



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

SECOND APPEAL NO. 4 OF 2016

- 1] Bansi S/o Lodya Sao (Dead)
through legal heirs
- i) Shankar S/o Bansi Sao,
Aged about - 52 years,
Occupation Service,
R/o Raiyatwari Colliery,
Chandrapur.
- ii) Ratanlal S/o Bansi Sao,
Aged about - 49 Years,
Occupation Ex-Serviceman,
R/o Ashok Nagar,
New Sumthana,
Teh. Bhadrawati,
District Chandrapur.
- iii) Shantaram S/o Bansi Sao,
Aged about - 47 Years,
Occupation Service,
R/o Near Old Power House,
Babupeth, Chandrapur.
- iv) Sau. Indira Nagesh Raipure,
Aged about - 40 Years,
Occ. Household, R/o Payali,
Teh. & Distt. Chandrapur.
- 2] Pandhari S/o Bansi Sao,
Aged about - 50 Years,
Occupation Cultivation,
R/o Palli Bhatrali, Teh. & Distt. Chandrapur. ... Ori. APPELLANTS NO.1 & 2
Ori. DEFENDANTS No. 1 & 2

VERSUS

Wachantabai Wd/o Uddhav
Katkar
(Since deceased through
L.Rs.)

- i-a) Tarachand Udhao Katkar,
Aged about - 62 Years,
Occupation Labour,
R/o Kitali,
Post Padmapur, Teh. & Distt.
Chandrapur.
- i-b) Haridas Udhao Katkar,
Aged about - 60 Years,
Occupation Labour,
R/o Payali, Teh. & Distt.
Chandrapur.
- i-c) Smt. Nirmala Tukaram
Petkar,
Aged about - 58 Years,
Occupation Household,
R/o Masala, Teh. & Distt.
Chandrapur.
- i-d) Smt. Umadabai Bhavnik
Deogade,
Aged about - 56 Years,
Occupation Household,
R/o Chichpalli, Teh. & Distt.
Chandrapur.
- i-e) Shalik Udhao Katkar,
Aged about - 55 Years,
Occupation Labour,
R/o Payali, Teh. & Distt.
Chandrapur.
- i-f) Smt. Birjulabai Kisan
Ramteke,
Aged about 53 Years,
Occupation Household,
R/o Tukum, Chandrapur,
Teh. & Distt. Chandrapur.
- i-g) Smt. Jaytulabai Pralhad
Khobragade,
Aged about - 50 Years,

Occupation Household,
R/o Tukum, Chandrapur,
Teh. & Distt. Chandrapur.

- i-h) Siddhartha Udhao Katkar,
Aged about 48 Years,
Occupation Labour,
R/o Payali, Teh. & Distt.
Chandrapur.
- i-i) Gautam Udhao Katkar,
Aged about - 43 Years,
Occupation Labour,
R/o Payali,
Teh. & Distt. Chandrapur.
- i-j) Rashtrapal Udhao Katkar,
Aged about 40 Years,
Occupation Service, **.... Ori. RESPONDENTS**
R/o Tukum, Chandrapur, **Ori. PLAINTIFFS**
Teh. & Distt. Chandrapur.
2. Thakabai Wd/o Rajaram (Dead through LRs)
Chunarkar,
Aged about - 65 Years,
Occ. Household, R/o Kitadi, **.... Ori. APPELLANT NO.3**
Teh. & Distt. Chandrapur. **Ori. DEFENDANT NO.3**
- 2.I Anandrav S/o Rajaram
Chunarkar, (Amendment carried out
R/o Koyna gate, Navin as per Court order
Sinhaka, Urjanagar, Dt.8/7/24)
Dist. Chandrapur.
- 2.II Mahendra S/o Rajaram
Chunarkar,
R/o Urjanagar,
Dist. Chandrapur.
- 2.III Ashok S/o Rajaram
Chunarkar,
R/o Carmel Academy,
Sugat Nagar Ward No.2,
Tukum, Dist. Chandrapur.

2.IV Vidya W/o Ashok Ramteke, (Dead through LRs)
R/o Samta Colony S.T.
workshop Chowkh,
Vidyavihar,
Dist. Chandrapur.

2(iv-i) Rahul s/o Ashok Ramteke
Aged - Major, Occ - Private, (Amendment carried out
R/o: Workshop Chawk, as per Court order
Near Vidyavihar Convent Dt. 8/7/2024)
School, Dist.- Chandrapur.

Shri S. P. Bhandarkar, Advocate for appellants.
Shri Yash Kullarwar, Advocate for h/f Shri M. Anilkumar, Advocate for
respondent Nos.1(i-a) to 1(i-j) and LRs of respondent No.2.

CORAM:- SANJAY A. DESHMUKH, J.

JUDGMENT RESERVED ON : 30/07/2024.

JUDGMENT PRONOUNCED ON : 27/09/2024.

JUDGMENT :

1. This appeal is preferred against the Judgment and decree passed by the learned District Judge, Chandrapur in Regular Civil Appeal No.22/2004 vide Judgment and decree dated 08/09/2015. The said First Appeal was preferred against the Judgment and decree passed by the Civil Judge, Junior Division, Chandrapur in Regular Civil Suit No.249/1996 dated 25/04/2001.

PLAINTIFF'S CASE

2. The ancestral agricultural land bearing T.S. No.12 at Village Payali Bhatali, Survey No.150, Post Padmapur, Tah. & Dist. Chandrapur (Old No.75/2) admeasuring 4 Hectare 88 R is subject matter of suit.

3. The plaintiff is elder daughter of deceased Lodya Sao. The defendant No.1 is the plaintiff's brother. The defendant No.6 is the sister of plaintiff. The defendant Nos.2 to 5 are sons of defendant No.1 deceased Bansi.

4. After Lodya's death, partition between the parties was not carried out. The defendant Nos.1 to 6 are earning income from the suit property. The plaintiff further contended that, without giving any intimation to her, names of defendant Nos.2 to 5 were recorded in the Record of Rights of the suit property on the basis of written partition dated 26/11/1986 effected by defendant No.1 – Bansi. The plaintiff asserts that the said partition deed is illegal.

5. The plaintiff sent a notice dated 04/09/1996 to the defendants requesting a partition of the suit property, but it was not responded. Therefore, she filed suit for partition.

6. The defendant Nos.1, 2 and 3 by their written statement, denied the material contentions raised by the plaintiffs. They further stated that defendant Nos.1 to 6 are legal heirs of Lodya Sao. The defendants lastly prayed for the dismissal of the suit.

7. The learned Trial Court framed nine issues and held that the plaintiff had proved that Lodya was the owner of the suit property, and it is ancestral property and the suit was decreed. The defendants preferred the Regular Civil Appeal No.22/2004, which was dismissed with costs.

8. This Court formed the following substantial question of law :-

"Whether the suit for partition and separate possession at the instance of plaintiff daughter was maintainable, particularly when her father died in the year 1940 and the plaintiff was married prior to 1994 ?"

9. Perused the impugned Judgment and Decree as well as record and proceedings.

10. Learned advocate for the appellant submitted that the Hindu Succession Act, 1956 was passed in the year 1956. It applies prospectively. The learned advocate for the appellant further pointed out that, though the suit property is ancestral, at the time of the father's death, the daughter was not entitled to share in the property of father. He is relying upon the following precedential laws :-

- i] **Adivepa and others Vrs. Bhimappa and another, (2017) 9 SCC 586** in which, law is laid down that, burden lies on the plaintiff to prove that the suit properties are ancestral properties of the Hindu Joint Family.
- ii] **In Tarsem Singh Dole Vrs. Achhar Singh, 2010 SCC OnLine P & H 10191,** it was held that heavy burden lies upon the plaintiff to prove the property to be ancestral property.
- iii] **In Marabasappa (Dead) by LRs and others Vrs. Ningappa (Dead) by LRs and others, (2011) 9 SCC 451,** it was held that when no proof put-forth by the plaintiff as to the disputed property being Joint Family Property, shifting burden of proof on the defendants to prove the said property as being self-acquired, is not proper.

iv] In Rangammal Vrs. Kuppuswami and another, (2011) 12 SCC 220, it was held that misplacing burden of proof on a particular party and recording findings on that basis by the Court vitiates its judgment.

11. Learned advocate for the defendants lastly submitted that Hindu daughter whose father died before 1956 is not entitled to share in his properties. He, therefore, submitted to set aside the Judgments of both the Courts by holding that the plaintiff is not entitled for share in the suit property.

12. Learned advocate for the plaintiff submitted that death of father of plaintiff before 1956 is not proved by the defendants. Such defence was not taken in the Trial Court. The Judgment and Decree passed by both the Courts are legal and correct and no interference is warranted in it. He submitted that this Court cannot enter into the issue of facts. There is concurrent finding of both Courts on facts in which no interference is warranted. He is relying upon the following precedential laws :-

i] C. Doddanarayan Reddy (Dead) by LRS. Vrs. C. Jayarama Reddy (Dead) By LRS. and others, in Civil Appeal No.2165/2009 decided on 14/02/2020 in which it was held that there is no scope for the High Court in

interfering with the findings on the point of appreciation of evidence regarding fact and recording reverse findings of fact under Section 100 of the Code of Civil Procedure.

ii] **Dhanpat Vrs. Sheo Ram (deceased) through legal representatives and others, (2020) 16 SCC 209** in which it was held in Para No.15 of Para No.13 as follows :-

"15. A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact."

13. The defendants took defence that the suit property is not ancestral property of Lodya. However, they have not adduced any reliable evidence to show that it was their self-acquired property. Admittedly, Mr.Lodya died intestate. The plaintiff had adduced evidence of 7/12 extract of the years 1954 - 1955, 1985 - 1986 at Exhs.54 and 55 respectively to prove that those are ancestral properties. The defendants have not disproved it.

14. In this case, the learned advocate for the defendants pointed out that there is admission of the plaintiff in her examination-in-chief that when her father died, she was 6 years old and defendant No.1 Bansi was 8 years old. While deposing, she stated that was 65 years old. She filed suit for partition on 01/11/1996. In her suit, she mentioned that her age was approximately 65. Learned advocate for the defendants submitted that from all these admissions, it can be inferred that plaintiff's father died before 1956. However, it is well settled that such admissions are weaker evidence. Plaintiff is rustic woman. She states 65 years age continuously in her plaint in the year 1996 and while deposing in the year 2000 also. As per Section 31 of the Indian Evidence Act, admission is not a conclusive proof. Moreover, under Section 58 of the Indian Evidence Act, 1872, fact admittedly need not be proved. However, as per proviso of it, Court may require independent proof of fact admitted. No such independent evidence is adduced by the plaintiff to prove the date of death of Lodya to show that he died before 1956. The defendants did not raise such defence of disputed fact in their written statement that the Lodya died before 1956. The defence of death of Lodya before 1956 is material proposition of law and fact as per Order XIV of the CPC which is not pleaded. It is mandatory

provision. But this defence has not been raised by the defendants in their written statement. Further, it must be proved by the positive evidence. The weakness of plaintiff's case cannot be ground to accept the case of the defendant. They have not established said defence by the cogent and acceptable evidence. As per proviso to Section 58 of the Indian Evidence Act, when there is no independent evidence of defendants to prove that Lodya died in 1956. Thus, admissions of plaintiff are not beneficial to the defendants to prove their defence of fact of death of Lodya in the year 1940. The defendants have not examined themselves to prove any disputed fact. It is not disclosed as to when wife of Lodya died. If she died after 1956, the plaintiff is her legal heir as per Section 15 of H. S. Act. However, such is not case of both sides.

15. The burden to establish that the father of defendant No.1 died before 1956 lies upon the defendants to prove it. There is concurrent finding of both Courts on the facts that the plaintiff is entitled to a share as per Section 8 of the Indian Succession Act, 1925 as Class-I heir of her father Lodya.

16. Considering all these aspects, the ratio laid down in the case of **Adivappa and others Vrs. Bhimappa and another, (2017) 9**

SCC 586 is not helpful to the defendants. Further, as per Tarsem Singh Dole Vrs. Achhar Singh, 2010 SCC OnLine P & H 10191 in which though it was held that heavy burden lies upon the plaintiff to prove the property to be ancestral property, the plaintiff has adduced the evidences of 7/12 extracts to show that the suit properties are ancestral. No any contrary evidence is adduced by the defendants.

17. The defence of the defendants that there was earlier partition between them in the absence of carving out the share of the plaintiff, it is, therefore, not legal and acceptable.

18. Considering all the aspects discussed above, this Court is of the view that the defendants did not adduce any evidence to prove that the Lodya died in the year 1940 before H. S. Act, 1956 and therefore, the plaintiff is not entitled for the share in the suit properties as his legal heir.

19. The law is now well settled by the precedential law of Vineeta Sharma that if the daughter married before 1994, she is entitled for the share in the coparcenary property. In the present case, the plaintiff has not claimed her share in the suit property as a coparcenar. The plaintiff has claimed her share on the basis of

succession as per Section 8 of the Hindu Succession Act, 1956 as she is Class-I heir of her father. Therefore, issue of her marriage before or after 1994 is redundant.

20. It is well settled that this Court cannot enter into factual matrix of the case. In view of law laid down by the Hon'ble Supreme Court in the case of Dhanpat Vrs. Sheo Ram, cited supra relied upon, on behalf of the plaintiff as there are concurrent findings of both the Courts against the defendants. It is also held by Hon'ble Supreme Court in the case of Damodar Lal Vrs. Sohan Devi and others, (2016) 3 SCC 78 that wrong finding of the fact by itself cannot constitute question of law.

21. Considering all these aspects, it is held that the plaintiff being Class-I heir, she is certainly entitled to claim her share. The suit is, therefore maintainable. The substantial question of law is therefore, answered that suit is maintainable as the death of the father of the plaintiff in the year 1940 is not proved by the defendants by cogent and acceptable evidence.

22. For the reasons discussed above, the precedential law cited supra on behalf of the defendants is not helpful to them. Hence, it is not relied upon.

23. The argument of learned advocate for the appellant/plaintiff is not acceptable that suit is not maintainable.

24. The appeal being devoid of merit, deserves to be dismissed. Hence, the following order :-

ORDER

25. The appeal is dismissed. No costs.

26. The application filed by the appellant bearing Misc. Civil Application No.1013/2022 is also disposed of as the suit is maintainable.

27. Pending applications, if any, are disposed of.

[SANJAY A. DESHMUKH, J.]