



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 691 OF 2019 WITH CA/15321/2019

1. Pandurang Arjun Wadavkar
(Since deceased)
 2. Sau. Tulsabai Pandurang Wadavkar,
Age: 75 years, Occ: Household,
R/o. Wadavkar Vasti, Velu Road,
Shrigonda, Tq. Shrigonda,
Dist. Ahmednagar
 3. Sau. Shakuntala Dnyandev Auti,
Age 57 years, Occ. Household,
As above
 4. Dnyandev Sitaram Auti,
(Since deceased, through his L.R.s)
 - 4A. Shivaji Dnyandev Auti,
Age 32 years, Occ. Agriculture,
R/o. Wadavkar Vasti, Velu Road,
Shrigonda, Tq. Shrigonda,
Dist. Ahmednagar
 - 4B. Balasaheb Dnyandev Auti,
Age 29 years, Occ. Agriculture,
As above
 - 4C. Manisha Ramdas Labade,
Age 27 years, Occ. Household,
R.o. C/o. Ramdas Mathurdas Labade
At and post. Belvandi (Bk),
Tq. Shrigonda, Dist. Ahmednagar
- ...Appellants**
(Orig. Defendants)

Versus

- Smt. Alkabai Dattatraya Auti,
Age 58 years, Occ. Household,
R/o. Velu, Tq. Shrigonda,
Dist. Ahmednagar
- ...Respondent**
(Orig. Plaintiff)

...
Mr. A. D. Sonkawade h/f Mr. A. V. Hon, Advocate for
Appellants

Mr. U. S. Palsikar, Advocate for Respondent

...

CORAM : R.M. JOSHI, J
RESERVED ON : JANUARY 09, 2024
PRONOUNCED ON : JANUARY 19, 2024

JUDGMENT :

1. This Appeal filed under Section 100 of Code of Civil Procedure takes exception to the judgment and decree dated 13.07.2018 passed by First Appellate Court in RCA No. 695/2012 dismissing the Appeal and confirming the judgment and decree dated 08.11.2012 passed by trial Court in RCS No. 260/2003 whereby the suit filed by the Plaintiff for partition and separate possession in respect of her share in the suit property came to be allowed.

2. The facts which led to the filing of the present Appeal can be narrated in short as under:

Plaintiff filed suit for partition and separation of possession of the agricultural land bearing block nos. 1961/2, 1961/5 and 2069 to the extent of 95R situated at Tq. Shrigonda against her parents, real sister and her husband. It is the case of

the Plaintiff that the suit properties are ancestral joint family properties of Plaintiff and Defendants. It is claimed that Plaintiff and defendant no. 3 are married, however, due to differences with her husband Plaintiff is residing at her parental home. Defendant Nos. 3 and 4 are also residing along with them. It is further claimed that out of suit properties Gut Nos. 1961 after death of Arjun, property came into the share of Defendant No. 1 i.e., father of Plaintiff. The suit property is now known as Gut Nos. 1961/2 and 1961/5. Similarly, Gut No. 2069 also came to the share of Defendant No. 2 pursuant to mutation entry no. 5749. It is claimed that since then Plaintiff and Defendants are jointly cultivating suit properties. According to Plaintiff, in order to grab property, Defendant Nos. 3 and 4 by pressurizing parents of the Plaintiff mutated some part of Gut No.1961 in their name without any right therein. Plaintiff has asked for the partition but the defendants denied parties and hence, suit came to be filed.

3. Defendant Nos. 1 to 4 filed written statement at Exh. 17 and except for the relationship between the

parties, rest of the contentions of Plaintiff was denied. It was the case of the defendants that suit came to be filed and in the said suit Gut No. 2070, 40 R land came to the share of defendant no. 1. It is also claimed by these defendants that Plaintiff was married prior to 22 years. It is claimed that husband of the Plaintiff has land at Shrigonda. There is allegation that Plaintiff was in illicit relation and hence, to avoid disrepute to the family of the Plaintiff, she came to the parental home. It is further case of these defendants that Defendant No. 1 had two brothers namely Zhumbar and Shrirang during the lifetime of their father Arjun there was a partition of suit properties between the brothers and accordingly, they were cultivating the land, however, no entries were taken in respect of the same in the revenue record. Since, some dispute arose between them, suit came to be filed bearing no. 265/2003 for partition and injunction. The said suit was decreed pursuant to the compromise between parties. It is the case of Defendant Nos. 1 and 2 that they treat Defendant No. 4 as their adopted son and hence, land was transferred in the name of Defendant Nos. 3 and 4.

4. Learned Trial Court framed issues including issue as to the effect of decree passed in RCS No. 265/2003. On the basis of evidence on record, issues were decided in favour of the Plaintiff and suit for partition was decreed. The said judgment and decree was unsuccessfully challenged in RCA No. 695/2012. The First Appellate Court also went through the pleadings of the parties, evidence on record and also considered the judgment and decree passed by the trial Court and confirmed the decree with modification in respect of shares determined by the trial Court.

5. Learned Counsel for Defendants submit that both the Courts below committed error in not taking into consideration the provisions of Maharashtra amendment of 1994 by addition of Section 29 A to Hindu Succession Act. It is his contention that since Plaintiff was already married and as such, by virtue of said amendment, she had no right in the ancestral properties. Apart from this, it is submitted that in absence of challenge to the decree passed in RCS No. 265/2003 it was not open for the Courts below to hold that the decree is not binding on the Plaintiff. It is

also submitted that as the partition was effected by virtue of decree amended provisions of Section 6 of Hindu Succession Act have no application to the present case. He placed reliance on following judgments : *Kenchegowda V. Siddegowda alias Motegowda, (1994) 4 SCC 294* & *Sneh Gupta V. Devi Sarup and Others, (2009) 6 SCC 194.*

6. Learned Counsel for Plaintiff opposed the said contention by stating that admittedly Plaintiff was not party to the suit for partition filed in collusion by Defendants and others. It is submitted that after receipt of summons of the present suit, the said suit came to be filed excluding the Plaintiff. It is further his submission that if it is the case of the defendant that there was earlier partition, i.e., during the lifetime of their father Arjun question of filing of any suit for partition does not arise. It is submitted that decree obtained by fraud and collusion is no decree in the eyes of law and as such, decree can be challenged even in a collateral proceeding. It is submitted that defendant no. 3 was also married at the relevant time and as such, question of discrimination

between two daughters does not arise. It is submitted that amendment of 2005 to Section 6 of Hindu Succession Act, squarely applies to the present case, as the suit was pending decision at time of coming into force of amended provision. To support his submissions, reference is made to following judgments: Babu s/o. Jyotiram Jadhav and Others. Vs. Muktabai w/o. Wamanrao Somwanshi, 2021 DGLS (Bom.) 1740 & Vineeta Sharma v. Rakesh Sharma and Others, AIR 2020 SC 3717.

7. In order to appreciate rival submissions, it is necessary to take into consideration certain relevant facts.

Suit properties are ancestral properties originally owned by his father Arjun. According to Defendants they were partitioned during his lifetime between his sons. Suit properties came to the share of Defendant No. 1. Plaintiff and Defendant No. 3 are daughters of Defendant No. 1. Both married prior to 1994. Plaintiff admitted this fact in her evidence whereas in the cross-examination Defendant No. 3 has claimed that prior to 20 years before recording of her evidence she was married to Defendant No. 4. The said

evidence was recorded on 23.02.2012. Thus, marriage of Defendant No. 3 also relates back to period prior to year 1994. Defendant No. 3 in her evidence has candidly admitted that Plaintiff has share in her father's (Defendant No. 1) property, which was denied to her.

8. In the written statement Defendants never challenged right of Plaintiff to get partition of the suit properties on the ground that she was married prior to 1994 and hence, in view of Maharashtra Amendment with introduction of Section 29A to the Hindu Succession Act, she is not entitled to seek share in the ancestral properties. This issue is not pure question of law but is mixed question of fact and law. If such issue was raised, it would have been incumbent on the part of the Trial Court to decide the rights of Plaintiff and Defendant No. 3 in the context of their marriage and Plaintiff could have shown her right in parity to Defendant No. 1. Having not raised the said issue in the written statement, now it is not open for the Defendants to seek aid of Section 29A to deny right of Plaintiff to get share in ancestral properties, particularly, in view of amendment to Section 6 of the

Act. In any case, both Plaintiff and Defendant No. 3 stood on the same footing as both were married prior to 1994. Hence, even otherwise there could be no reason or justification for discriminating against Plaintiff.

9. During the pendency of present suit being RCS No. 265/2003 came to be filed by Defendants excluding Plaintiffs and decree is obtained therein behind back of the Plaintiff. Record indicates that filing of the suit being RCS No. 265/2003 aimed at frustrating the claim of the Plaintiff seeking share in the ancestral properties. In RCS No. 265/2003 Defendant No. 4 who is not the member of joint family and had no right in the ancestral properties was made Defendant and the property to share of the Defendant No. 1 herein was allotted to him. It is sought to be contended by Defendant No. 1 that he treated Defendant No. 4 as his son. In the next breath contention is raised he being adopted. Admittedly, Defendant No. 4 is not biological son or even adopted son of Defendant Nos. 1 and 2. There is absolutely no evidence on record to hold that he was ever adopted as son by Defendant Nos. 1 and 2 in order to create any right of whatsoever nature in his

favour in respect of the ancestral properties. Giving of share to defendant No. 4 by way of compromise decree is one of major circumstance indicating fraud played upon the Court.

10. Trial Court has held that for want of being party to the suit, decree passed in RCS No. 265/2003 is not binding on Plaintiff. It is trite law that decree which is obtained by fraud is nullity and as such, it was not necessary for Plaintiff to challenge the same independently and exception to the same could be taken in the present proceeding. On the basis of contentions raised by Defendants in written statement the issue to the effect of compromise decree passed in RCS No. 265/2003 was rightly framed and answered by the trial Court holding that the same does not bind affect the rights of Plaintiff.

11. Defendant No. 3 also claims absolute right in the properties came to her share pursuant to compromise decree by taking aid of Section 14 of Hindu Succession Act. No doubt a property legitimately come to Hindu women becomes her absolute property. However, pre-condition thereof would be that such property must come

to her lawfully. As held by the First Appellate Court that said acquisition is not lawful being obtained under compromise decree by playing fraud, this defendant is not entitled to seek plea of absolute ownership under Section 14 of Hindu Succession Act.

12. It is sought to be contended by learned Counsel for the Defendants that right of Plaintiff in suit property got extinguished in view of Maharashtra amendment of 1994 (Section 29A) and in view of decree passed in RCS No. 265/2003, amendment to Section 6 of Hindu Succession Act, does not apply to present case. Considering the fact that the suit bearing RCS No. 265/2003 was filed for the partition and separate possession of the ancestral properties, meaning thereby, admittedly as on the day of filing of the present suit, properties were not partitioned and its status remained as ancestral properties only. Present suit came to be decided on 08.11.2012. The amendment to Section 6 of Hindu Succession Act came into effect from 05th September, 2005. As held by Hon'ble Apex Court in case of Vineeta Sharma (supra) the provisions contained in substituted Section 6 of Hindu Succession Act

confers status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities. It is further held therein that provisions of said substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal. Thus, there is no impediment in applying the amended provisions of Section 6 of Hindu Marriage Act to the present case, since the suit filed by the Plaintiff was pending for decision and even no preliminary decree was passed therein.

13. Since this appeal is filed under Section 100 of Code of Civil Procedure, this Court cannot entertain the same unless substantial question of law is involved therein. Now what is substantial question of law is well settled to say that question of law must be debatable, not settled earlier by any binding precedent and it must have material bearing on the decision of the case or rights of parties before it, if decided either way. In the instant case, law applicable is

fairly settled by binding precedents and this Court finds no perversity in the findings of facts recorded by both Courts.

14. In view of above discussion, this Court finds no perversity in the impugned judgment and decrees. The concurrent findings recorded by both Courts do not deserve interference for want of involvement of any substantial question of law in this Appeal. Hence, appeal stands dismissed. Pending applications are also disposed of.

(R. M. JOSHI, J.)

After pronouncement:

1. Learned Counsel for the Appellants seek extension of interim relief by four weeks to approach the Hon'ble Apex Court.

2. Learned Counsel for Respondents opposed the said request by contending that the Plaintiff is denied her right since year 2003.

3. There is no dispute made about the fact that the decree passed by trial Court was stayed during the

pendency of First Appeal. Similarly status quo was directed to be maintained during this Second Appeal. Hence, in the interest of justice, order of status quo to continue for four weeks from today.

(R. M. JOSHI, J.)

Malani