



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL No.249 OF 2004

Amendment carried
out as per Court's
Order dated
05.06.2023

1. ~~Jagmohan S/o Shrikrishna Upadhye,~~
~~Aged about 35 years, Occ ; Nil,~~
~~R/o Shanti Nagar, Nagpur. [Deleted]~~

Legal heirs of Appellant No.1 are as under :

- 1(a) Sau. Varsha w/o Jagmohan Upadhye,
Aged about 52 years,
Occupation : House-wife,
R/o Plot No.114, Saket Nagar,
Nagpur 440015.
- 1(b) Sagar S/o Jagmohan Upadhye,
Aged about 25 years,
Occupation : Service,
R/o. Plot No.114, Saket Nagar,
Nagpur 440015.
2. Smt. Ramkalibai W/o Laxminarayan Pande,
Aged about 42 years, Occ. Household,
R/o Bhatpara, Chhindwara,
Tahsil and Distt. Chhindwara.
3. Shri Manoj Kumar S/o Shrikrishna Upadhye,
Aged about 32 years,
Occ. Medical Practitioner.
4. Ku. Anita D/o Shrikrishna Upadhye,
Aged about 30 years, Occ. Household.
5. Yogendra S/o Shrikrishna Upadhye,
Aged about 29 years, Occ. Student.

Appellant Nos. 3, 4 & 5 all residents of
Shanti Nagar, Nagpur.

APPELLANTS

...V E R S U S...

1. ~~Shri Bindrabhan S/o Late Shankarprasad Tiwari, Aged about 30 years, R/o in Shanti nagar, Nagpur. [Deleted]~~

Legal heirs of Respondent No.1-A to 1-E are as under :

Amendment carried out
as per Hon'ble Court
Order dated 12.12.2019
& 16.01.2020

- A) ~~Sau. Rekha Wd/o Bindrabhan Tiwari Aged about 56 Years, Occupation : Housewife, R/o Near Gharonda Apartment, Shanti Nagar, Nagpur. [Expired on 01.05.21 Deleted]~~
- B) Kum. Pawan S/o Bindrabhan Tiwari
Aged about : 25 Years, Occupation : Nil
R/o Near Gharonda Apartment, Shanti Nagar,
Nagpur.
- C) Ku. Sonu S/o Bindrabhan Tiwari
Aged about : 27 Years, Occupation : Nil
R/o Near Gharonda Apartment, Shanti Nagar,
Nagpur.
- D) Ku. Aarti D/o Bindrabhan Tiwari
Aged about : 35 Years, Occupation : Nil
R/o Near Gharonda Apartment, Shanti Nagar,
Nagpur.
- E) Sau. Poonam Dubey
Aged about : 30 Years,
R/o Selu, Wardha. [Dismissed]

Matter dismissed
against R.No.1 (E)
vide R (J) Ord.
Dated 10.10.19

2. Smt. Shakuntala w/o Suresh Upadhye,
Aged about 42 years, R/o. Police Line,
Hinganghat, Distt. Wardha.

2. Smt. Shakuntala w/o Suresh Upadhye,
R/o Pawansut Nagar, Near Sawangi Meghe
Grampanchayat, Sawangi Meghe,
District Wardha.

Amended as per
Registrar's (J) order
dated 1/9/2016

..... **RESPONDENTS**

Mr. S. N. Bhattad, Advocate for Appellants.

Mr. C. F. Bhagwani, Advocate for Respondent 1(A) to 1(D).

Mr. C. B. Dharmadhikari, Advocate for Respondent 1(B).

CORAM: **SANJAY A. DESHMUKH, J.**

DATE OF RESERVING THE JUDGMENT : 14.06.2024
DATE OF PRONOUNCING THE JUDGMENT : 28.06.2024

JUDGMENT :

1. This appeal is preferred against the judgment and decree passed by the learned Additional District Judge, Nagpur in R.C.A. No.597-A/2000 dated 09.01.2004 which arised out of judgment and decree passed in Special Civil Suit No.416/1985 decided by 5th Joint Civil Judge, Junior Division, Nagpur dated 27.09.1995.

2. **FACTUAL MATRIX:**

3. Late Surajbali Tiwari who died on 23.07.1965 purchased the suit property House No.941, admeasuring area 100' x 90' sq.ft. (but, as per agreement to sale and sale-deeds Exh.-58 and 59 area is different) situated at Shanti Nagar, Nagpur. He was having two sons viz. Laxminarayan and Shankarprasad. Late Laxminarayan was having two daughters viz. Ramkalibai (plaintiff No.2) and late Chandrakalabai who died on 30.07.1970. The plaintiff Nos.1 and 3 to 5 are her sons and daughter. During the pendency of suit Jagmohan plaintiff No.1 died, his legal representatives are appellant No1(a) and 1(b).

4. Defendant No.1 – Bindraban and defendant No.2 Shakuntala are son and daughter of late Shankarprasad Tiwari. The defendant No.1 died on 21.04.2015. His wife Rekha Tiwari died on 11.05.2021. His legal representatives are respondent Nos.1A to 1E.

5. The plaintiffs have contended that the suit property is the property of the Hindu joint family of plaintiffs and the defendants. They prayed for partition of it.

6. The defence of the defendants is that female i.e. plaintiff No.2 daughter cannot file suit for partition in respect of dwelling house of Hindu joint family as per Section 23 of the Hindu Succession Act, 1956 for short 'the H.S. Act'. She has no right to claim partition as her mother died before 2005.

7. The learned trial court held that there is no bar of Section 23 of the H.S. Act for claiming partition of dwelling house of the Hindu joint family by female i.e. plaintiff No.2.

8. The suit was decreed. The appeal was allowed and suit was dismissed.

9. The learned Advocate for the appellant submitted that one of the male member of Hindu joint family i.e. plaintiff No.1 has claimed partition. It is pointed out that now the law has been

changed in the year 2005 by an amendment in the H.S. Act. and Section 23 of the H.S. Act is omitted as it is discriminatory provision against the Hindu females for claiming partition in a dwelling house of Hindu joint family. The plaintiff No.2 granddaughter has right to claim partition of self acquired property of late Surajbali. Now old Section 23 of the H.S. Act cannot be applied as it is omitted. The suit property is not coparcenary property of Hindu joint family. He is relying upon the following authorities:

(i) *G. Sekar v. Geetha and others 2009(5) Mh.L.J. 755*, in paragraph Nos.17 and 23 it is held that for self-acquired property Section 23 of the Hindu Succession Act is not applicable and daughter cannot be divested of the said right and can maintain the suit for partition of dwelling house.

(ii) *Vineeta Sharma v. Rakesh Sharma and others (2020) 9 SCC Page 1* in which it is held that the amended H.S. Act, 2005 is retrospective as well as retroactive.

10. Learned Advocate for respondent No.1 argued that it is suit of the year 1984. Therefore, old Section 23 of the H.S. Act, 1956 is applicable to this case. Hindu female i.e. plaintiff No.2 cannot file a suit for partition of dwelling house as there was express bar under old Section 23 of the H.S. Act at the time of

filing of suit. The amended Section 6 the H.S. Act of 2005 is not applicable to this old case.

11. Learned Advocate for respondent No.1 submitted that mother of the plaintiff No.1 died on 30.3.1970 before passing of the Act of 2005. She was not coparcener. The plaintiff No.2 is also not a coparcener. She is not entitled for partition. Learned advocate for respondent No.1 submitted that judgment and decree of the trial Court were not legal and correct hence first appellate Court rightly allowed the appeal on merit and by setting aside the judgment and decree of trial Court and rightly dismissed the suit.

12. Learned advocate for respondent No.1 lastly submitted that the description of the suit property is not correctly pleaded in the plaint. He pointed out an agreement to sale Exh.-58 and a sale-deed at Exh.59 in which it is correctly given. He submitted that suit must be dismissed on this count alone as per provisions of Order VII of the Code of Civil Procedure, 1908.

13. Learned Advocate for respondent No.2 argued that suit is not maintainable because the plaintiff No.1 is son of predeceased daughter of late Surajbali, he is claiming partition of share of his deceased mother who died on 30.7.1970 before amended H.S. Act of 2005. The plaintiff No.2 who is Hindu

female cannot claim partition in the dwelling house of Hindu joint family. He prayed that appeal be dismissed with costs.

14. Learned Advocate for respondent No.2 is relying upon the authority of **Sangeeta Bhambani Vs. Jatinder Sardana and others, (2014) SCC OnLine Del 1278** in which High Court of Delhi held that, “When mother of the plaintiff, through whom she claims, died on 9.11.1993 before the coming into force of the Amended Act, of 2005. Her mother can not become a coparcener in the Hindu undivided family and, therefore, daughter cannot claim partition in the suit property. The coparcenary right accrues to the daughter, only “on and from” the commencement of Section 6 of the H.S. Act i.e. Amended Act of 2005.

15. The substantial questions of law are formed as per order dated 11.8.2004 as under :

- [i] Was the Appellate Court was right in holding that the suit was barred under Section 23 of the Hindu Succession Act on the face of admitted fact that the male and female had joined the suit for partition of dwelling house?
- [ii] How decree passed for partition of dwelling house can be refused when male members have filed suit for

partition only on the ground that the female members have joined in the suit?

16. Perused the record and proceedings of the trial Courts and impugned judgment of first appellate Court.

17. As per old Section 23 of the H.S. Act there was bar to the Hindu females to claim partition in the dwelling house of Hindu joint family. It is omitted and said bar is now not in existence as per the amendment in the H.S. Act of 1956. The amended H.S. Act of 2005 is retrospective and retroactive and hence it is applicable to the case of the plaintiff. There is no pleadings of existence of coparcenary on the part of any of the side. As per Section 8 of H.S. Act the succession to claim partition it was opened when Surajbali died on 23.7.1965. The plaintiff have succession right and not coparcenary right to claim partition. Thus, as per law laid down in the judgment of *Vineeta Sharma* cited supra that the amended Act of 2005 is retrospective and retroactive as well as Section 23 of the H.S. Act is omitted, the plaintiffs have certainly right to file suit for partition of dwelling house of Hindu joint family. Therefore, arguments of learned Advocates for the respondents are not acceptable in this regard that partition of dwelling house cannot be claimed by Hindu

female plaintiff No.2.

18. As per amended new Section 6 of the H.S. Act a Hindu daughter can claim partition in the coparcenary property only if it is in existence. It is basic principle of civil trial that 'FIRST PLEAD AND THEN PROVE'. However, generally except the exception in a suit for partition filed on behalf of coparcener daughter there are no such pleadings of existence of coparcenary family and coparcenary property, which is *sine quo non*. Generally the pleading is that 'it is Hindu Joint family property or ancestral property'. Thus, unless there is existence of coparcenary property and there is existence of Hindu coparcenary family of which no partition took place for three generations, no such birth right of coparcenary is available to the Hindu daughters. In this case also both parties have not pleaded that there is existence of coparcenary and coparcenary property.

19. The suit property was purchased by late Surajbali, who died intestate is subject matter of suit. It was his self acquired property. Admitted facts are that late Surajbali Tiwari purchased the suit property by sale-deed Exh.-59 dated 11.1.1929. He died intestate on 23.7.1965. The succession right was accrued to plaintiff's predecessors to claim share in the suit property as per Section 8 of the H.S. Act to the two sons of Surajbali late

Laxminarayan, who died on 16.10.1980 and late Shankarprasad the predecessor of the defendant No.1. The plaintiff No.2 is daughter of late Laxminarayan. Another daughter of late Laxminarayan i.e. late Chandrakala died on 30.7.1970. Her sons and daughters are the plaintiff Nos.1 and 3 to 5. The plaintiffs have succession rights as per Section 8 of the H.S. Act as they are Class I legal heir of late Surajbali's son late Laxminarayan. Though it is ancestral property of great grandfather Surajbali it is not coparcenary property. It is only ancestral property of Hindu joint family. Every ancestral property of Hindu joint family cannot become coparcenary property unless it complies with the essential requirement of the existence of coparcenary family of three male generations residing together and coparcenary property i.e. such property of which no partition took place for three generations. There is no such existence of Hindu coparcenary family between the plaintiffs and the defendants and their forefathers etc. Therefore, defence of defendants that plaintiff's cannot claim partition as coparcenar as her father died on 16.10.1980 before passing of the H.S. Act of 2005 is not sustainable.

20. The plaintiffs have right to claim partition as they have succession right provided under Section 8 of the H.S. Act as they are class-I heir of late Surajbali. Therefore, case law of

Sangeeta Bhambani cited supra by respondent No.2 is not applicable to the case in hand as there is no such existence of coparcenary.

21. Learned Advocate for respondent No.1 submitted that description of the suit property is not correct. This issue was not raised earlier. However, in an execution proceeding said defence is likely to be raised. Learned Advocate for respondent No.1 pointed out agreement to sale Exh.-58 and a sale-deed Exh.59 in which description of suit property is 100 sq.ft. x 75 sq.ft. However, in the plaint it is described as 100 sq.ft. x 90 sq.ft. This fact is discussed in the judgment of the trial Court. In case of ***T. Rajlu Naidu v. M. E. R. Malak AIR 1939 NAGPUR 197*** it is held that in case of a discrepancy between dimensions and boundaries, the rule is now well settled that an area specified within the boundaries will prevail.

22. There is substance in the argument of learned Advocate for respondent No.2 that description of suit property must be correct. However, it is a mistake of fact that description is wrongly pleaded in the plaint. The fruits of the decree shall not be deprived because of mistake of Advocate's in the plaint. The justice cannot be denied only because of such mistake of fact as to incorrect description of the suit property. To err is human being.

To correct mistakes is duty of all of us. It is salient feature of justice that merely because of unintentional mistake of fact occurred on the part of Advocate of the plaintiffs who during drafting of plaint committed it. The valuable substantive rights of litigants cannot be extinguished. No doubt there is mandate of procedural law i.e. Order VII Rule 3 of the Code of Civil Procedure, 1908 that description of suit property must be correctly given in the plaint. However, it is procedural irregularity and not illegality to defeat substantive rights of the parties which can be corrected by giving directions to the executing Court or decree final Court. The modes of acquiring rights and liabilities and its extinguishment are governed by the substantive laws and not by procedural laws. Only on such mistake of facts valuable substantive rights of the plaintiffs cannot be defeated. Therefore, clarification as to the area of suit property is necessary in the interest of justice for effective execution of decree to end this finally.

23. The description of suit property in these two documents Exh.-58 and 59 is also different. It has to be correctly ascertained by measurement in decree final proceedings. The decree final Court or executing Court may adjudicate this issue as per para No.345 of the Civil Manual. It is because some times by

encroachment or road widening etc. the area may reduce or area may be more than described in the plaint may in existence. In such cases decree final Court or executing Court may adjudicate and determine the exact area of suit property for ends of justice and also to prevent multiplicity of judicial proceedings. For that property card, plan/map etc. or measurement of suit property may be required. The decree final Court or executing Court may if those are not produced by either sides take recourse of Section 30(b) of the Code of Civil Procedure, 1908 and decide controversy to end the lis finally in the interest of justice.

24. The judgment and decree of the learned trial Court are legal and correct. However, the judgment and decree of the first Appellate Court are not legal and correct as held above. It require interference. Therefore, all the substantive questions of law are answered accordingly.

25. The appellants were compelled to file this appeal. The appellants have filed this appeal in the year 2005. They must have incurred some amount for it. The appellants are entitled for costs as per Section 35 of the Code of Civil Procedure, 1908. The appeal, therefore, deserves to be allowed with the costs of Rs.10,000/- to be paid by the respondents to the appellants.

26. The appeal is allowed as under :

(i) The impugned judgment and decree of the first Appellate Court are set aside and the judgment and decree of the trial Court are upheld and restored with clarification that description of the suit property is to be adjudicated and finalised in the decree final or execution proceedings, as discussed above.

(ii) Respondents shall pay costs of Rs.10,000/- to the appellants within three months and if it is not deposited within three months then the appellants are entitled for 9% p.a. interest on it from the date of this judgment. The costs be deposited in the decree final Court or executing Court. If it is not deposited, it can be recovered as per the provisions of law.

27. The appeal is disposed of.

(SANJAY A. DESHMUKH, J.)