



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.697 OF 2019
WITH
CIVIL APPLICATION NO.4517 OF 2024**

1. Vishnu s/o Magan Somwanshi,
Age: 57 yrs, Occu: Agril,
R/o. Motegaon, Tq. Renapur,
Dist: Latur.
2. Vishal s/o Vishnu Somwanshi,
Age: Major, Occu: Education,
R/o. Motegaon, Tq. Renapur,
Dist: Latur.
3. Sunita d/o Vishnu Somwanshi,
Age: Major, Occu: Education,
R/o. Motegaon, Tq. Renapur,
Dist: Latur.
4. Manish d/o Vishnu Somwanshi,
Age: Major, Occu: Education,
R/o. Motegaon, Tq. Renapur,
Dist: Latur.

..Appellants
(Orig. Defendants)

Versus

1. Ashruba s/o Vishnu Somwanshi,
Age: 26 yrs, Occu: Agril,
R/o. Motegaon, Tq. Renapur,
Dist: Latur.
2. Vimal Vishnu Somwanshi,
Age: Major, Occu: Household,
R/o. Tatborgaon, Tq. Ambajogai,
Dist: Beed.
3. Babasaheb s/o Magan Somwanshi,
Age: 62 yrs, Occu: Agril,
R/o. Motegaon, Tq. Renapur,
Dist: Latur.
4. Mina Hanmant Bhise
Age: 52 yrs, Occu: Household,
R/o. Pimpri-Amba Post. Yeli,
Tq. & Dist: Latur.

5. Jayshree Shrimant Sonwane
 Age: 47 yrs, Occu: Household,
 R/o. Shera, Post. Darjiborgaon,
 Tq. Renapur, Dist: Latur. ..Respondents
 (Respt. No.1 & 2- Orig. Plaintiffs)
 (Respt. No.3 to 5- Orig. Defendants)

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Mr. A. A. Joshi h/f Mr. S. V. Natu, Advocate for Appellants.
 Mr. T. G. Gaikwad, Advocate for Respondent Nos.1 and 2.
 Mr. M. D. Shinde, Advocate for Respondent Nos.4 and 5.
 Respondent No.3 is served.

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CORAM : S. G. CHAPALGAONKAR, J.
DATED : 31st JANUARY, 2025.

ORDER:-

1. The appellants/original defendant nos.2, 5, 6 and 7 assail judgment and decree dated 18.11.2017 passed by the Principal District Judge, Latur in Regular Civil Appeal No.205/2014, thereby upholding judgment and decree dated 05.12.2014 passed by the Joint Civil Judge, Junior Judge, Renapur in Regular Civil Suit No.9/2011. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The respondent nos.1 and 2 (original plaintiffs) instituted Regular Civil Suit No.9/2011 seeking decree of partition and separate possession in respect of suit property, particularly described in plaint. The plaintiffs contend that plaintiff no.2-Vimal married with defendant no.2-Vishnu in the year 1990. The plaintiff no.1-Ashruba is begotten from the said marriage. The defendant no.2 ill-treated plaintiff no.2. Therefore, after

cohabitation of about two and half years, she was forced to leave home. According to plaintiffs, defendant no.2 failed to provide maintenance to them. On 24.12.2010, plaintiffs asked defendants to allot them share in the joint family properties, but they refused. Lastly, legal notice dated 30.12.2010 sent by registered post, which was not replied. Hence, cause of action arose to file the suit.

3. The defendant no.2-Vishnu filed written statement at Exhibit-49. He admitted marriage with plaintiff no.2. However, denies paternity of plaintiff no.1. The Trial Court framed issues based on pleadings of parties and referring to presumption under Section 112 of the Indian Evidence Act accepted the case of plaintiffs that plaintiff no.1 is son of defendant no.2 borne from plaintiff no.2. Resultantly, declared that plaintiffs are having 1/12th share in the suit properties and granted decree for partition and separate possession. Aggrieved defendants filed Regular Civil Appeal No.205/2004. The learned District Judge concurred with the decree passed by the Trial Court and dismissed the Appeal.

4. Mr. Joshi, learned Advocate appearing for the appellants submits that defendant no.2 has specifically denied paternity of plaintiff no.1. However, Courts below have erroneously held that plaintiff no.1 is biological son of defendant no.2. According to him, plaintiff no.2 left the house of defendant no.2 within a period of two months of marriage. As such, there was no access between plaintiff

no.2 and defendant no.2, although their marriage was subsisting. Referring to contradiction in the statement of plaintiff no.1 and plaintiff no.2 as to the place of birth of plaintiff no.1, he submits that Courts below erred in accepting plaintiffs case. He would further submit that second wife of defendant no.2 was necessary party. In her absence, suit was not maintainable.

5. Mr. Gaikwad, learned Advocate appearing for respondent nos.1 and 2/plaintiffs supports the decree contending that concurrent findings of the fact has been recorded by the Courts below on appreciation of evidence by applying correct legal position. As such, no substantial questions of law arises for consideration in this Appeal.

6. Having considered submissions advanced, limited controversy that has been raised in this Appeal is as regards to the concurrent findings recorded by the Courts below that plaintiff no.1 is biological son of defendant no.2-Vishnu. The Trial Court has discussed in detail the pleadings and evidence of the parties while recording findings against issue no.1. The Trial Court referred to Section 112 of the Indian Evidence Act regarding the presumption of legitimacy when a birth took place during the continuance of a valid marriage between the mother and another man. The Trial Court rightly observed that, in light of the admission of the subsistence of marriage between plaintiff no.2 and defendant no.2,

it was for the defendant to establish that he did not have access to plaintiff no.1 when denying paternity of plaintiff no.1. Reference is given to the observations of Supreme Court of India in case of ***Kamti Devi and another Vs. Poshi Ram***¹. It is accordingly observed that normally rule of evidence is that the burden is on the party who asserts, but in wake of legislative intent against illegitimizing child, the burden is cast on the parties, who pleads negative. The Trial Court further observed that plaintiff no.2 deposed that her marriage took place on 13.05.1990 with defendant no.2 and she lived with him for about two and half years till she was driven out of the house and plaintiff no.1 borne out of such matrimonial relationship. The plaintiffs have specifically brought on record date of birth of plaintiff no.1 as 25.06.1991, which is not been specifically denied by defendants. As such, on appreciation of evidence and legal position, finding of facts has been arrived as to paternity of defendant no.2 in relation to plaintiff no.1. The Appellate Court concurred with the findings. No infirmity can be found in concurrent findings of the Courts on the aspect of paternity of defendant no.2.

7. Both the Courts have concurrently hold that plaintiffs have 1/12th share each in the suit property alongwith defendant no.2. No infirmity can be found in carving out shares looking to the settled legal position. So far as applicant nos.2, 3 and 4 (original

¹ AIR 2001 SC 2226.

defendant nos.5, 6 and 7) are concerned, admittedly they are children borne from second marriage of Vishnu during subsistence of his marriage with plaintiff no.2. So far as their rights are concerned, they are governed by the law laid down by the Supreme Court of India in the case of ***Revanasiddappa and another Vs. Mallikarjun and others***², wherein, upon interpreting Section 16(3) of the Hindu Marriage Act and provisions of the Hindu Succession Act, the right of illegitimate children to share in their parents' property along with legitimate children has been upheld. However, they have no independent right in coparcenary property, nor do they have the right to seek partition during the lifetime of their parents. In view of the settled legal position, appellant nos.2 to 4 can assert their right to partition only after the lifetime of their father, Vishnu.

8. Consequently, Second Appeal sans merit. Hence, Second Appeal stands dismissed.

9. In view of dismissal of Second Appeal, nothing survives in Civil Application and same is accordingly disposed of.

(S. G. CHAPALGAONKAR)
JUDGE