



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

SECOND APPEAL NO. 257 OF 2009

- 1] Mrs. Vanita Charandas Dumane,
aged about 43 years.
- 2] Ms Gayatri Charandas Dumane,
(now Ms Gayatri Ravindra Gedam),
aged about 26 years.

Both are R/o Hanuman Ward, Desaiganj,
Taluka Desaiganj, District – Gadchiroli.

...APPELLANTS

Versus

- 1] Mrs. Satyabhama Bhaskar Dumane,
aged about 53 years.
- 2] Praveen Bhaskar Dumane,
aged about 35 years, Occ. Agriculturist.
- 3] Arvind Bhaskar Dumane,
aged about 26 years, Occ. Agriculturist.

All are R/o Ward No.2, Patil Square,
Armori, Taluka Armori, District – Gadchiroli.

- 4] Mrs. Sheela Bandu Waghmare,
R/o Gurudev Ward, Opposite Main Primary School,
Azad Square, Bhiwapur,
District – Nagpur.

**Amendment carried out as per
Court's order dated 3/7/2013 and 8/8/2013.**

- 5] Mrs. Vandana Vinayak Meshram,
aged about 38 years and
R/o C/o Vinayak Bakshi Meshram,
Vairagad, Taluka Armori, District – Gadchiroli.

Respondent nos. 1 to 5 are legal heirs of
Bhaskar Murlidhar Dumane (original defendant no.1).

- 6] Ramdas Murlidhar Dumane,
aged about 51 years, Occ. Agriculturist and
Resident of Taluka Armori,
District – Gadchiroli.
(Original defendant no.2).

...RESPONDENTS

Shri V.N. Morande, Counsel for the appellants.
None for the respondents.

CORAM : ANIL L. PANSARE, J.

ARGUMENTS WERE HEARD ON : APRIL 30, 2024

JUDGMENT IS PRONOUNCED ON : MAY 3, 2024

JUDGMENT :

The appeal has been admitted on the following
substantial question of law :

*“Whether the first appellate court could have rejected
the claim which was already granted by the trial court
and particularly when the appeal preferred by the
defendant was dismissed ?”*

- 2] The appellants – plaintiffs filed a suit for partition
and possession. Appellant no.1 is mother of appellant no.2.
Respondent nos. 1 to 5 are the legal representatives of Bhaskar

Murlidhar Dumane, who was defendant no.1 before the trial Court. Bhaskar and respondent no.6 herein were brothers of deceased Charandas, who was the husband of appellant no.1 and father of appellant no.2.

3] The suit was based on theory of joint hindu family property. The family owned an agricultural land bearing Khasra No. 841/3 admeasuring 0.84 H.R. According to the appellants, three brothers, i.e., the husband of appellant no.1 and original defendant nos. 1 and 2, started business of printing press at village – Armori and sold the aforesaid agricultural land. The sale proceeds were invested for purchasing machine of printing and accordingly the joint family funds were utilized in starting business of printing press.

4] It was further the case of the appellants that out of the income of the printing press, the three brothers/partners, in the year 1982, purchased agricultural land bearing Survey No. 1400 admeasuring 0.46 H.R. In the year 1985, they purchased land bearing Survey No. 108/97 admeasuring 0.94 H.R. Both

the lands were purchased in the name of defendant no.1, who then constructed house in the land bearing Survey No. 1400. The said house was in use and enjoyment of all. The name of plaintiff no.1's husband was added as owner, after he initiated revenue proceedings against his brothers. The order passed by Tahsildar attained finality.

5] The appellants then urged for partition, which was refused and, therefore, the suit came to be filed. The trial Court has framed various issues and answered the same as under :

Sr. No.	Issues	Findings
1)	Do plaintiffs proved that defendant no 1 purchased the "Printing press" to run joint family by selling joint family field bearing Khasra No 843/1, Gat No 1404 area 0.84 H.R.	Yes
2)	Do plaintiffs prove that on the date of death of Charandas on 12.01.1986 he was the member of undivided join family ?	Yes
3)	Do plaintiffs prove that defendant no 1 constructed new house worth Rs. 1 lakh in 1991-92 in the field Survey No 1400 area 0.46 HR of Armori from the income of joint family property.	Yes
4)	Do plaintiffs prove that defendant no 1	Yes

	has purchased field survey No 1400 are 0.46 HR of Armori and field S. No 108/97 area 0.94 HR of Rampuri chowk from the joint family income of printing press in 1982 and 1985 respectively?	
5)	Does the defendant no 1 prove that he has purchased the printing press, the field Khasra No 1400, area 0.46 HR of Armori, and field Eh. No 108/97, area 0.94 HR from self acquired earned	No
6)	Do plaintiffs prove that they are entitled for partition and possession of 1/3rd share in the ancestral undivided joint family property shown in the paragraph A B C D of plaint as prayed ?	Yes to the extent of A.B.C.
7)	Do plaintiffs prove that they are entitled for the amount of Rs.25,000.00 towards 1/3rd income of the suit field and income of printing press as prayed ?	No
8)	Whether plaintiffs are entitled for mean profit as prayed ?	Yes
9)	What order, decree order and relief?	Suit is partly decreed.

Having answered the issues in the aforesaid manner, the trial Court proceeded to decree the suit in the following terms :

“1. It is hereby declared that each of the plaintiff no 1 and 2 have 2/6th share each in the suit properties described in paragraph A.B.C. of the plaint.

2. The partition of the agricultural lands be effected equitably as per section 54 of the Code of Civil

Procedure by Collector, Gadchiroli and possession of respective share of each of the plaintiff be delivered to them.

3. It is declared that the plaintiffs have right of resident in house properties described in paragraph D and E of the plaint.

4. Business of printing press be partitioned equitably as per above shares by appointing the court commissioner.

5. An inquiry be held for mesne profits for the properties to be delivered to the plaintiffs from the date of this suit till actual delivery of possession as per order XX Rule 12 of the Code of Civil Procedure.

6. The claim of plaintiff for compensation of Rs.25,000.00 is rejected.

7. Both defendants shall bear their own costs but defendant no 1 shall pay costs of this suit to the plaintiffs.”

6] The appellants were aggrieved by operative clause no. 3 of the decree. According to the appellants, the trial Court committed error in not granting share in properties mentioned in paragraphs D and E. The learned Counsel for the appellants submits that the trial Court relied upon Section 23 of the Hindu Succession Act, 1956 (for short “Act of 1956”) by which a special provision was made in favour of female heir to reside in dwelling house with a bar to claim partition. This provision, however, has been deleted by the Hindu Succession (Amendment) Act, 2005. The trial Court passed decree on

6/1/2007. Accordingly, the learned Counsel for the appellants contends that the trial Court committed error in not granting share to the appellants, who are the female heirs of the deceased Charandas. The First Appellate Court failed to consider the effect of omission of Section 23, particularly the theory of the appellants that the suit property was the joint hindu family property.

7] As such, the only prayer made in the present appeal is to quash and set aside the judgment passed by the Principal District Judge, Gadchiroli in Regular Civil Appeal No. 12/2007. The appellants have not sought any declaration as regards their share in the suit properties mentioned in paragraphs D and E. Nonetheless, considering the apparent error committed by the Courts below and taking aid of Order 41 Rule 33 of the Code of Civil Procedure, 1908, once it is found that the appellants were entitled to share in the said properties, there appears no reason to deny the relief. If denied, the unavoidable second

round of litigation will commence. The appellants request is, thus, being considered.

8] The learned Counsel for the appellants then submits that the respondents had, by way of filing cross objection before the First Appellate Court, challenged first part of the operative order passed by the trial Court. The First Appellate Court dismissed the appeal. Thereafter, the First Appellate Court proceeded to render a finding that the appellants have no right in property mentioned in paragraph C.

9] The learned Counsel for the appellants submits that once the cross objection filed by the respondents was dismissed, the First Appellate Court could not have rendered a finding against the appellants in appeal filed by them challenging operative clause no. 3 and not operative clause no. 1 of the decree.

10] I find substance in the submissions made by the learned Counsel for the appellants. The appellants have not

challenged clause no. 1 of the decree but had restricted their challenge to clause no. 3. The respondents' challenge to operative clause no. 1 failed and, therefore, the First Appellate Court could not have disturbed the finding given by the trial Court as regards shares of the appellants and defendants in the manner as described in the said clause.

11] The First Appellate Court as also the trial Court have committed yet another error of law. They have ignored the effect of deletion of Section 23 of the Act of 1956. The female heirs have been recognized as coparceners. The trial Court has found that they are entitled to reside in the dwelling house. This finding has been based on the evidence that the suit properties were joint family properties. The First Appellate Court has, without going into the aspect of the joint family property status, has rejected the prayer made by the appellants seeking their share in the dwelling house only on the ground that the respondents have incurred expenses in constructing

the dwelling house. This inference, being contrary to the provisions of the Act of 1956, is liable to be set aside.

12] The First Appellate Court, therefore, could not have rejected the claim of appellants, which was already granted by the trial Court, particularly when the cross objection preferred by the respondents was dismissed. The first substantial question of law is accordingly answered in the negative. The appellants, therefore, have made out a case. Hence the following order :

ORDER

- i] The appeal is allowed.
- ii] The judgment and decree dated 20/12/2008 passed by the Principal District Judge, Gadchiroli in Regular Civil Appeal No. 12/2007 is quashed and set aside.
- iii] The judgment and decree dated 6/1/2006 passed by the Civil Judge Junior Division, Armori in Regular Civil Suit No. 10/2003 is restored with a modification that the plaintiffs

(appellants herein) are entitled for the declared share in properties described in paragraphs A to E.

13] The appeal is disposed of in above terms with no order as to costs.

JUDGE

Sumit