



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

919 SECOND APPEAL NO. 132 OF 1994

NANA RAOSAHEB WAGH
VERSUS
RAMDAS VISHNU WAGH AND OTHERS

Mr. A. V. Hon, Advocate for the appellant
None for the respondents.

CORAM : R. M. JOSHI, J.
DATE : 10th JANUARY, 2025

PER COURT :-

1. This appeal involves peculiar questions as to the effect of decree passed in the previous suit for partition against the predecessor of the plaintiffs herein which is held to be not binding on him as the same being passed against the dead person. Secondly, in this back drop, whether it was open for the plaintiffs i.e. successor of deceased to seek partition of only in respect of one property excluding other properties which are admittedly ancestral property of plaintiffs and defendant.

2. Plaintiffs filed suit before the Trial Court seeking partition of suit property bearing Gut No. 361 situated at Wanjoli, Taluka Newasa, District Ahmednagar claiming that it is ancestral property of plaintiffs and defendant. Defendant no.1 filed written statement specifically contending therein that the suit for partial partition is not tenable and gut no. 367

and house property which also belong to joint family are not included therein. Apart from this it is specifically averred that previously the suit was filed by defendant being R.C.S. No. 325/1979 wherein Laxman, predecessor of the plaintiffs was party defendant. This suit was decreed. It is alleged that in order to ensure that the defendants do not get their shares as decided in the said partition, present suit is filed. It is also claimed that Laxman has never sought any partition of the suit properties during his lifetime.

3. After Trial Court framed the issues, plaintiffs examined Janabai at Exhibit 30, whereas defendants examined Nana at Exhibit 22. The learned Trial Court dismissed the suit, with observations that decree passed in R.C.S. No. 325/1979 is binding on Laxman though he was dead when it was passed. This judgment was taken exception before the First Appellate Court in R.C.A. No. 197/1988. The Appellate Court reversed the said judgment and decree. It is held that the decree passed against the dead person would not bind him or his LR's.

4. Learned counsel for defendant no.1-appellant submits that though the observation made by the learned Trial court about decree passed in R.C.S. No. 325/1979 would be binding against Laxman and consequently on his LR's is correct, however, at the same time the First Appellate Court has committed error in not appreciating the pleadings

and evidence on record in proper perspective. It is his submission by relying upon the judgment of the Hon'ble Supreme Court in case of *Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board*, MANU/SC/0863/2010, that if the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at such findings, the said findings may be said to be perverse and can be interfered with in the second appeal. To support his submission he drew attention of the Court to certain admitted facts during the evidence of plaintiffs. He pointed out that plaintiff has candidly admitted about Laxman never demanded any partition during his lifetime from Raosaheb. He also referred to admission of plaintiffs witness to the effect that there is another land. But she claims that defendants have no share then. As against this defendant no.1 has specifically stated about the inclusion of suit property as well as other properties in R.C.S. No. 325/1979.

5. There is no dispute about the fact that R.C.S. No. 325/1979 Laxman was party defendant. Since the decree is passed when he already dead, the same is not binding upon him. Now question arises as to whether once it is held that the decree is not binding upon Laxman because he is dead, whether it is open for the plaintiff to file a suit by

excluding other properties than the suit property. The written statement filed by the defendant specifically takes a plea that suit for partial partition and without including gut no. 367 and house property is not tenable. There is no dispute made by the plaintiffs about the fact that along with suit property herein other properties were subject matter of R.C.S. No. 325/1979.

6. A further question arises what would be the consequence of holding that the decree passed wherein against Laxman would not bind him or his LR's. If it to be held that the decree passed in the suit for partition is against dead person, obviously in fact entire decree would not survive. Consequently, all the properties would be subjected to the partition in fresh suit filed by the plaintiffs. These aspects are not taken into consideration by Trial Court as well as First Appellate Court. In the considered view of this Court this appears to be error in law committed by them which amounts to a substantial question of law involved in this appeal.

7. In the peculiar facts of the case there would no alternative to but to set aside both orders and to relegate the suit for decision afresh. Needless to say that Trial Court to decide the said suit uninfluenced by the observations made by the First Appellate Court as well as this Court. Needless to say that the objection raised by the defendant to the

maintainability of the suit be also considered as per law.

8. In view of the above discussion, second appeal stands allowed. Both orders set aside. R.C.S. No. 325/1979 is relegated back to the Trial Court for decision afresh. Since, the suit is of year 1979, it be decided finally within a period of six months, from date of knowledge of this order by Trial Court.

(R. M. JOSHI, J.)

ssp