



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

SECOND APPEAL NO.466 OF 2007

1. Mungsaji S/o Pundlik Pawar
Aged about 41 years, Occ: Agriculturist,
2. ~~Tulsabai Wd/o Pundlik Pawar~~
~~Aged about 70 years, Occ: Agriculturist,~~

(Appellant No.2 deleted as per Court's order
dated 16.09.2014)

Both R/o Nandana, Tahsil Risod,
Dist. Washim.

...APPELLANTS
(Orig. Deft. Nos.1 &2 on RA)

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

1. Radhabai W/o Pundlik Pawar
(since deceased)
2. Kondubai W/o Dnyanba Waghmare,
(dead) through LRs

...Orig.Plff. Nos.1 &2 on RA

(1) Dnyanba Kundlik Waghmare
Aged 70 years, Occ: Agriculturist,

(2) Sheshrao Dnyanba Waghmare
Aged 43 years, Occ: Agriculturist,

(3) Suresh Dnyanba Waghmare
Aged 40 years, Occ: Agriculturist,

Nos.1 to 3 R/o Wasari, Tahsil Malegaon,
District Washim.

(4) Sharda W/o Vishnu Dalvi
Aged about 35 years, Occ: Household,
R/o Somnatha, Tq. Malegaon,
Dist. Washim.

(5) Jyoti W/o Satish Pawar
(Since dead) through LRs

(5A) Gayatri Satish Pawar,
Aged 22 years, Occ: Household

(5B) Krishna Satish Pawar,
Aged 18 years, Occ: Agriculturist

Both 5A & 5B R/o Shripur,
Tah. Malegaon, Dist. Washim.

3. Santosh S/o Bhanudas Khandagale,
Aged about 10 years, being minor through his
natural guardian father Bhanudas Khandagale
R/o Adoli, Tahsil and Dist. Washim.

...Orig. Def. No.5 on RA

4. Shewantabai alias Shantabai Wd/o
Kisanrao Pakhale, (since deceased)
Through LR.

...Orig. Def. Nos.3 & on RA

a) Bhikubai W/o Bharat Choudhari
Aged about 35 years,
R/o Dudhala, Tahsil Anudha,
Dist. Hingoli.

b) Parvatibai Kisanrao Pakhale,
Aged about 33 years,

c) ~~Santosh Kisan Pakhale~~
~~Aged about 33 years, Military~~
~~Constable, BSF, C/o 56 APO,~~
~~Dist. Samba, J&K.~~

(Resp.4 (c) deleted as per Registrar (Jud.)
order Dt. 10.01.13)

d) Gajanan Kisanrao Pakhale
Aged about 30 years, (a) to (d)
R/o Shri Nagar, Near Risala Bazar,
Hingoli, Tahsil and District Hingoli.

5. Rekha W/o Shankar Bhujade,
Aged about 35 years, R/o Shukrawar Peth,
Washim, Tahsil and Dist. Washim.

...RESPONDENTS

Shri P.R. Agrawal, Advocate for Appellants.
Shri A.P. Tathod, Advocate for respondent no.2.

CORAM :- M.W. CHANDWANI, J.

DATE :- 07.10.2024.

JUDGMENT:

1. The second appeal has been admitted on the following substantial question of law.

*“1. Whether the First Appellate Court fell in error in disinheritng Tulsabai although there is no pleading that she was not legally wedded wife of Pundlik?
2. Whether the share have been properly carved out?”*

2. Deceased Pundlik husband of original plaintiff no.1 and defendant no.2 and father of original plaintiff no.2 and defendant nos.1, 3 and 4 had ancestral properties i.e. agricultural land, house and open plots. Plaintiff No.1, the first wife, and plaintiff no.2, her daughter begotten from deceased Pundalik filed a suit against the second wife of deceased Pundalik, her son and daughters for partition and separate possession. They claimed that the suit property is an ancestral property of Pundalik and after the death of Pundalik, the plaintiffs also became owners of the suit

property to the extent of 1/6th share each. Defendant no.1 came up with a case that there was partition between him and his father deceased Pundalik in the year 1967 and accordingly, mutation entry was certified by the revenue authorities. Defendant no.1 also claimed that deceased Pundalik on 13.05.1992 executed a will-deed bequeathing the property which fell in his share, in favour of defendant no.1. The defendants sought rejection of the suit. During pendency of the suit, original plaintiff no.1- Radhabai died.

2. The trial Court did not accept the case of the defendants and decreed the suit of the plaintiffs. The trial Court granted a decree of partition and granted 1/6th share in favour of original plaintiff no.2 -Kondabai.

3. Feeling aggrieved with the judgment and decree, original defendant nos.1 to 4 filed an appeal before the learned District Judge, Washim. The learned District Judge also discarded the contention of oral partition between defendant no.1 and deceased Pundalik as well as the will allegedly executed by deceased Pundalik in favour of defendant no.1. However, the shares granted to the parties to the suit by the trial Court are modified. The first appellate Court granted 1/3rd plus 1/18th share to original defendant no.1 of the suit property and did not

grant any share in favour of Tulsabai holding that she being the second wife of Pundalik who got married after the Hindu Marriage Act, 1955 came into force is not a legally wedded wife. The appellate Court also enhanced the share of original plaintiff no.1- Radhabai to the extent of 1/3rd. However, the share of plaintiff no.2 was determined as 1/18th share in the share of deceased Pundalik. Therefore, the appellants are before this Court in this second appeal.

4. Mr. P.R. Agrawal, learned counsel for the appellants would submit that, despite there being no pleadings made by the plaintiffs stating that Tulsabai was not a legally wedded wife of Pundalik, the appellate Court held that the marriage of Tulsabai with Pundalik was performed after the Hindu Marriage Act, 1955 came into force and therefore, the marriage of Tulasabai with Pundalik performed during the lifetime of his first wife Radhabai was not valid. It is submitted that the appellate Court, without there being any material on record with regard to the date of marriage of Tulsabai, erroneously on assumption and conjuncture held that the marriage of Tulasabai (defendant no.2) with Pundalik was performed after 18.05.1955 i.e. the date on which the Act of 1955 came into force.

5. Evidently, no claim is raised in the pleadings by the original plaintiffs that Tulsabai (defendant no.2) is not a legally wedded wife of Pundalik. Even, there is nothing on record which suggests that the marriage of Tulsabai with Pundalik was performed after 18.05.1955 when the Act of 1955 prohibiting second marriages came into force. Perusal of the impugned judgment passed by the first appellate Court shows that an inference came to be drawn from the pleadings from the fact pleaded in earlier suit of 1973 that Tulsabai married Pundalik prior to 20 years, the first appellate Court assumed that marriage of Tulsabai has been performed after commencement of the Act of 1955. Even if 20 years is counted from year 1973, it would suggest that the marriage between Pundalik and Tulsabai was performed in the year 1953. I find substance in the argument of the learned counsel for the appellants that the appellate Court, without substantial material on record, erroneously held that the marriage of Tulsabai with Pundalik was not legal and consequently, deprived her from the share which she had in the suit property. Therefore, this finding of the first appellate Court does not sustain in the eyes of law.

6. Axiomatically, the appellate Court under Order XLI Rule 22 can reverse the findings recorded by the trial Court but cannot modify the decree of the trial Court. Whereas, Rule 33 and 4 of Order XLI of the CPC confer powers of the widest amplitude to the appellate Court to avoid inconsistency, inequity and inequality in relief granted to similarly placed parties and unworkable decrees or orders coming into existence, more particularly in cases when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered with by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched, either injustice would result or inconsistent decrees would follow. This is the main distinction between Order XLI Rule 22 and Order XLI Rule 33 of the CPC. A reference can be made to the decision of the Supreme Court in the case of ***Banarsi and others Vs. Ram Phal***¹, wherein the Supreme Court observed in para 15 as under:

“15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the appellate court so as to do

1 (2003) 9 SCC 606

complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched

either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.”

7. In the present case, though the respondents did not file any cross-objection or cross-appeal, while considering the appeal of the appellants, the appellate Court had to determine the share of the appellants and consequently share of the respondents would also flow from such determination. The decree is inseparably connected with the portion in appeal by the respondent which if left untouched, would result in injustice to the respondents. The first appellate Court has exercised the power under Order XLI Rule 33 of the CPC. Therefore, I do not find any

perversity in the order of learned first appellate Court while interfering with the order of trial Court and granting more share to respondent no.1 than that granted by the trial Court despite no cross-appeal or cross-objection being filed by respondent no.1.

8. This takes me to the next question, whether the first appellate Court has properly determined the share of the parties to the suit.

9. There is concurrent finding of both the Courts below that the suit property is an ancestral property. As per the Uncodified Hindu Law, in partition the mother gets equal share to son under Mitakshara School of Hindu law, by which the parties to the suit are governed. Here, deceased Pundalik left two widows, therefore, as per the Hindu law, both widows in partition are entitled to the share equal to son. The reference can be made to clause 315 (4) alongwith illustration (c) of the Mulla's Hindu Law, which reads thus:

“315. Widow-mother -

.....

....

(4) On a partition between sons by different mothers, when more than one mother is alive, the rule is first to

divide the property into as may share as there are sons, and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them. [Kristo Bhabiny Vs. Ashutos, (1886) 13 Cal 39.]

Illustrations

(e) A dies leaving two widows B and C, and two sons D and E by B. C has no son. D sues E, B and C for partition. The property will be divided into four parts, there being two widows and two sons, and each widow and son one-fourth. The fact that C has no son does not affect her right to a share. [Damodar Vs. Senabutty, (1882) 8 Cal 537; Premshankar Vs. Taradevi, AIR 1980 MP 1771.]”

10. Therefore, in view of the law prevailing at the relevant time of marriage, in partition both widows of deceased Pundalik will get equal share to the son i.e. the appellant.

11. There is one more twist in the case in hand. During pendency of the present proceedings before the Courts below, amendment to Section 6 of the Act of 1956 came into force whereby, a daughter became a coparcener in the coparcenary property and now a daughter has the same right in the coparcenary property which she would get, had she been a son. Once constitution of coparcenary changes, shares have to be

worked out at the time of actual partition. Now, the shares will have to be determined according to the changed scenario.

12. Needless to mention that the amendment/change in Section 6 of the Act of 1956 giving the status of coparcener to a daughter will not be made applicable to cases in which there is any disposition of the coparcenary property by way of partition which has taken place before 20.12.2004. Statutory fiction of partition incorporated in Section 6(5) of the Act of 1956 is not applicable to property which has not been partitioned by execution of deed of partition registered under the Registration Act, 1908 (16 of 1908) or partition which has not been effected by a decree of a court. Meaning thereby, if the property has not been partitioned either by way of registered partition deed or decree of court, then a daughter will get the share equal to the son in partition of coparcenary property.

13. In the case of *Vineeta Sharma Vs. Rakesh Sharma and others*¹ the Supreme Court has held in para 76 as under:

“76. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to Section 6(1). When we read the

¹ (2020) 9 SCC 1

provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it became necessary to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20-12-2004. A daughter can assert the right on and from 9-9-2005, and the proviso saves from invalidation the above transactions.”(Emphasis supplied)”

Thus, the amendment of 2005 will also be applicable to pending cases where final decree has not been passed by the Court.

14. Evidently, in the present case, no final decree has been passed and only preliminary decree came to be passed. It is a settled position of law that preliminary decree can be amended until final decree is prepared. In that view of the matter, keeping the law enunciated by the Supreme Court and this Court in various decisions in mind, the effect of law has to be considered accordingly. A reference can be made to the decision of Supreme Court in the case of *Vineeta Shamra* (supra), wherein it has been held that passing of preliminary decree cannot come in the way while conferring the benefit of amended law to the said case in which the preliminary decree came to be passed. Therefore, in the present case, mere severance of status by way of filing of suit by

the respondent does not bring about partition till the date of final decree. Therefore, change in law and change due to subsequent events can be taken into consideration. Original plaintiff no.2 and defendant nos.3 and 4 being daughters of deceased Pundalik were alive on the date of enforcement of 2005 amendment, being coparceners will be entitled to the same share as allotted to a son i.e. appellant no.1.

15. Now, only question that remains is about the share of third deceased daughter-Kamalbai i.e. mother of respondent no.3-Santosh Khandagale, who died prior to coming into force of the amendment in Section 6 of the Hindu Succession Act, 1956 (for short, “**Act of 1956**”). The law in this regard has been crystallized by the decision of Full Bench of this Court of ***Badrinarayan Shankar Bhandari and others Vs. Omprakash Shankar Bhandari***¹, wherein, in para 53 and 57, it has been held as under:

“53. In view of above discussion, in our view the correct legal position is that Section 6 as amended by the 2005 Amendment Act is retroactive in nature meaning thereby the rights under Section 6(1)(b) and (c) and under sub-Rule (2) are available to all daughters living on the date of coming into force of the 2005 Amendment Act i.e. on 9 September 2005, though born prior to 9 September 2005.

¹ 2014 (5) MhLJ 434

Obviously, the daughters born on or after 9 September 2005 are entitled to get the benefits of Amended Section 6 of the Act under clause (a) of sub section (1). In other words, the heirs of daughters who died before 9 September 2005 do not get the benefits of amended Section 6.

57. We have considered the rival submissions. On an examination of amended Section 6 of the Principal Act and bearing in mind the words 'on and from commencement of the Hindu Succession Act, 2005' found in Section 6, it must follow that the rights under the amended Section 6 can be exercised by a daughter of a coparcener only after the commencement of the Amendment Act 2005. Therefore, it is imperative that the daughter who seeks to exercise such a right must herself be alive at the time when the Amendment Act, 2005 was brought into force. It would not matter whether the daughter concerned is born before 1956 or after 1956. This is for the simple reason that the Hindu Succession Act 1956 when it came into force applied to all Hindus in the country irrespective of their date of birth. The date of birth was not a criterion for application of the Principal Act. The only requirement is that when the Act is being sought to be applied, the person concerned must be in existence/ living. The Parliament has specifically used the word "on and from the commencement of Hindu Succession (Amendment) Act, 2005" so as to ensure that rights which are already settled are not disturbed by virtue of a person claiming as an heir to a daughter who had passed away before the Amendment Act came into force."

Therefore, for claiming right in coparcenary property, daughter of Hindu male shall be alive on the date of amendment of Section 6 of the Act of 1956. The right created in favour of a daughter of Hindu male being coparcener in coparcenary property will not be applicable to a deceased daughter who was not alive at the time when the right was created by the amendment in Section 6 of the Act of 1956. Indisputably, the mother of respondent no.3 died prior to 09.09.2005, when the amendment to Section 6 of the Act of 1956 came into force. Hence, her legal heirs will not be entitled to share in the coparcenary property.

16. Thus, by calculation, appellant no.1-Mungsaji Pawar, appellant no.2 – Tulsabai Pwar, respondent no.1- Radhabai Pawar, respondent no.2 - Kondubai Waghmare alongwith, respondent no.5 – Rekha Bhujade and respondent no.4 – Shewantabai alias Shantabai Wd/o Kisanrao Pakhale will get 1/6th each share in the suit property.

Whereas, the share of deceased appellant no.2-Tulsabai will devolve equally upon (1) appellant no.1 – Mungsaji Pawar, (2) respondent no.5 – Rekha Bhujade, (3) the legal heirs of respondent no.4-Shewantabai alias Shantabai and (4)

respondent no.3 – Santosh being son of pre-deceased daughter of appellant no.2-Tulsabai being heirs of Class-I of the Schedule of Act of 1956. Thus, appellant no.1, respondent no.3 and respondent no.5 will get 1/4th share each in the share of deceased Tulsabai. Whereas the legal heirs of respondent no.4 i.e. respondent nos.4(a) to 4(d) will together get 1/4th share in property that fell in the share of deceased Tulsabai.

17. Since respondent no.1-Radhabai Pawar and respondent no.2-Kondubai i.e. original plaintiffs died, therefore, the share of Radhabai will devolve upon appellant no.2 – Kondubai and consequently the said share will devolve upon the legal heirs of appellant no.2 -Kondubai i.e. respondent nos.2(1) to 2 (4) and 2(5A) and 2(5B) who will get 2/6th share in the suit property.

18. The appeal succeeds to that extent only by setting aside the impugned orders passed by the trial Court as well as first appellate Court. Remaining part of the order of trial Court will remain as it is.

JUDGE

Wagh