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

**SECOND APPEAL NO. 61 OF 2020
WITH C.A. NO. 11869 OF 2019**

**GOKUL RAMBHAU HARKAL MINOR H/G. RAMA ASHROBA HARKAL
AND ANOTHER
VERSUS
SITABAI ASHROBA HARKAL AND OTHES.**

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Mr. PN. Kalani, Advocate for appellants
Mr. D.A. Mane h/f. Mr. Milind Patil, Advocate for respondent Nos. 1 to 4
Mr. S.M. Sunjal Advocat for respondent Nos. 5A to 5G

CORAM :S.G. CHAPALGAONKAR, J.

DATE : 18th December, 2024.

P.C. :-

1. The appellant/original defendant Nos. 12 and 13 impugn the judgment and order dated 2.11.2018 passed by the District Judge, Parbhani in R.C.A. No. 88 of 2012, thereby upholding the judgment and decree dated 19.3.2012 passed by the Civil Judge (J.D.), Pathri in R.C.S. No. 39 of 2011
2. For the sake of convenience, parties hereinafter are referred to as per their original status.
3. Respondent Nos. 1 to 4/plaintiffs filed R.C.S. No. 39 of 2011 seeking a decree of partition, separate possession and perpetual injunction in respect of the suit properties. Plaintiffs contend that Gat No. 431 situated at Village Babhalgaon is the ancestral property and

plaintiffs and defendants are entitled for share. Initially, Dadarao Harkal was the owner of suit property. Ashroba was his son. Plaintiff No.1 is wife of Ashroba and Plaintiffs Nos. 2 to 4 are his sons. Defendant No.13 is the son of second wife of Ashroba. Defendants refused to allot share to the plaintiffs and indulged in creating third party interests. Hence, cause of action arose to file the suit.

4. Defendants refuted plaintiff's claim. Although there is no dispute as regards to the relationship, they denied that suit properties are ancestral properties or joint Hindu family properties. According to defendant No.1 he purchased Gat No. 103 from his own funds and Ashroba has no concern with the said property. Appellants/defendants also contend that, in fact, plaintiff No.1 Sitabai was second wife of Ashroba and defendant Nos. 12 and 13 are born from Sumanbai i.e. first wife of Ashroba. As such, plaintiffs have no right in the suit property.

5. The trial court framed issues based on pleadings of the parties. Parties led their oral as well as documentary evidence. Finally, the trial court concluded that plaintiff Nos. 2 to 4 are entitled for 1/4th share each in Gat No. 103 situated at Village Limba and injuncted defendant Nos. 12 and 13 from alienating or creating any third party interest in the suit property. Aggrieved defendant Nos. 12 and 13 preferred R.C.A. No. 88 of 2012 before the District Judge at Parbhani. Same has been dismissed, upholding judgment of trial court. Hence, this second appeal.

6. Mr. P.N. Kalani, learned advocate appearing for the appellants vehemently submits that the plaintiff Sitabai is second wife of Ashroba. Plaintiff Nos. 2 to 4 are the daughters born out of second

marriage, whereas, defendant Nos. 12 and 13 are the sons born from first wife Sumanbai. This aspect is conveniently ignored by courts below. Plaintiffs have no legal right to claim partition in the suit property. Mr. Kalani would submit that neither trial court framed necessary issues in tune with Order 14 of CPC, nor had appellate court framed points for consideration in tune with Rule 33 of order 41. According to him, serious prejudice is caused to rights of appellants due to jurisdictional error committed by the courts below. He would further submit that evidence recorded on behalf of defendants has been completely ignored by both the courts below on crucial aspect. Defendants have examined three witnesses, who have categorically stated that Sitabai is second wife of Ashroba, however, courts below ignored aforesaid evidence. Accordingly, he submits that the decree passed by trial court and confirmed by appellate court is liable to be quashed and set aside.

7. Per contra, Mr. D.A. Mane, learned advocate appearing for respondent Nos. 1 to 4 supports the impugned judgments passed by court below.

8. Pertinently, there is no dispute as regards to the relationship between the parties. Plaintiff No.1 is wife of Ashroba. Plaintiff Nos. 2 to 4 are daughters born to Plaintiff No.1 Sitabai. Defendant Nos. 12 and 13 are claiming to be legal heirs from Sumanbai i.e. alleged first wife of Ashroba. Plaintiff Sitabai stepped into witness box and deposed that Ashroba had first wife namely, Ansabai and she is second wife of Ashroba, whereas, Sumanbai is third wife. The statement of plaintiff Sitabai is not challenged. No suggestion is put denying that Ashroba had first wife, namely, Ansabai. In para. No. 13 of the cross examination, only suggestion is put to plaintiff that she is not first wife. Plaintiff No.1

denied suggestion that Sumanbai is first wife of Ashroba. Plaintiffs have further examined Dattarao Harkal as P.W.-2 who states that Sitabai was first wife of Ashroba and Sumanbai is his second wife. He further clarifies that since Sitabai had begotten 3 daughters, Ashroba performed marriage with Sumanbai. He denied suggestion that Sumanbai is first wife of Ashroba. Similar version is reiterated by witness Eknath Manere – P.W.3.

9. It is true that defendant's witnesses, namely, Namdeo Harkal and Kundlik Giram states that Sumanbai is first wife of of Ashroba, however, during cross-examination both the witnesses failed to give details about the date, year of marriage or any other particular, by which inference can be drawn that marriage of Ashroba with Sumanbai was earlier than marriage with Sitabai.

10. Although Mr. Kalani argued that appropriate issues and points for consideration were not framed by the courts below, it is a matter of record that parties have led evidence on crucial aspects of the matter knowing the issues involved. It is not their case that they were deprived or put to disadvantageous situation for non framing of a particular issue. As such, no prejudice can be said to be caused to appellants on account of the procedural lacunae posed in this second appeal.

10. Both the courts have recorded concurrent finding and concluded that plaintiff and defendants would be entitled for equal share in the suit property. If parties have failed to lead acceptable evidence on a particular point then court has to draw necessary inference. In present case, there is no convincing material by which plaintiff No.1 can be declared as second wife of Ashroba. Court cannot be oblivious that

declaration of status of plaintiff No.1 as second wife would not only disentitle her children from claiming right in the ancestral property but plaintiff No.1 would be treated as illegitimate wife. Therefore, in absence of cogent evidence, court would be slow in accepting the case of defendants that would put the plaintiffs to disadvantageous situation. In present case, merely there is oath against oath. It is trite that one who asserts a fact must prove. When defendants have taken plea that plaintiff No.1 is second wife of Ashroba, then it was their burden to prove the said fact, which they failed to discharge. Consequently, no case for interference is made out in second appeal. No substantial question of law arise for consideration. Hence, second appeal sans merit stands dismissed. Civil Application No. 11869 of 2019 stands disposed of.

[S.G. CHAPALGAONKAR, J]

At this stage Mr. Kalani, learned advocate for appellants seeks continuation of interim protection that was granted in the second appeal.

For the reasons stated in the order, since matter is arising out of concurrent finding of fact, request for continuation of interim relief stands rejected.

grt/-