



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

SECOND APPEAL NO.215 OF 2021

1. Balkrushna S/o Pandurang Kamble
Aged about 68 years, Occ: Agriculturist
2. Shriram S/o Pandurang Kamble
Aged about 56 years, Occ: Agriculturist
3. Smt. Sundara W/o Manohar Bhujade
Aged about 70 years, Occ: Housewife
All R/o Village Pipla P.O. Aptur,
Tah. Umred, Dist. Nagpur.

...APPELLANTS
(Orig. Resp. Nos.1,3 &4)

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

1. Sau. Chandrakala W/o Manohar Sahare
Aged about 48 years, Occ: Agriculturist
R/o Village Gangapur, Tah. Umred,
Distt. Nagpur.
2. Mangla alias Indira W/o Diwakar Mankar
Aged about 53 years, Occ: Housewife
R/o Fegad, Tah. Kuhi, Distt. Nagpur.

...(Orig. Plaintiff)

...RESPONDENTS
(Orig. Respondent no.5)

Shri P.K. Mishra, Advocate for Appellants.
Shri T.S. Deshpande, Advocate for respondent no.1.

CORAM:- M.W. CHANDWANI, J.
RESERVED ON :- JULY 4, 2024
PRONOUNCED ON :- JULY 22,2024

JUDGMENT:

. The present appeal is an exception to the impugned
judgment and decree dated 09.03.2021 passed by the learned

District Judge, Nagpur in Regular Civil Appeal no.100 of 2018, thereby allowing the appeal by which, judgment and decree passed by the learned trial Court was modified and share of the plaintiff (respondent no.1 herein) has been increased from 1/24th to 1/6th share in the suit property.

Facts which give rise to the present appeal can be summarized as under:

2. The respondents and appellant no.3 are sisters of appellant nos.1 and 2. Respondent no.1 filed suit for partition and separate possession before the Civil Judge, Senior Division, Umred in the suit property old survey Nos.67/3 and 69/1 (Renumbered as Survey Nos.43, 110, 134, 136) on the premise that the suit property is an ancestral property and fell into the share of the father of the appellants and respondents. Though respondent no.1 requested to effect the partition but the appellants did not pay any heed.

3. Appellant nos.1 and 2 alongwith their brother Bisan Pandurang Kamble resisted the claim by filing written statement *inter alia* contending that the suit property is self-acquired property of deceased Pandurang. Twenty years after the death of

Pandurang, respondent no.1 demanded her share, therefore, the suit is barred by limitation. Respondent no.1 has orally relinquished her share from the suit property by accepting an amount of Rs.55,000/- from the appellants. From the said amount of Rs.55,000/- she purchased agricultural land and sold the same for valuable consideration.

4. After hearing the suit on merits, the trial Court decreed the suit by declaring that respondent no.1 and her sisters i.e. appellant nos.3 and respondent nos.2 and 3 have $1/24^{\text{th}}$ share whereas appellant nos.1 and 2 and their brother Bisan Kamble (original defendant no.2) have $7/24^{\text{th}}$ share in the suit properties bearing Survey Nos.43,110, 134 and 136 and directed for issuance of precept under Section 54 of the Code of Civil Procedure (for short "CPC") for effecting actual partition of the suit properties apart from direction for enquiry for future *mesne* profits. Respondent No.1 was not satisfied with the ratio of share allotted to her, and therefore, she exercised her statutory right of appeal. The appellate Court by the impugned judgment, allowed the appeal and ruled that respondent no.1 is entitled to $1/6^{\text{th}}$ share in the suit properties. Appellant nos.1 and 2 felt aggrieved with the impugned judgment filed present appeal.

5. By order dated 15.11.2022, this Court (Coram : Smt. M.S. Jawalkar, J.) framed following substantial questions of law :

“I) Whether the original plaintiffs/respondents who were not born even prior to 1968, when their father purchased the suit field property, can claim the equal share in the light of Section 6 of Hindu Succession Act, 1956 (amended Act of 2005) ?

II) Whether the Courts below were right in granting shares to the respondents in the field property bearing No.2/1 (new survey no. 43) admeasuring 6.90 acres i.e. 2.96 HR which was purchased prior to the birth of the respondents and allowed to be disposed of by father Pandurang himself amongst his sons ?”

6. With consent of the both parties, the appeal was taken up for final hearing at the admission stage.

7. Shri P.K. Mishra, learned counsel appearing for appellants, submitted that partition between father of the parties to appeal and his brother was effected in 1961, wherein Pandurang received only three properties i.e. Survey No.110 area 4.75 HR, Survey No.134 area 0.18 HR and Survey No.136 area 3.64 HR and respondent no.1 can claim her share only in these properties. Learned counsel for the appellants went on to submit that Survey No.43 area 2.96 HR part of suit property has

been purchased on 14.11.1967 before the birth of respondent no.1 therefore, she will not get any birth right in the suit property. He submitted that it is self-acquired property of Pandurang therefore, respondent no.1 has no share in the suit property, and therefore, she cannot claim equal share in view of Amended Section 6 of the Hindu Succession Act, 1956 (for short “the said Act”).

8. Learned counsel for the appellants submitted that the appellate Court committed serious error by modifying the decree of the trial Court and granting $1/6^{\text{th}}$ share in the suit property including in Survey No.43. According to him, the suit property was already partitioned prior to 2005 before amendment in Section 6 of the said Act came into force, therefore, respondent no.1 being a female cannot claim herself as coparcener of the property left by deceased Pandurang.

9. Conversely, Shri T.S. Deshpande, learned counsel for respondent no.1, submitted that no ground was taken in the written statement filed by the appellants before the trial Court nor any submission was made before the appellate Court that Survey No.43 is purchased by Pandurang in 1967, therefore, this ground cannot be taken in second appeal. According to him, the

appellants are raising this ground for the first time without pleading it in their written statement filed before the trial Court. Therefore, there is no substance in his argument and consequently no substantial question of law arises to that effect in the present appeal.

10. Learned counsel for respondent no.1 further vehemently submitted that the trial Court had wrongly held that the case of respondent no.1 is governed by the provisions of pre-amended Hindu Succession Act. The appellate Court after considering the ratio laid down by the Supreme Court in the case of *Vineeta Sharma Vs. Rakesh Sharma and others*¹ rightly granted equal share to respondent no.1 in the suit property and modified the decree increasing the share of respondent no.1 from 1/24th to 1/6th.

11. Having heard the learned counsel for the respective parties, I have gone through the judgments passed by the trial Court as well as appellate Court.

12. The learned trial Court concluded that suit property is an ancestral property in the hands of Pandurang, and therefore,

¹ AIR 2020 SC 3717 : AIROnline 2020 SC 676

respondent no.1 is entitled for share as per Old Section 6 of the said Act. The trial Court ruled that since Pandurang who is the father of respondent no.1, was not alive on 09.09.2005 i.e. on the date when the amendment of the said Act of 2005 came into force, therefore, the amendment cannot be applied to the case in hand. Pending appeal, the decision of the Supreme Court in the case of *Vineeta* (supra) came to be delivered. Relying on the decision of *Vineeta*, the appellate Court held that in the claim for applicability of amended Section 6 of the said Act there is no requirement that father of the coparcener should be alive. The appellate Court modified the judgment and decree of the trial Court by granting equal share to respondent no.1 as per Amended Act of 2005.

13. Needless to mention that the Supreme Court in the cases of *Badrinarayan Shankar Bhandari and others Vs. Omprakash¹, Prakash and others Vs. Phulwati and others²*, observed that right under amendment Section 6 of the said Act will be applicable to living daughters of living coparcener as on 09.09.2005 irrespective of the fact when such daughters are born. The issue again came up for consideration before the Supreme

¹ 2014(5) MhLJ 434

² (2016) 1 SCC 36

Court in the case of *Vineeta* (supra). After considering the decision in the case of *Badrinarayan* (supra), the Supreme Court has observed that right of coparcener is by birth and it is not necessary that the father of the coparcener should be alive as on 09.09.2005 when the said Act was amended in 2005. The Supreme Court has observed that irrespective of the date of death of father, the amended Section 6 of the said Act confers status of coparcener on the daughter born before or after the amendment in the same manner as the son with the same rights and liabilities. Therefore, I do not find any illegality in the finding to that effect recorded by the appellate Court.

14. This takes me to the next submission made by the learned counsel for the appellants who stressed more on the point that the land of Survey No.43 was purchased by Pandurang in the year 1967 prior to birth of respondent no.1, therefore, she will not have any right in the land of Survey No.43 as a coparcener. I have perused the written statement filed before the trial Court, there is no whisper in the entire written statement that land of Survey No.43 was purchased by Pandurang in the year 1967 prior to birth of respondent no.1. Therefore, I find substance in the argument of

learned counsel for respondent no.1 that this cannot be agitated for the first time in second appeal in absence of any pleading and proof in this behalf.

15. Be that as it may, even otherwise the submission made by the learned counsel for the appellants is strange and misconceived. Even for the sake of argument, if it is presumed that deceased Pandurang purchased the property in 1967, before birth of respondent no.1, on death of Pandurang she will be entitled to the equal share in the property being self-acquired property of deceased Pandurang as Class I heir of deceased Pandurang by virtue of Section 8 of the said Act irrespective of the date on which she is born. It is not the case of the appellants that deceased Pandurang has left any Will bequeathing his property so called Survey No.43 in favour of the appellants. Therefore, respondent no.1 being daughter of deceased Pandurang falls in the category of Class I heir of the Schedule of the said Act. Thus, even if it is presumed that land Survey No.43 is self-acquired property, rather entire suit property is self-acquired property of deceased Pandurang, on death of Pandurang respondent no.1 shall be entitled to equal share alongwith appellants, respondent no.2 and

Bisan Kamble. Therefore, no question of law muchless substantial question of law arises in this appeal. The appeal fails. Consequently, it is dismissed.

JUDGE

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