

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.309 OF 2016
WITH
CIVIL APPLICATION NO.570 OF 2016

Shri. Santosh Maruti Waghmode And Anr.

....Appellants

Versus

Maruti Rajaram Waghmode And Ors.

....Respondents

Mr. Vaibhav R. Gaikwad for the Appellants.

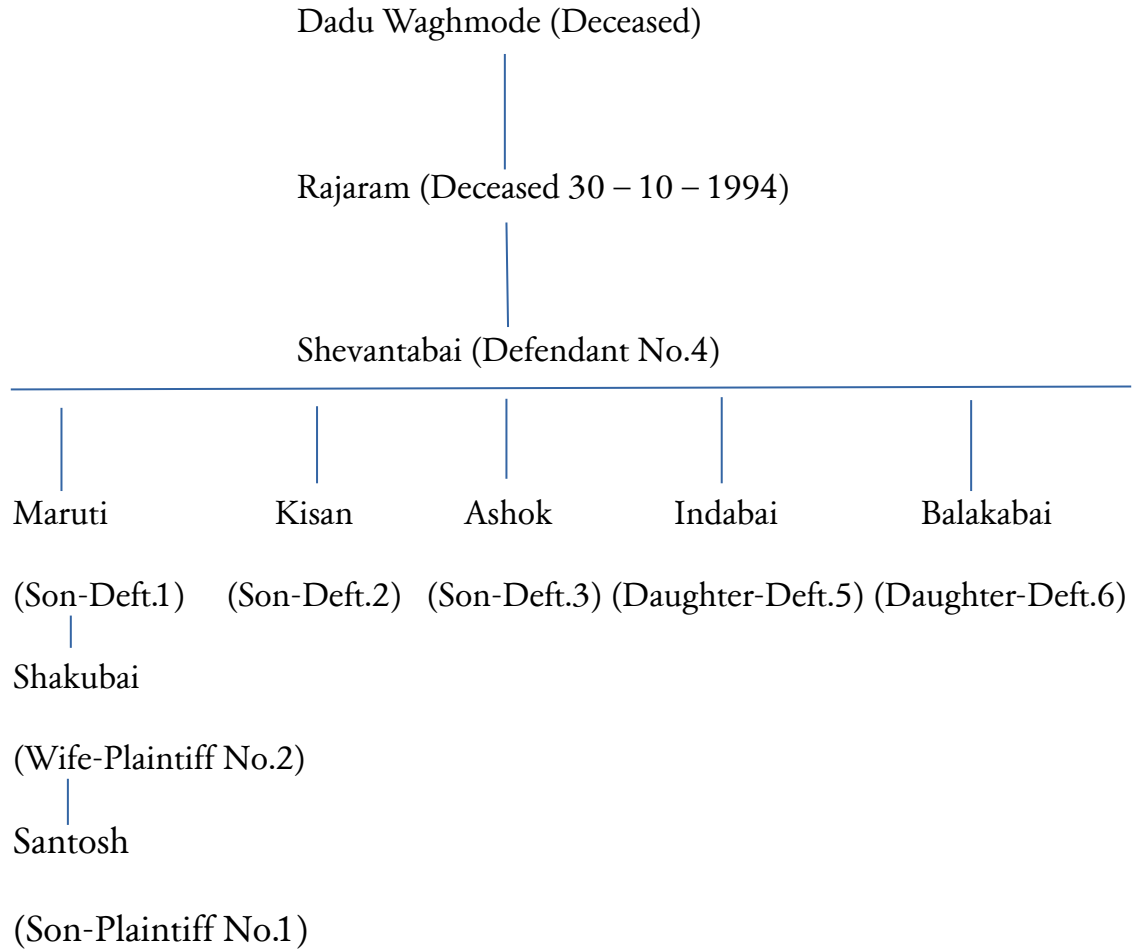
Mr. Kuldeep U. Nikam for Respondent Nos.1 to 7.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : 6th MARCH, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 21/9/2015 passed by the Appellate Court in Regular Civil Appeal No.420/2011 by which there was only re-determination of the share of defendant No.1 by including therein the share of illegitimate children, the original plaintiffs are before this Court.

2. Regular Civil Suit No.19/1995 was instituted by the plaintiffs i.e. the wife and the son of defendant No.1 seeking partition and separate possession of the suit properties. It is necessary to reproduce the genealogy to understand the *inter se* relationship between the parties.



3. The propositus was Dadu Waghmode, whose son was Rajaram. Defendant No.1 -Maruti is one of the sons of Rajaram and plaintiff Nos.1 and 2 are the wife and the son of Maruti i.e. Defendant No.1. The case of the plaintiffs was that during the life time of Rajaram “*Hayatpatra*” was executed by Rajaram in favour of the plaintiff No.2 giving two properties in lieu of her maintenance for enjoyment till her life time. It was her case that however the possession was not given out of the properties forming part of “*Hayatpatra*”. As such the suit for partition and possession was filed.

4. The defendants resisted the suit contending that the “*Hayatpatra*” was illegal and *void ab initio* and not binding on the shares of defendant No.1. It was further contended that Defendant No.1 had another wife Gokulabai and two sons Sunil and Anil and they are necessary parties to the suit and without joining them as parties the suit was bad for non-joinder of the necessary parties. The same pleadings were adopted by the other defendants.

5. The parties went to trial. The Trial Court answered the issue as regards the execution of “*Hayatpatra*” in favour of the plaintiffs. The Trial Court held that the defendant No.1 has not been able to establish the second marriage as well as the birth of the two sons Sunil and Anil from the said marriage. The Trial Court partly decreed the suit and determined *inter alia* the share of plaintiff No.1 and 2 as 7/120th share each and defendant No.1 as 7/20th share. As against the preliminary decree the appeal came to be filed by the plaintiff being Regular Civil Appeal No.420/2011. The Appellate Court considered that the children born out of void marriage acquire legitimacy and that the children of the second wife Gokulabai i.e. Sunil and Anil will get share in the property of defendant No.1 their father i.e. Maruti and as such redetermined only the share of Maruti from 7/120th to 7/360th share.

6. Heard Mr. Vaibhav R. Gaikwad, learned counsel for the appellants and Mr. Kuldeep U. Nikam, learned counsel for Respondent Nos.1 to 7.

7. Mr. Gaikwad, learned counsel appearing for the appellant would submit that by virtue of "*Hayatpatra*" the plaintiff No.2 was entitled to 2/15th share in the suit properties excluding the property obtained by way of "*Hayatpatra*" i.e. Gat No. 238 and 356. He would submit that the Trial Court having held that the factum second marriage as well as the children begotten from the second marriage was not proved by defendant No.1, the Appellate Court was not right in granting share to Sunil and Anil as those are illegitimate children from the void marriage.

8. *Per contra*, Mr. Nikam, learned counsel for the respondent would submit that there is no re-determination of the share of the plaintiffs and out of the share which was allotted to defendant No.1 the same is further divided so that defendant No.1 as well as Sunil and Anil would get 7/360th share.

9. Considered the submission and perused the record. The genealogy is not disputed and neither is re-determination of the shares of

plaintiffs No.1 and 2 or defendant No.1. What is contended is that by virtue of "*Hayatpatra*" in addition to share in ancestral property, the plaintiffs are entitled to the exclusive possession and ownership of the properties forming part of the "*Hayatpatra*". The Trial Court has held that the prayer for possession of the suit lands forming part of "*Hayatpatra*" was an alternative prayer and as the substantial prayer itself has been granted, the alternative prayer cannot be considered. No infirmity has been demonstrated as the admitted position is that the entire properties have been partitioned and the prayer for seeking possession on the basis of "*Hayatpatra*" was an alternate prayer. It also needs to be noted that by way of "*Hayatpatra*" what was granted is life interest for the purpose of maintenance and by way of partition substantial relief of partition has been granted. As regards the share of Sunil and Anil by redetermining share of Maruti as $7/360^{\text{th}}$ each, it needs to be noted that there is no re-determination of the shares of the plaintiffs and in the share of Maruti the same is further divided between him and his illegitimate children. The effect of partition is to dissolve the coparcenary, with the result that the separating members henceforth hold their respective shares as their respective property and share of each member will pass on his death to his heirs. However if a member while separating from his other coparceners continues joint with his own male issue, the share allotted to him on partition, will in his hands retain the character of a coparcenary property

as regards the male issue. Unless demonstrated that the plaintiff No.2 continues joint with Maruti even after partition, plaintiff No.2 has no right in respect of property falling to share of Maruti upon partition. Section 30 of the Hindu Succession Act provides that the interest of a male Hindu as per Mitakshara, coparcener property shall notwithstanding anything contained in this Act or any other law for the time being in force include the property capable of being disposed of by him or by her within the meaning of Section. That being the case the property was coming to the share of Maruti is being capable of disposed by testamentary disposition. There being no re-determination of the shares of the plaintiff, the share of Maruti being further divided cannot be faulted with at instance of plaintiffs. As such no substantial question of law arises.

10. Appeal stands dismissed. Civil Application does not survive and is accordingly disposed of.

(SHARMILA U. DESHMUKH, J.)