



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 673 OF 2018
WITH
CIVIL APPLICATION NO.1511 OF 2018

Kusum Savala Ramoshi

... Appellant.

Versus

Rajendra Kerba Bagal

... Respondent.

Mr. Mahesh Rawool i/by Mr. Avinash B. Avhad, for the Appellant.
Mr. Rahul S. Kadam, for the Respondent No.1.

Coram : Sharmila U. Deshmukh, J.

Date : March 12, 2024.

ORDER :

1. Being dissatisfied by the judgment dated 28th July, 2017 passed by the Appellate Court in Civil Appeal No.3 of 2011 allowing the Appeal and setting aside the judgment dated 7th December, 2010 dismissing the Regular Civil Suit No.191 of 1998 and partly decreeing the suit, the original-Defendant Nos.1 to 3 are before this Court. For the sake of convenience, the parties are referred to by their status before the trial Court.

2. Regular Civil Suit No.191 of 1998 was preferred by the plaintiff, who was a purchaser of share of the Defendant No.8 in the ancestral

property bearing Survey No.607/1 admeasuring 2 Acre 30 Gunthas being in her possession under a family arrangement. The suit was filed for partition and separate possession of 1/3rd share of the Defendant No.8. It was pleaded that by registered sale-deed dated 6th April, 1991, the Defendant No.8 has alienated part of Gat No.607/1 in favour of the Plaintiff and put the Plaintiff in possession of the said property.

3. It was pleaded that the Defendant No.4 and deceased-Savla who were the brothers-in-law of the Defendant No.8 alongwith one Ramchandra, who belongs to the other branch of the family alienated property bearing Gat No.425 to the exclusion of the Defendant No.8, who had 1/3rd share in the said property. In lieu of her share in Gat No.425 by way of family arrangement an area of 2 Acre 30 Gunthas out of Gat No.607 was handed over to the Defendant No.8. Out of the Gat No.607, the Defendant No.4 sold 1 Acre land to the Defendant No.5 by registered sale-deed dated 19th October, 1981, to which objection was taken by the Defendant No.8. The Defendant No.8 had instituted Regular Civil Suit No.249 of 1990 seeking partition and during the pendency of the said proceedings, the registered sale-deed was executed in favour of the plaintiff on 6th April, 1991. It was contended that during the pendency of Regular Civil Suit No.249 of 1990, the Defendant No.8 in collusion with the Defendant Nos.1 to 4,

again sold the property forming part of the registered sale-deed dated 6th April, 1991 in favour of the Defendant No.7 by sale-deed dated 2nd November, 1996. In view of the collusion between the parties, the Defendant No.1 did not appear in Regular Civil Suit No.249 of 1990 and the same came to be dismissed. In the said Regular Civil Suit No.249 of 1990, the plaintiff had filed a counter claim which was not accepted by the Court. It was pleaded that the branch of Ramchandra has separated from the branch of Kesharbai and as such, the branch of Ramchandra was not made a party to the proceedings.

4. The suit came to be resisted by the Defendant Nos.2 to 7. It was contended that the Defendant No.8 was not the wife of the brother of the Defendant No.4 and as such, the Defendant No.8 did not have 1/3rd right in the suit property. Without prejudice to the said pleading, it was contended that even if the Defendant No.8 was the wife of Dagdu i.e. brother of the Defendant No.4, the said Dagdu expired prior to the year 1956 and as such, the Defendant No.8 had no right in the suit property.

5. The parties went to trial and the trial Court vide judgment dated 7th December, 2010 dismissed the suit. As against this Civil Appeal No.3 of 2011 was filed by the plaintiff. The Appellate Court

allowed the Appeal and partly decreed the suit and passed the following order:

“ORDER

- 1] *Appeal is allowed.*
- 2] *Judgment and decree passed by the Ld.Trial Court in R.C.S. No.191/1998 is hereby set-aside and following order is passed :*
 - a. *Suit is partly decreed.*
 - b. *It is hereby declared that the plaintiff is having 1/3rd undivided share, defendant No.1 to 3 are having 1/9th undivided share, each respectively, and defendant No.4 is having 1/3rd undivided share in the suit property i.e. gat No.607/1, area admeasuring 2 H 44 R land, four boundaries of which are :*

Towards East : Gat No.607/2

Towards West : Gat No.634

Towards North : Gat No.637

Towards South : Gat No.603

accordingly partition be effected between the plaintiff and the defendant No.1 to 5. It is made clear that the defendant No.5 i.e. Mahadeo Gopinath Kokare will get his undivided share of 1 acre of land from gat No.607/1 as above, from the 1/3rd undivided share of defendant No.4 Dnyandeo Bhau Ramoshi. Accordingly, partition be effected and the parties be put into their respective share and possession as above.
 - c. *Issue precept U/s 54 of C.P.C. to the District Collector, Pune to get the partition effected through himself or any subordinate officer deputed on his behalf.*
 - d. *It is hereby declared that the sale-deed executed by defendant No.4 Dnyandeo Bhau Ramoshi in favour of*

defendant No.5 Mahadeo Gopinath Kokare of 1 acre of land in gat No.607/1 as above is not binding on the undivided share of the plaintiff in the suit property. It is further declared that the sale-deed executed by defendant No.8 Kesharbai in favour of defendant No.7 Hanumant Gopinath Kokare of dated 2/11/1996 in respect of gat No.607/1 as above is not binding on the undivided share of the plaintiff in the suit property as above.

e. The defendants do bear their own cost of the suit and appeal and defendant No.1 to 4 do pay the cost of the suit and appeal to the plaintiff.

3] Preliminary decree be drawn up accordingly.

4] Inform the Trial Court accordingly.

5] Record and proceeding of R.C.S. No.191/1998 be send to the Trial Court."

6. Heard Mr. Mahesh Rawool, learned counsel for the Appellant and Mr. Rahul S. Kadam, learned counsel for the Respondent No.1.

7. Mr. Rawool, learned counsel for the Appellant would submit that the substantial question of law arising is the case of the plaintiff that the property was the joint family property of the branch of the Defendant No.4 and Ramchandra and that there was no partition and therefore the suit was not maintainable without joining Ramchandra as a party. He has taken this Court through the pleadings of the plaint in that respect and would contend that Ramchandra was necessary party. He further submits that the plaintiff had filed a counter claim in Regular Civil Suit No.249 of 1990 filed by the Defendant No.8 and

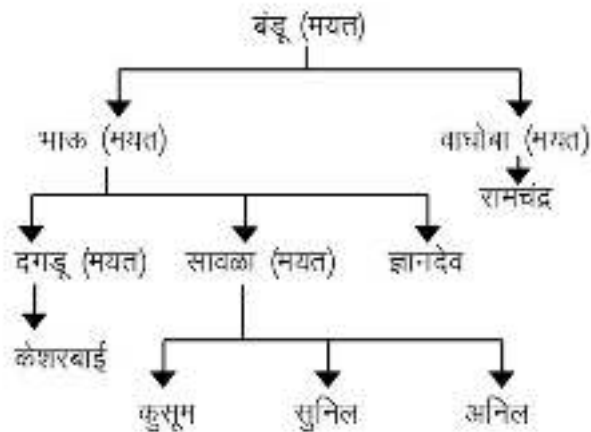
considering the provisions of Order VIII Rule 6-A and Order XXIII Rule 1(4) of the Code of Civil Procedure, 1908, in view of the earlier counter claim, the present suit was not maintainable. He further submits that the husband of the Defendant No.8 having expired prior to the year 1956, the Defendant No.8 had no right in the ancestral properties before the coming into force of the Hindu Succession Act, 1956 and as such, the plaintiff being the purchaser of undivided interest in the ancestral property did not acquire any right.

8. *Per contra*, Mr. Kadam, learned counsel for the Respondent No.1 would submit that in paragraph No.6 of the plaint, there is a specific pleading that there was partition between the branch of the Defendant No.8 and the branch of Ramchandra and as such, Ramchandra is not made a party. He submits that in written statement, the only case put forward was that the Defendant No.8 was not the wife of Dagdu, which the Appellate Court has rightly negated by taking into consideration the evidence and mutation entries. He would further submit that the Appellate Court has rightly considered that in the written statement filed by the Defendant Nos.2 to 5 and 7, the Defendants have acknowledged the Defendant No.8 as the wife of Dagdu Bhau Ramoshi, so far as the sale of the suit property to Defendant No.7 is concerned, however, at the same time,

the status of the Defendant No.8 as the wife of Dagdu is declined vis-à-vis the sale to the present plaintiff. He would further submit that the specific case of the plaintiff was that in the earlier Regular Civil Suit No.249 of 1990, the counter claim was not accepted by the trial Court. He submits that in the written statement the plea of Order XXIII Rule 1(4) of CPC was not taken. He would further submit that the decision of the Apex Court in the case of ***Munni Devi Alias Nathi Devi (Dead) through LRs. and Ors. vs. Rajendra Alias Lallu Lal (Dead) through LRs. and Others, reported in 2022 SCC OnLine SC 643***, clearly lays down that the Hindu Women's Rights to Property Act, 1937 (for short, "Act of 1937") conferred right on Hindu widow to the property of her husband, who died after the commencement of the said Act of 1937. He submits that even if it is accepted that the Defendant No.8's husband expired prior to the 1956, the Act of 1937 conferred right on Hindu widow and as such, she was entitled to alienate her 1/3rd share in the property being the absolute owner.

9. Considered the submissions and perused the record.

10. Regular Civil Suit No.191 of 1998 has been filed by the purchaser of an undivided interest of the ancestral property, the vendor being the wife of Dagdu. For better appreciation, the genealogy is reproduced as under:



11. It is well settled that the right of the purchaser of the undivided interest in the ancestral property is to file a suit seeking partition of the share which would be allotted to his vendor and in the present case, the plaintiff has exercised the said right. The defence set up by the defendants is that the Defendant No.8 was not the wife of Dagdu and as such, she had no right in the ancestral property or to alienate her share. The other without prejudice defence raised was that as Dagdu has expired in the year 1956, the Defendant No.8 had no right in the ancestral properties. The trial Court on the issue as regards the marital status of the Defendant No.8 disregarded the Mutation Entry No.4588 which mentions Defendant No.8 as the legal heir of Dagdu. The trial Court on the basis of evidence on record held that there was no evidence to demonstrate that the Defendant No.8 and Dagdu were residing together as husband and wife. The trial Court also held that by reason of the death of Dagdu prior to the year 1956, the Defendant

No.8 had no right in the property. As regards the counter claim filed by the plaintiff in the earlier Regular Civil Suit No.249 of 1990, the trial Court held that it appears that the plaintiff had withdrawn the counter claim and as such, the plaintiff has not come before the Court with clean hand and as such dismissed the suit.

12. The Appellate Court considered that even if there is no evidence of any witness who have attended the marriage of the couple or seen the couple residing as husband and wife, the fact that after the death of Dagdu, the name of the Defendant No.8 has been mutated vide Mutation Entry No.4588 shows that the Defendant No.8 was the widow of Dagdu. The Appellate Court also considered that the said mutation entry was not challenged by the Defendants. The Appellate Court also considered that in Regular Civil Suit No.249 of 1990, the Defendant No.8 claimed to be the wife of Dagdu which was not rebutted by the Defendant Nos.1 to 4. The Appellate Court also considered that the Defendants acknowledge the Defendant No.8 as the wife of Dagdu as far as the sale of suit property to the Defendant No.7 and as such held that the Defendant No.8 was the wife of Dagdu.

13. In the memorandum of Appeal, the substantial question of law framed was as regards the marital status of the Defendant No.8 with the deceased Dagdu. Considering the evidence which has come on

record, the Appellate Court has rightly considered the Mutation Entry No.4588 which was certified on 6th June, 1958 in respect of the suit property and other properties, where the Defendant No.8 was shown as wife of Dagdu. The said mutation entry has remained unchallenged and could therefore be relied upon for the purpose of recognising the relationship of the Defendant No.8 with Dagdu. The Appellate Court has also rightly considered that the Defendants have accepted the marital status of the Defendant No.8 for the purpose of confirming the sale of the suit property to Defendant No.7, however, *qua* the present plaintiff the marital status has been denied and the party cannot be permitted to approbate or reprobate.

14. The finding of the Appellate Court as regards the marital status of the Defendant No.8 with Dagdu was not assailed by the learned counsel appearing for the Appellant and the contention which was raised was that as Dagdu has expired prior to 1956, the Defendant No.8 had no right in the property. The decision of the Apex Court in the case of ***Munni Devi Alias Nathi Devi*** (supra) dealt with the issue of the ownership of the widow, who was in settled legal possession of the suit property before and after commencement of the Hindu Succession Act, 1956. The Apex Court held that the Act of 1937 conferred right of Hindu widow to the property of the husband. The

Apex Court has further considered the provisions of Section 14 of the Hindu Succession Act, 1956 and has held that the words “possessed by” used in Section 14(1) are the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. The Apex Court held in that case that the widow was in long settled possession of the suit property, which she had acquired in lieu of her pre-existing right to maintenance, prior to the commencement of the Act of 1956, entitled her to become a full owner of the suit property by virtue of Section 14(1) of the said Act. The said decision is a complete answer to the contention that Defendant No.8 had no right to the property in view of the death of Dagdu prior to 1956.

15. As regards the second issue that in the previous proceedings the counter claim filed by the plaintiff has been withdrawn by him, upon perusal of the written statement, there is no such plea taken by the Defendants. The trial Court has observed that it appears that the plaintiff had withdrawn the counter claim. The observation of the trial Court is not supported by any evidence oral or documentary. It is also not clear as to whether the earlier proceedings and the orders passed therein were placed for consideration of the trial Court on the basis of which, the trial Court had arrived at such a finding. For the purpose of

applicability of Order XXIII Rule 1(4) of CPC, it is necessary to plead and establish that the earlier proceedings had been withdrawn by the party without any liberty given by the Court. In the instant case, there is no material on record to demonstrate the said position. As regards the contention that the suit is not maintainable as the branch of Ramchandra was not made a party, the pleadings in the plaint are specific that as there was partition between the branch of the Defendant No.8 and the branch of Ramchandra, Ramchandra is not made a party. Apart from the general denial in the written statement, there is no case put forth in the written statement that the suit is not maintainable for non-joinder of the branch of Ramchandra. Upon perusal of the pleadings of the plaint, the averments as regards the property being the joint family property of the branch of the Defendant No.8 and the branch of Ramchandra referred to the previous history which has been misread by the learned counsel appearing for the Appellant.

16. In the light to the discussion above, no substantial question of law arises in the present case. Appeal stands dismissed. In view of the dismissal of Second Appeal, Civil/Interim Application(s) taken out in this appeal, if any, does not survive and the same is disposed of.

[Sharmila U. Deshmukh, J.]