



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 156 OF 2022 WITH
CIVIL APPLICATION NO. 4122 OF 2022
IN SA/156/2022

Bapurao Shivaji Suryawanshi Died Through Lrs. Kondabai
Paurao Suryawanshi And Ors.

VERSUS

Shankar Shivaji Shahu Suryawanshi And Ors.

- Mr. S. R. Bagal, Advocate for the Appellants
- Mr. P. R. Katneshwarkar, Senior Advocate i/by Mr. A. A. Fulfagar, Advocate for the Respondents

CORAM : R. M. JOSHI, J

DATE : JULY 23, 2025

PER COURT :

1. This Appeal under Section 100 of the Code of Civil Procedure takes exception to the concurrent findings recorded by the Trial Court and First Appellate Court in RCS No. 555/2003 and RCA No. 8/2018 respectively.

2. Parties are referred to as 'Plaintiff' and 'Defendant' for the sake of convenience.

3. Plaintiff - Shankar filed suit being RCS No. 555/2003 seeking partition and separate possession of his 1/3rd share in the suit properties. It is

specifically contended that suit properties are ancestral joint family properties of Plaintiff and Defendants. It is his further case that he was born to Shahuji @ Shavaji, his father and Sakhubai, his mother around 48 years ago. It is claimed that Sakhubai died in the year 1972. It is further claimed that at the time of death of Shavaji, Plaintiff was about 15 to 16 years of age. It is specifically stated in the plaint that Plaintiff was given 1/3rd share in the grain cultivated. The cause of action is spelt out in the plaint stating that till the death of Satvaji the said 1/3rd share was given to the Plaintiff and when the Plaintiff has sought partition of the suit properties, the same was denied.

4. Defendants appeared before the Trial Court and filed written statement denying the case sought to be made out by the Plaintiff about he being son of Shavaji. There is also denial of the fact that Shavaji married to Sakhubai. The other contentions sought to be raised by the Plaintiff are also denied. The tenability of the suit is challenged on the ground that all the properties of Shavaji are not included in the suit.

5. After filing of the written statement, Defendants failed to appear before trial Court to contest the suit further. Plaintiff - Shankar examined himself at Exh. 15. He has deposed in accordance with his plaint so also it is specifically claimed that there was a marriage between Shavaji and Sakhubai i.e., mother of the Plaintiff. To support his oral evidence, he placed reliance on the death certificate of Sakhubai indicating name of her husband as Shavaji. Reliance is also placed on school leaving certificate indicating that Shavaji is father of the Plaintiff. The said contention of the Plaintiff and the evidence on record went unchallenged as he was not cross-examined. The Defendants obviously failed to lead any evidence. The Trial Court by judgment dated 07.09.2015 decreed the suit by holding that the Plaintiff is son of Shavaji and Sakhubai. The said findings are recorded essentially on the ground that the evidence led by the Plaintiff has gone unchallenged.

6. This judgment and decree passed by the Trial Court was assailed before the First Appellate Court in RCA No. 08/2018. Before the First Appellate Court the

Defendants though sought remand of the suit for giving an opportunity of hearing and leading evidence to the Defendants. The First Appellate Court however upheld the impugned order before it and hence, this Second Appeal.

7. Learned Counsel for the Defendants/Appellants submits that the Trial Court has committed error in casting burden upon the Defendants to prove that their father Shavaji was not married to Sakhubai i.e. mother of the Plaintiff. It is his submission that the burden ought to have been placed on the Plaintiff to prove that there was such marriage. It is his submission by relying upon the judgment of the Hon'ble Supreme Court in case of *Bant Sing and Anr. vs. Niranjan Singh (D) by Lrs. and Anr. 2008 AIR (SC) 1512* that the issue of validity of the marriage between Shavaji and Sakhubai ought to have been considered by the Courts below keeping in mind the provisions of Section 50 of the Evidence Act. It is his submission that for want of examining any witness who has attended the marriage, it cannot be held that there was a valid marriage between these persons. It is his further submission that the

burden of proof would always be on the Plaintiff and since the same has wrongly placed on the Defendants, it becomes a substantial question of law. To support these submissions, he placed reliance on the judgment of Supreme Court in case of *Rangammal v. Kuppuswami and Anr, AIR 2011 SC 2344*. It is further argued that all the joint family properties are not included in the suit and hence, on that count alone suit ought to have been dismissed by the Trial Court. Finally, it is submitted that there was error committed by the Advocate for the Defendants in not causing appearance before the Trial Court and this has resulted into their non appearance and non contesting of the suit. He, therefore, seeks remand of the suit before the Trial Court. In support of these submissions, he placed reliance on following judgments: *Ram alias Ramdas Sheshrao Neharkar vs. Sheshrao baburao Neharkar and Others, (2024) 7 SCC 512* & *Ariane Orgachem Private Limited vs. Wyeth Employees Union and Others, (2015) 7 SCC 561*.

8. Learned Senior Counsel appearing for the Plaintiff/Respondent submits that this is not the case

wherein the judgment has been passed on the basis of incorrect issue framed by the Trial Court. According to him, though the issue framed is not happily worded, however, Plaintiff has discharged his initial burden of proving the marriage between the Shavaji and Sakhubai and that he is their son. It is his contention that apart from the oral evidence of the Plaintiff, there is corroborative statement in the form of school leaving certificate of Plaintiff so also death certificate of his mother i.e., Sakhubai. It is his submission that since the evidence led by the Plaintiff had gone unchallenged, there occurred no occasion for the Plaintiff to lead evidence to substantiate his case any further. It is his submission that in so far as non inclusion of the house property is concerned, there is explanation provided in the evidence by the Plaintiff, which has not been challenged by the Defendants. According to him, in order to entertain an Appeal under Section 100 of the CPC, there ought to exist a substantial question of law and in absence thereof, the Appeal cannot be entertained.

9. At the outset, it needs to be recorded that

the Appellants/Defendants after filing written statement failed to cause appearance before the Trial Court and that has resulted into Plaintiff being not cross-examined. Thus, at first instance it was obligatory on the part of the Defendants to show to the First Appellate Court that as to the reason for which they could not cause appearance before the Court below. Though it is sought to be argued now that on account of mistake of the Advocate the appearance is not caused, there is no such ground raised before the First Appellate Court. Now it cannot be allowed to be argued that the ground now sought to be raised of the mistake of the Advocate should be presumed to have been taken up before the First Appellate Court. Needless to say that unless the party provides a satisfactory reason for non appearance before the Court, it is to be held responsible for the outcome thereof. Here in this case, for want of any specific plea being raised before the First Appellate Court showing sufficient reason for non appearance, now it cannot be permitted for the Defendants to say that their non appearance has occurred on account of the mistake of the Advocate. Thus, contention of the Counsel for the

Defendants/Appellants sans merit and deserves no consideration.

10. No doubt, in appropriate cases where the outcome of the suit is on account of the incorrect framing of the issue, it can become a substantial question of law. Here in this case, Plaintiff has led his evidence and has practically discharged the initial burden upon the him to prove his case. The onus, therefore, even otherwise, shifted on Defendants. They however have failed to cause appearance before trial Court after filing of the written statement and have chosen not to cross-examine the Plaintiff. The evidence of the Plaintiff thus went unrebutted.

11. Now question arises as to whether it would be open for the Defendants now to claim that the prejudice is caused to them on account of their absence without justifying the absence itself. Though the issue framed by the Trial Court was not happily worded, however, as a matter of fact Plaintiff led the evidence and discharged initial burden on him. Perusal of order impugned does not show that the suit has been decreed solely on the ground that Defendants failed to

discharge the burden, wrongly placed upon them. The trial Court has duly considered the un-controverted oral evidence of Plaintiff supported by documentary evidence and accepted the same. Thus, for want of the decision of the suit only for the reason that the Defendants have not led evidence, it cannot lead inference that there exists a substantial question of law in this present Appeal.

12. As far as the judgment cited in case of **Rangamma1** (supra), the Hon'ble Supreme Court has held that the substantial question of law will arise while appreciating the question of burden of proof. A burden of proof is misplaced on a particular party and recording findings in a particular way has been done, then it vitiates the judgment. It is so observed in paragraph 20 indicating that it has happened so in the said matter. As far as present case is concerned, the evidence of the Plaintiff has gone unchallenged, initial burden is, therefore, duly discharged by Plaintiff. The onus obviously has to shift upon the Defendants to prove otherwise. Perusal of the impugned judgment also does not indicate that the Trial Court

was swayed away with the fact that burden casts upon the Defendants. The judgment clearly indicates that the Trial Court has considered the evidence led by the Plaintiff and accepted the same in view of the supporting documentary evidence. In respectful view of this Court, the above cited judgment has no application to the present case.

13. Perusal of the impugned judgment and order passed by the Trial Court indicates that the Trial Court has duly considered the oral evidence of the Plaintiff, which is duly supported by the documentary evidence on record. Since such evidence has gone unchallenged, no fault can be found that with the Trial Court if such evidence is accepted and is made a basis for passing of the judgment.

14. As far as Section 50 of the Evidence Act is concerned, it deals with relevancy of opinion on relationship. This provision permits a Court to form opinion as to the relationship of one person to another. Such existence of relationship can be opined from conduct of any person, who has special means of knowledge. It must be relevant to take note of proviso

to the said section, which makes such opinion not sufficient to prove a marriage in a proceeding under the Indian Divorce Act and in a prosecution under Section 494, 495, 497 and 498 of the Indian Penal Code. Thus, opinion formed by a Court in respect of relationship even on the basis of oral evidence would be sufficient. The documentary evidence to substantiate such fact has not been excluded from consideration. Here in this case, it is not only oral evidence of the Plaintiff to establish that he was born in the year 1957 and marriage of his mother is performed prior thereto. There is cogent documentary evidence to support his case. His date of birth is duly proved from the school leaving certificate so also the name of father and mother. The death certificate of his mother Sakhubai indicates that her husband was Shavaji. Thus, this is not the case wherein there is only oral statement led by the Plaintiff in respect of marriage of the parents but the same is duly corroborated by the documentary evidence on record. It would be too harsh to call upon the Plaintiff to prove the marriage of his parents, which has taken place around 50 years ago. More particularly, when the Defendants have not

challenged the evidence of the Plaintiff, no fault can be found with the findings recorded by the Trial Court about accepting the relationship between the parties.

15. The Hon'ble Supreme Court in case of Ram alias Ramdas Sheshrao Neharkar (supra) has dealt with the provision of Section 50 of the Evidence Act. A bare perusal of the said judgment indicates that the discrepancies in the evidenced led with regard to the marriage was not considered. Moreover, there was no evidence placed on record with regard the alleged marriage between the parties. Considering the facts of the said case, it was held so. As far as present case is concerned, there is undisputed evidence of the Plaintiff supported by the cogent documentary evidence.

16. So far as the issue of non joinder of the other properties of the joint family is concerned, the same has been duly explained by the Plaintiff in his evidence. The said explanation is sufficient to keep the other properties out of the suit, more particularly when the Plaintiff does not claim any share and provides reason for its non inclusion.

17. As far as the issue of limitation is concerned, first of all no issue of maintainability of the suit has been raised on the point of limitation, which is not pure question of law but mixed question of facts and law. Apart from this, the pleadings in the plaint clearly indicate that the suit was not filed immediately after death of father, the reason that the Plaintiff was given 1/3rd share in the agricultural yield for years together and only after the same was stopped and when the partition was denied cause of action accrued for him to file the suit. Merely because the suit has been filed after long years of attaining majority by that itself it cannot be said that suit is barred by limitation.

18. As a result of above discussion, it can be said that without justifying the absence before the Trial Court, now the Defendants are intending to seek the remand of the suit on grounds set out in memo of Appeal. Needless to say that without justifying the absence before trial Court and without raising any plea as to what prevented them to appear before trial Court in the Appeal before the First Appellate Court, it

would not be open for the Appellants to claim so in the Second Appeal. Apart from this, there is absolutely no material on record to hold that on account of the mistake of the Advocate, Defendants failed to contest the suit. Thus, it cannot be assumed that their non appearance is outcome of mistake on the part of their Advocate.

19. In view of above discussion, this Court is of the considered view that there is no substantial question of law involved in this Appeal. Accordingly, Appeal stands dismissed. Pending Civil Application(s), if any, stand disposed of.

(R. M. JOSHI, J.)