

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.111 OF 2021
WITH
INTERIM APPLICATION NO.233 OF 2021
IN
SECOND APPEAL NO.111 OF 2021**

Shobha Shivaji Ugale

....Appellant/Applicant

V/S

1 Sanjay Tukaram Dhumane

2 Bhaskar Tukaram Dhumane

**Both residing at Flat No.3,
Dhumane Niwas, Savarkarnagar
Jail Road, Nashik Road,
Nashik - 422 013.**

3 Kailas Khanderao Wagh

4 Vatsala Shankar Dhumane

**Nos.3 and 4 residing at Chinchkhed
Taluka Dindori, District Nashik.**

5 Tarabai Tukaram Dhumane

**Sawarkarnagar, Jail Road,
Nashik Road, Nashik - 422 013.**

6 Bebitai Tanaji Sonawane

Sonawane Vasti, Sinnar Phata,

Nashik Road, Nashik - 422 013.

....Respondents

Mr. Ketan Dhavle *for the Appellant/Applicant.*

Mr. Vinayak R. Kumbhar *for Respondents.*

CORAM: SANDEEP V. MARNE, J.

DATE : MARCH 6, 2024.

ORAL ORDER:

1 By the present Second Appeal the Appellant challenges judgment and decree dated 21 March 2020 passed by the District Judge-6, Nashik in Regular Civil Appeal No.34 of 2018 by which the First Appellate Court, while dismissing the Appellant's Appeal, has modified the decree passed by the Trial Court by reducing the share of Appellant from 1/5th to 1/20th in properties described in paragraphs 9C and 9D of the Counter Claim.

2 Appellant's brothers Sanjay Tukaram Dhumane and Bhaskar Tukaram Dhumane instituted Regular Civil Suit No.64 of 2001 seeking injunction as well as declaration that mutation entry No.1477 does not create any rights in favour of Defendants. Defendant No.1 appeared in the suit and in addition to filing a Written Statement, she also filed a

Counter-Claim seeking a declaration that she is the exclusive owner in respect of the property described in paragraph 9D of the Counter Claim. She also sought share in respect of the remaining suit properties described in the plaint. The Trial Court partly decreed the Counter-Claim of the Appellant. It rejected Appellant's prayer for declaration of ownership and injunction in respect of property described in paragraph 9D of the Counter-Claim. However the Trial Court proceeded to grant $1/5^{\text{th}}$ share each to Plaintiff Nos.1 and 2 and Defendant Nos.1, 4 and 5 in property described in paragraphs 9C and 9D of the Counter-Claim.

3 The Appellant got aggrieved by refusal of declaration and injunction in respect of property described in paragraph 9D of the Counter-Claim and filed Regular Civil Appeal No.34 of 2018. Far from providing any solace to the Appellant, the First Appellate Court not just dismissed Appellant's Appeal but further reduced her share in properties described in paragraphs 9C and 9D of the Counter-Claim from $1/5^{\text{th}}$ to $1/20^{\text{th}}$.

4 I have heard Mr. Dhavle, the learned Counsel appearing for the Appellant. The main grouse of the Appellant is about refusal of declaratory relief in respect of her exclusive ownership in respect of

property described in paragraph 9D of the Counter-Claim. The claim of ownership in respect of the property described in paragraph 9D of the Counter-Claim was premised on previous partition between the parties. I have gone through the findings recorded by the Trial Court with regard to the claim of the Appellant about prior partition in paragraph 17 of the Trial Court's judgment. Admittedly the Appellant was not a signatory to the application filed before the Tahasildar seeking partition of the property. It appears that mutation entry No.1477 was erroneously effected though the Appellant was not even signatory to the application for partition. In my view therefore the Trial Court has rightly arrived at a conclusion that the Appellant did not become exclusive owner in respect of the property described in paragraph 9D of the Counter Claim. No fault therefore can be found in the decree of the Trial Court refusing declaration and injunction in respect of property described in paragraph 9D of the Counter-Claim. The Second Appeal to this extent must fail.

5 This leaves the second aspect about reduction of Appellant's share in properties described in paragraphs 9C and 9D of the Counter-Claim from 1/5th to 1/20th. The same is done by the First Appellate Court by relying on the judgment of the Apex Court in ***Prakash & Ors. Vs. Phulavati & Ors.*** AIR 2016 SC 769. In my view the Appeal needs to be admitted on this issue in the light of the judgment of the Apex Court in

Vineeta Sharma vs. Rakesh Sharma, (2020) 9 SCC 1. Accordingly the Second Appeal is admitted and following substantial question of law arises in the Appeal:

i) Whether a daughter whose father is not living on the date of incorporation of 2005 amendment to the Hindu Succession Act would be entitled to share in respect of the ancestral property?

6 After formulation of the substantial question of law, the learned counsel appearing for parties would agree that since the issue is already covered by the judgment of the Apex Court in ***Vineeta Sharma*** (supra), the Second Appeal can be taken up for hearing. Accordingly, Second Appeal is taken up for final hearing with consent of the learned counsel appearing for parties and the learned counsel appearing for parties have been heard on the substantial question of law formulated above.

7 In ***Vineeta Sharma*** (supra) the Apex Court has held that a daughter born before the date of enforcement of the 2005 amendment to the Hindu Succession Act has same rights as a daughter born on or after the amendment. It is further held that if daughter is alive on the date of enforcement of Amendment Act, 2005 i.e. on 9 September 2005, she becomes a co-parcener with effect from the date of the said amendment. In paragraph 139 of the judgment the Apex Court has overruled its judgment in ***Prakash vs. Phulavati*** (supra), on which the First

Appellate Court has relied upon while reducing the share of the Appellant in properties described in paragraphs 9C and 9D of the Counter Claim.

8 Consequently the Second Appeal partly succeeds. The judgment and decree dated 21 March 2020 passed by the First Appellate Court in Regular Civil Appeal No.34 of 2018 is set aside to the limited extent of reduction of the share of the Appellant from $1/5^{\text{th}}$ to $1/20^{\text{th}}$ in properties described in paragraphs 9C and 9D of the Counter-Claim. It is declared that the Plaintiff Nos.1 and 2 as well as Defendant Nos.1, 4 and 5 shall each have $1/5^{\text{th}}$ share in properties described in paragraphs 9C and 9D of the Counter Claim. In respect of all other prayers of the Appellant, the Second Appeal shall stand dismissed.

9 This Court has already clarified by order dated 4 February 2021 that all steps taken in execution application shall be subject to the outcome of the Second Appeal, accordingly if any action is taken towards execution of the decree, which is contrary to the declaration given in the present order, the same is required to be reversed in tune with the declaration made in the present order.

10 With the above directions, the Second Appeal is **partly allowed**.
Decree be drawn up accordingly. The parties shall bear their own costs.

(SANDEEP V. MARNE, J.)

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signed by
SUDARSHAN
RAJALINGAM
KATKAM
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