
(2022) 03 BOM CK 0116

In the Bombay High Court

Case No : Second Appeal No.315 Of 1991, Civil Application No.12278 Of 2009 In
Second Appeal No.315 Of 1991

**Bindubai Daulatram Ajamere And Others @Hash Uttamchand Sukhlal
Ajmaere And Others**

Date of Decision : 29-03-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 11, 11(4), 54, 100, Order 1 Rule 10, Order 2
Rule 2, Order 20 Rule 12 (1)(c)
Hindu Succession Act, 1956 — Section 14, 14(1)

Citation : (2022) 03 BOM CK 0116

Hon'ble Judges : Mangesh S. Patil, J

Bench : Single Bench

Advocate : Uday S. Malte, Rashmi S. Kulkarni

Final Decision : Disposed Of

Judgement

Mangesh S. Patil, J

1. This is a Second Appeal by the plaintiffs. They filed the suit against the respondents' predecessors Uttamchand and Manikchand who were the real brothers of plaintiff Bindubai's deceased husband, for partition and separate possession of the suit properties comprising of movable and immovable properties. It was dismissed by the trial court which decree has been confirmed by the lower appellate court by the judgment and order under challenge.

2. The facts as are necessary for appreciation of the matter in controversy can be summarized as under :

i) One Sukhlal was the father of Daulatram, Uttamchand and Manikchand. While Bindubai was cohabiting in her matrimonial home as a wife of Daulatram, he died on 17.02.1939 leaving behind along with her, their two daughters who are now prosecuting the Second Appeal, Leelabai and Premabai.

ii) Bindubai instituted a suit for partition in the year 1945 bearing R.C.S. No.90/1945 against Sukhlal, Uttamchand and Manikchand asserting that the suit

properties particularly the suit house property involved in the present suit was the ancestral and joint family property. A private arbitrator was appointed who passed an award (Exhibit-69) which he submitted along with his application (Exhibit-68) before the civil court on 08.03.1945.

iii) Sukhlal died on 07.05.1945.

iv) The civil court, on the basis of the award, passed a decree (Exhibit-67) on 02.10.1945.

v) By virtue of the decree the defendants therein i.e. Sukhlal, Uttamchand and Manikchand were directed to pay Rs.25/- per month with effect from 01.10.1944 to Bindubai and her two minor daughters Leelabai and Premabai out of which an amount of Rs.150/- for first six months was to be paid immediately. It was also directed that out of Rs.25/- per month Rs.15/- were for the maintenance of Bindubai till her life time and Rs.5/- each for the maintenance of her two daughters till they were married.

vi) Certain other conditions in respect of consent of Sukhlal and his sons at the time of marriage of the two daughters etc. were also imposed as a condition for payment of maintenance and certain provision was also made for that purpose. A charge of this amount of maintenance was created over one of the suit properties namely Gram Panchayat House No.350 admeasuring 66 feet east-west and 19 feet north-south consisting of a house property having three floors.

vii) Wife of Sukhlal died in the year 1968.

viii) Bindubai along with her two daughters started residing at her parental home at Jalgaon since before filing of R.C.S. No.90/1945.

ix) Bindubai served a notice to Uttamchand and Manikchand dated 21.07.1975 (Exhibit-77) through her advocate. By reciting aforementioned circumstances she complained that the amount of maintenance was paid only till 30.09.1965 and was stopped thereafter. She also complained that both of them had illegally got the record of the suit properties mutated in their name and demanded the arrears of maintenance.

x) Uttamchand and Manikchand replied the notice on 29.07.1975 (Exhibit-108) they denied about having stopped paying maintenance but asserted that it was in good faith that they had never insisted for any receipt and Bindubai was taking advantage of that fact to lay a false claim.

xi) Bindubai served another notice through her advocate to Uttamchand and Manikchand on 23.03.1976 (Exhibit-109). She asserted that after demise of Sukhlal her father-in-law on 07.05.1945 she has been intermittently staying at Jalgaon as also at Kopargaon. She asserted that the immovable properties mentioned therein bearing C.T.S No.169 and 170, C.T.S. No.933 and 934 and C.T.S. Nos.1885 to 1891 and the immovable properties described therein were the joint family properties and she had 1/3rd share and demanded it to be

separated.

xii) Uttamchand and Manikchand replied that notice with their reply dated 06.04.1976 (Exhibit-110). They denied that the suit properties were the joint family properties. They also denied that Bindubai was intermittently staying in Kopargaon and that she had a share in the suit properties. Alternatively, they contended that even if she had any share she had relinquished it. They have been using the suit properties to her exclusion and had become owners by adverse possession.

xiii) Bindubai then instituted Special Civil Suit No.276/1977. After giving the genealogy she averred that she had 1/3rd share in all the suit properties and she was entitled to get it separated. She also asserted that in case it was held that the suit properties were not the joint family properties, she was entitled to succeed as a tenant in common.

xiv) Uttamchand and Manikchand contested the suit by their separate written statements (Exhibit-10 and Exhibit-21 respectively). They denied that the suit properties were the joint family properties. They contended that the suit properties were separate and self acquired properties of Sukhlal. They also contended that whatever claim she had had culminated into right to receive maintenance in view of the award passed in R.C.S. No.90/1945. Her claim that the suit properties were the joint family properties was refuted and that decision would operate as res judicata.

They also contended that Bindubai's claim was also barred under Order II Rule 2 of the Code of Civil Procedure. They also contended that both the sides had acted upon the decree passed on the basis of the arbitration award and she was not entitled to resile therefrom and her claim was also barred by estoppel by conduct.

Alternatively, they also put up a claim of having become owners of the suit properties by adverse possession.

They further contended that the suit was not maintainable for non-joinder of their sister Phulabai but admitted about their mother having died in the year 1966.

xv) Bindubai PW-1 (Exhibit-39) and Lilawati PW-2 (Exhibit-52) were examined on behalf of the plaintiffs.

The defendants Uttamchand and Manikchand did not step into the witness box.

xvi) The trial court dismissed the suit. Following were the issues and there answers :

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Issues

Findings

1

Does the plaintiff prove that the immovable property described in para No.1A to 1C in the plaint and the movable property of Rs.25,000/- described in para No.1D and in Exh.21 was the ancestral property of the joint family of husband of the plaintiff and defendants 1 and 2 and their father ?

In the negative

2

Does the plaintiff prove that she has undivided 1/3rd share in the said immovable and movable property ?

In the negative

3

Whether the suit is barred by limitation ?

Does not survive

4

Whether the defendant Nos.1 and 2 prove that they have acquired title over the suit property by adverse possession ?

In the negative.

5

Whether the suit is barred by principles of res judicata due to the decision in R.C.S. No.90/1945 ?

In the affirmative.

6

Does the defendants prove that in R.C.S. No.90/1945 plaintiff's right of share in the suit property was denied and she was given only maintenance at the rate of Rs.15/- p.m. and the plaintiff had accepted this arrangement ?

In the affirmative.

7

Whether the suit is barred by estoppel by judgment because of the judgment and decree passed in R.C.S. 90/45 ?

In the affirmative.

8

Whether the suit is in proper form ?

In the affirmative.

9

Whether the plaintiff is entitled for partition and separate possession ?

In the negative

10

Whether the plaintiff is entitled for future mesen profits ?

In the negative

11

What decree order ?

In the negative

”

xvii) Bindubai preferred the Regular Civil Appeal No.282/1982 and by the judgment and order under challenge in this Second Appeal the lower appellate court dismissed the Appeal.

The lower appellate court concurred with the trial court in holding that the suit properties were the separate properties of Sukhlal and were not the joint family properties. It also concurred with the trial court in holding that the decision in case of R.C.S. No.90/1945 operated as res judicata. However, the lower appellate court did not agree with the conclusion of the trial court that though the suit properties were the separate properties of Sukhlal, he having died on 07.05.1945 still Bindubai was not entitled to inherit 1/3rd share in such separate property of Sukhlal being the widow of his predeceased son Daulatram. The lower appellate court further held that the trial court could have directed impleadment of Phulabai who also could have succeeded the estate left behind by Sukhlal, along with her brothers, by issuing a direction under Order I Rule 10 of the Code of Civil Procedure.

It was also held that since Sukhlal had died on 07.05.1945 i.e. even before the decree was passed in R.C.S. No.90/1945 on 02.10.1945 she could have improvised by amending the plaint to lay a claim even on the ground of succession. She having not done so her claim was barred by constructive res judicata under explanation 4 to Section 11.

Though the trial court refuted the claim of Uttamchand and Manikchand of having become owners of the suit properties by adverse possession, the lower appellate court allowed their cross objection and held that the ouster was proved and they had become owners by adverse possession and the suit was barred by limitation.

3. The Second Appeal was admitted on 22.08.1991 by mentioning that ground Nos.2 to 6 from the appeal memo involved substantial questions of law. However, by the order dated 14.11.2019, the appellants were directed to tender

substantial questions of law. Accordingly appellants furnished substantial questions of law on 27.11.2019. I have reformulated those substantial questions of law and have heard the learned advocates of both the sides on these questions. The questions and my replies to those for the reasons to follow are as under :

Questions

Findings

1

Whether the decree passed in RCS No.90/1945 operates as res judicata ?

NO

2

Whether the courts below were justified in non-suiting the appellants on the principle of estoppel ?

NO

3

Whether appellant's claim is barred by Order II Rule 2 of the Code of Civil Procedure ?

NO

4

Whether the courts below have failed to consider the effect of the provisions of the Hindu Women's Rights to Property Act, 1937 and its consequence, in view of Section 14(1) of the Hindu Succession Act, 1956 ?

YES

5

Whether there was sufficient material before the lower appellate court to reverse the finding of the trial court refuting the claim of the respondents defendants of having become owners of the suit properties by way of adverse possession and consequently holding that the suit was barred by limitation ?

NO

4. At the out set it is necessary to observe that this being a Second Appeal under Section 100 of the Code of Civil Procedure, there are inherent limitations on the powers of this Court to undertake a fresh scrutiny of evidence particularly on the disputed questions of facts. As has been rightly pointed out by the learned advocate Mrs. Kulkarni on behalf of the respondents relying upon the decision in the case of Narayanan Rajendran and Ors. Vs. Lekshmy Sarojini and Ors.;

(2009) 5 SCC 264. After painstakingly going through the catena of decisions post amendment in Section 100 of the Code of Civil Procedure and after considering the legislative background in the form of 54th report of Law Commission and the historical perspective, the scope of the powers under that provision were crystallized in following words :

"64. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used inherent in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

- (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;
- (ii) The substantial question of law to precisely state such question;
- (iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;
- (iv) Another part of the Section is that the appeal shall be heard only on that question."

5. Bearing in mind the principles, since both the courts below on the basis of the available evidence have concurrently held that all the suit properties were the self acquired properties of Sukhlal, one will have to proceed on that premise while addressing the substantial questions formulated herein above.

Question No.1 :

6. There is no dispute about Bindubai and her two daughters having instituted R.C.S. No.90/1945 in which an award was passed which culminated in the form of a decree wherein they were held entitled to claim maintenance and a charge was created on the property described therein. Both the courts below have concurred in holding that this decision operates as *res judicata*. A perusal of the award and the decree passed on that basis would clearly indicate that it was in the nature of some kind of settlement or arrangement whereby the parties to the award had agreed to receive/pay maintenance to Bindubai and her two daughters. It is to be borne in mind that in view of the provisions of Section 11 of the Code of Civil Procedure, the decision in order to operate as *res judicata* has to be on merits. When apparently the award was in the form of some kind of

compromise or settlement, it could not have been said that it was a decision on merits which is a sine qua non for constituting res judicata. Not every decision operates as res judicata. The provision requires that it has to be a decision on merits and not by default. Both the courts below have clearly overlooked this vital circumstance albeit they were clearly alive to the legal principles which need to exist in order that a decision operates as res judicata.

7. Admittedly, Bindubai and her daughters were asserting that the suit properties were the ancestral and joint family properties in which their predecessor Daulatram was having a share. Whereas, as has been rightly pointed out by the lower appellate court, they were also coming with a contingent claim of their entitlement to succeed to the estate of Sukhlal, along with the other sharers namely Uttamchand and Manikchand and even their sister Phulabai. It is therefore quite clear that the claim that was directly and substantially in issue in R.C.S. No.90/1945 was a claim for partition asserting that the suit properties were the ancestral and joint family properties. Whereas, in the matter in hand, in this suit, may be contingently, they are putting forth a claim to succeed to the estate of Sukhlal on his demise being the heirs of his predeceased son Daulatram. It cannot therefore be said that the matter that was directly and substantially in issue in R.C.S. No.90/1945 is directly and substantially in issue in the present suit. The earlier claim and the latter claim were quite distinct and separate according to the personal law as is applicable to the parties.

8. Surprisingly, the lower appellate court in spite of having correctly understood the contingent claim being put forth by Bindubai and her daughters which, though akin, was not substantially the same, has erroneously concurred with the finding of the trial court that the decision in R.C.S. No.90/1945 operated as a res judicata.

9. A bare look at the award which had culminated in passing of the decree in R.C.S. No.90/1945 would demonstrate that after reproducing the rival contentions, the operative part starts. Ex facie there is no adjudication. Even the decree passed on that basis does not demonstrate any matter having been heard and finally decided. There is no record available to demonstrate that some kind of evidence was recorded or arguments were heard much less by formulating any issues. In the absence of any such record simply by going through the award and the decree passed on that basis it cannot be said that it was a decision on any particular issue which was heard and decided so that it could have operated as res judicata.

10. I therefore answer this substantial question in favour of the appellants.

Question Nos.2 and 3 :

11. So far as the principle of estoppel is concerned, certainly, at no point of time Bindubai and her daughters had ever made any attempt to put up any challenge to this decree passed in R.C.S. No.90/1945. On the contrary, as is mentioned in the notice (Exhibit-77) issued by them they did admit that at least till 1965 they

were paid maintenance pursuant to this very decree. If this be so, certainly, the courts below are correct in holding that this decision would estop Bindubai and her daughters from asserting that the suit properties are ancestral and joint family properties.

12. The same cannot be said in respect of their claim to succeed to the estate of Sukhlal. Merely because they had willingly suffered the decree passed in R.C.S. No.90/1945, at the most they would be estopped from asserting that the suit properties are the ancestral and joint family properties. However, this principle will not debar them from putting up a fresh claim to succeed to Sukhlal's estate after his demise on 07.05.1945.

13. According to the lower appellate court, Sukhlal had died just before passing of the decree in R.C.S. No.90/1945 and Bindubai and her daughters could have promptly modified their claim and could have claimed to succeed to his estate. It has been observed that in the absence of such prompt step to assert such a claim soon after death of Sukhlal and allowing the decree to be passed would debar them from asserting the claim in view of the bar contained under Order II Rule 2 of the Code of Civil Procedure. The lower appellate court has not referred to this provision and has described it as a bar in view of the principle of estoppel.

14. True it is that Bindubai and her daughters could have improvised and modified the claim immediately after death of Sukhlal on 07.05.1945 just before the decree was passed in R.C.S. No.90/1945 on

02.10.1945. However, bar under Order II Rule 2 of Code of Civil Procedure would apply only to the relief that was available on the date of filing of the suit and not to some new right created subsequently i.e. after filing of the suit. Once it is held that the suit properties are self acquired and separate properties of Sukhlal, Bindubai could have laid the claim under Hindu Women's Rights to Property Act only after his death, which was not available to her on the date of the suit.

15. Again, by virtue of the enactment of Hindu Succession Act, 1956, which came into force subsequently creating a new right in favour of widows culminating a limited estate recognized under Hindu Women Rights of Property Act, 1937 into a fulfilled ownership, such a claim under Section 14 of the Hindu Succession Act was not available to her to have when R.C.S. No.90/1945 was filed.

16. Therefore, it cannot be said that the claim to which Bindubai became entitled to by virtue of Hindu Women's Rights to Property Act and Hindu Succession Act, 1956 which she could not have claimed earlier was barred by virtue of Order II Rule 2 since it was not available when R.C.S. No.90/1945 was filed.

17. The upshot of the above discussion and the conclusions, though the suit properties are not the ancestral and joint family properties, Bindubai would be entitled to succeed initially having a limited estate after demise of Sukhlal under Hindu Women's Rights to Property Act which limited right having blossomed in

full ownership after coming into force of Section 14 of Hindu Succession Act, 1956, she would be entitled to a legal share in all the suit properties. Hence I answer both these questions in the negative.

Questions Nos.4 and 5 :

18. It is necessary to simultaneously deal with both these questions of adverse possession which was discarded by the trial court but has been upheld by the lower appellate court and the effect of the two enactments. It would be necessary to consider this aspect at this juncture since Section 14 of the Hindu Succession Act requires a female to 'possess' a property in order

19. It is trite that in order to set up a plea of adverse possession the necessary that the property is held in possession *nec vi nec clam nec precario*. It presupposes that the person putting up a claim of having become owner by adverse possession must possess sufficient animus to hold the property adversely with sufficient hostility. The claim of ownership and claim of adverse possession cannot go hand in hand. If Uttamchand and Manikchand were intending to put up a claim of adverse possession, it was imperative on their part to admit the right and title of Bindubai and her daughters in the suit properties. Without such a stand, they are not legally entitled to assert it. It is a condition of mind which is so vital to demonstrate hostility. Conspicuous absence of Uttamchand and Manikchand from the witness box itself was sufficient to draw an adverse inference against their having waived the claim of adverse possession. Both the courts below have grossly erred in overlooking this vital circumstance which was so very important to ascertain if they were holding sufficient animus to possess the suit property adversely to Bindubai and her daughters.

20. The trial court had rightly point out that if the property was succeeded by all these persons simultaneously, merely because Bindubai and her daughters were staying in Jalgaon and were only intermittently coming to Kopergaon was not sufficient to jump to the conclusion that there was any ouster. However, the lower appellate court seems to have taken a frogs leap in the realm of conclusions while drawing an inference about ouster by referring to some stray circumstances which even cumulatively are not sufficient to dislodge the inference deducible from the conspicuous absence of positive evidence on behalf of Uttamchand and Manikchand about having ousted them from the suit properties.

21. In the matter of *Md. Mohammad Ali Vs. Jagadish Kalita*; (2004) 1 Supreme Court Cases 271 it has been held that in case of co-sharers in order to enable one of them to put up a plea of adverse possession the plea of ouster has to be raised. The lower appellate court seems to have got swayed away by the fact that these women were residing in Jalgaon, they were merely casually visiting Kopargaon, Uttamchand and Manikchand were recovering rent from the tenants for number of years but these women were never given any share therein and

that their names were also mutated in the City Survey record of the suit properties to the exclusion of these women, the fact to which they were quite alive as can be seen from their stand in the notice (Exhibit-77). In my considered view, once having found that Uttamchand and Manikchand were not admitting these women to be the owners of the suit properties or having a share therein, their intention was quite apparent and was clearly inconsistent with the basic requirement for constituting adverse possession. The lower appellate court has clearly relied upon irrelevant circumstances and has overlooked the material and decisive ones and without sound and cogent reasons has reversed a well reasoned finding of the trial court of Uttamchand and Manikchand having failed to prove about having become owners by adverse possession. As a corollary the lower appellate court has also erred in holding that the suit was barred by limitation.

22. Reverting back to the Hindu Women's Rights to Property Act, 1937 read with the provision of Section 14 of the Hindu Succession Act, 1956, in the matter of Seth Badri Prasad Vs. Srimati Kanso Devi ; AIR 1970 Supreme Court 1963 and Satrugan Vs. Sabjupari; AIR 1967 Supreme Court 272, it has been laid down that the word 'possessed' used in Section 14 has a widest connotation and could be either actual or constructive or in any other form recognized by law. Following the principles one can conclude that Bindubai was 'possessing' the suit properties on the date of coming into force of the Hindu Succession Act, 1956 which by virtue of Section 14 blossomed into full ownership. As has been held in the case of Nagappa Narayan Shetti Vs. Mukambe Venkatraman Shetti; AIR 1951 BOM 309, such a right of Bindubai is neither by way of survivorship or inheritance but a special right created by the statute of 1937 to give better right and get a limited interest which by virtue of Section 14 culminates into a full ownership.

23. I therefore answer these substantial questions in favour of the appellants Bindubai and her daughters.

24. There is no dispute about the fact that Sukhlal died on 07.05.1945 and was survived by his widow, two sons Uttamchand and Manikchand, the appellants, who are the widow and daughters of his predeceased son Daulatram and daughter Phulabai. The succession had opened before the enactment of Hindu Succession Act, 1956. Therefore Phulabai being a daughter was not entitled to any share.

25. Consequently, the branches of Daulatram, Uttamchand and Manikchand and widow of Sukhlal would get equal share in all the suit properties left behind by Sukhlal which were his self acquired and separate properties. Sukhlal's widow having died in the year 1968 i.e. after coming into force of Hindu Succession Act her share would further devolve equally on all the four issues namely Daulatram, Uttamchand and Manikchand and daughter Phulabai. So Phulabai would get 1/16th share and others would get 5/16th share each in all the suit properties.

26. As has been pointed out by the lower appellate court, the trial court could

have directed impleadment of Phulabai in view of Order I Rule 10 of the Code of Civil Procedure. However, that has not happened. Even the lower appellate court could have directed her to be impleaded but even that has not been done. Even this Court could have directed her to be impleaded before demarcating the shares. However, the Second Appeal was filed in the year 1991. It was admitted on 22.08.1991 and is awaiting decision since then.

27. Therefore though Phulabai is not a party to the present litigation, in order to obviate any further delay her share to which she is legally entitled to is being carved out, it is being done keeping in mind her best interest possible so that rather than remanding the suit for the sole reason of her absence when there is no dispute that she being daughter of Sukhlal would be legally entitled to receive a share in the share to which her mother was entitled to, it would be just and proper and in the best interest of the parties to divide the suit properties amongst all, including Phulabai.

28. Resultantly, the Second Appeal deserves to be and is allowed. The impugned judgments and orders of the courts below are quashed and set aside. The suit is decreed. It is declared that the plaintiff Bindubai, the branch of defendant No.1 Uttamchand and the branch of defendant No.2 Manikchand have 5/16th share each and daughter Phulabai (or her heirs) is entitled to receive 1/16th share, in all the suit properties.

29. A commissioner be appointed to divide the movable properties and house properties by metes and bounds. A copy of decree be sent to the Collector for effecting partition under Section 54 of the Code of Civil Procedure. A separate inquiry be conducted under Order XX Rule 12 (1)(c) of the Code of Civil Procedure for ascertaining future mesne profits. A decree be drawn accordingly. The parties to bear their respective costs through out.

30. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

31. After pronouncement of the judgment the learned advocate Mrs. Kulkarni for the respondents submits that the execution and operation of the judgment and order be stayed for a reasonable time to enable them to approach the Supreme Court.

32. None is present for the appellants.

33. Considering the nature of the dispute, the execution and operation of the judgment and order shall stand stayed for a period of five weeks.