble(since deceased) through his Heirs and L.Rs. Mrs Zubil P. Noble Dennis** wherein it is observed that order permitting defendants to file written statement pleading their title to suit property, not erroneous.

13. It is significant to note that in the instant matter, the

appellants being the legal representatives of original defendant No.1 Manga had filed their written statement additionally after the death of Manga and thereby claimed that land Gut No. 3 out of suit land was the self acquired property of Manga and Gut No 199 and 208 were received by deceased Manga exclusively for his services of providing water to the cattle in the village. The learned trial Courts appears to have discarded this contention mainly because deceased Manga had not come with such case in his written statement filed during his lifetime at (Exh.13). However, on going through the judgment of the learned trial Court, this is not the only the reason for refusing such contention of the appellants, but the learned trial court has specifically observed that even otherwise also there was no evidence to establish that the land Gut No.3 was self acquired property of deceased Manga and land Gut Nos. 199 and 208 were given to him as Inam land. Thus, the learned trial Court has discarded the aforesaid contention of the appellants as there was no evidence on record to support the same. Even otherwise also, the 7/12 extracts filed on record are showing that the name of Manga was entered into the record of rights of the suit lands only as a Manager of joint family properties and not exclusively. Therefore, this substantial question of law also does not appear to be involved

in this appeal as being successfully answered by the both the learned Courts below on the basis of evidence. Thus, the aforesaid citations are not helpful to the appellants.

14. Now let us come to the substantial question of law at Sr. No. 6 in respect of suit being bad for want of joining necessary parties. Both the learned Courts below have given concurrent findings that suit of the plaintiff is not bad for non joinder of the necessary parties. While discussing the same the learned trial Court has observed that all the legal representatives of Bhoju Kirshna Rajput from whom the parties are claiming their rights are joined in the suit and though Bhavanbai died, but her son Daulat is already defendant No.4 and therefore, he can represent the interest of Bhavanbai. Further, in the share of the plaintiff the share of her two daughters is also inclusive. The necessary party is the one without whose inclusion the dispute cannot be decided. Here in this case, the relationship between the parties is not in dispute. Moreover, the relation of the plaintiff with her deceased husband Lotansing is also established on the basis of evidence. Therefore, even if certain children of some of the parties are missing, but the without their inclusion also, the shares of all the parties can be decided. Therefore, this substantial question of law is also answered satisfactorily by both the learned Courts below.

15. The learned counsel for the appellants vehemently argued that the judgment of the learned First Appellate Court is hit by Order XLI Rule 31 of the Code of Civil Procedure, as it is without any discussion regarding the evidence on record and therefore, the matter needs to be remanded back for fresh consideration at the hands of learned First Appellate Court. On going through the judgment of learned First Appellate court, it is evident that the learned First Appellate Court has already framed all the points involving the issues framed by the learned trial Court. Moreover, the challenge to relationship between respondent No.1/plaintiff and Lotansing as that of husband and wife, is also considered in detail. It is to be noted here that in the partition suit if the relationship between the parties and the nature of suit properties being joint family properties is established, then the decree for partition is bound to follow. In the instant case, though the learned First Appellate Court has dealt point Nos. 2 to 7 without elaborate discussion, but it has already confirmed the findings of learned trial Court which are based on evidence on record. Therefore, it cannot be said that the judgment of learned First Appellate Court does not comply the requirements under Section 96 of the Code of Civil Procedure and Order XLI Rule 31 of the Code of Civil Procedure. Therefore, considering all

these aspects, some of the substantial questions of law as discussed above are already answered satisfactorily by both the learned Courts below on the basis of evidence and some of them are not at all involved in the present appeal. As such, considering the concurrent findings of both the learned Courts below, no substance is found in the present Second Appeal and accordingly it stands dismissed along with the pending Civil Applications, if any.

(SANDIPKUMAR C. MORE, J.)

Y.S. Kulkarni/