

(2007) 12 BOM CK 0049
In the Bombay High Court
Case No : Second Appeal No. 135 of 1987

Dada Bhagwan Shinde and Aba Bhagwan Shinde	APPELLANT
Vs	
Tulsabai Shinde, Bhima Maruti Ghule and Ganpat Khandu Shingade	RESPONDENT

Date of Decision : 11-12-2007

Acts Referred:

Hindu Succession Act, 1956 — Section 14, 14(1), 14(2)
Hindu Womens Right to Property Act, 1937 — Section 3(3), 4
Maharashtra Land Revenue Code, 1966 — Section 157
President of India to Hyderabad (Application of Central Acts) Act, 1952 — Section 1(3), 2

Citation : (2008) 5 ALLMR 776 : (2008) 2 BomCR 159 : (2008) 110 BOMLR 156 : (2008) 3 MhLj 475

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : V.G. Mete, for the Appellant; S.Y. Mahajan, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—This appeal challenges the judgment and decree passed by the learned District Judge in Regular Civil Appeal No. 138 of 1981 dated 20th December, 1986. The present Appellants are the plaintiffs in Regular Civil Suit No. 85 of 1976 and the Respondents are defendants in that suit. Parties hereinafter are referred to their status as plaintiffs and defendants, for convenience.

2. At the out set, it is to be noticed that the appeal stands abated against Respondent No. 1 [Tulsabai Wd/o Narayan Shinde] by the order passed on 21st June, 2006. The Respondent No. 3 Ganpat is served -absent. Advocate Mr. S.Y. Mahajan is representing the Respondent No. 2/ defendant No. 2. The Respondent Nos. 2 and 3/ defendants No. 2 and 3 are purchasers of the suit property from original defendant No. 1 Tulsabai Wd/o Narayan Shinde.

3. Regular Civil Suit No. 85 of 1976, filed by the plaintiffs, was for cancellation of sale-deed and possession of the suit property, which, after recording evidence, came to be dismissed by the trial Court. The unsuccessful plaintiffs, carried the matter by filing Regular Civil Appeal No. 138 of 1981 in the Court of learned District Judge, Osmanabad, who, after hearing the parties, dismissed the same. It is this judgment and decree, passed by the first Appellate Court, is the subject matter of this second appeal. This second appeal was admitted by this Court on the substantial question of law -"Is defendant entitled to benefit of the provisions of Hindu Women's Right to Property Act, 1937 which was made applicable to Marathwada Region in 1952?".

4. On behalf of the plaintiffs, I have heard Advocate Mr. V.G. Mete. According to him, agricultural land/ subject matter of the suit, is situated at village Bhotra Taluka Paranda, district Osmanabad. This area was erstwhile part of the Hyderabad State. Hindu Women's Right to Property Act, 1937 (for short, the Act of 1937) was not made applicable to this part of the Hyderabad State at the time of its enactment. In this fact situation, analogy that in the partition of the joint Hindu family, share was allotted to Narayan, deceased husband of defendant No. 1 Tulsabai and after his death, said property was being cultivated by Tulsabai, in view of the provisions of the Act of 1937, cannot be made applicable. He has invited my attention to the assent given by the President of India to Hyderabad (Application of Central Acts) Act, 1952 (hereinafter referred to as the Act of 1952). According to him, this Act had received assent from President on 15th October, 1954. Thereafter, it was published in the official gazette of the Central Government on 22nd October, 1954. He submitted that application of the Act of 1952 is provided under Sub-section (3) of Section 1. It states that the said Act shall come into force at once. Appointed day is defined u/s 2 of the said Act of 1952, meaning thereby the date on which this Act came into force. He, therefore, submits that this Act can be said to have applied to this part/ suit property (now forming part of the State of Maharashtra) on 22nd October, 1954.

4.1 According to him, there is no question of retrospective application of the provisions of said Act of 1937. He further submitted that the suit property is agricultural land and cannot be said to be within the purview of the provisions of the Act of 1937. For this proposition he relied on a judgment of the Federal Court reported in the case of Case No. 1 of 1941, a Special Reference by His Excellency the Governor-General reported in AIR 1941 P.C. 72. Tulsabai never possessed or cultivated the suit property. Tulsabai, in collusion with the revenue authorities, succeeded in getting recorded her name. Therefore, there is no question of any title initially with Tulsabai, and valid transfer of the said title by defendant No. 1 Tulsabai in favour of defendant Nos. 2 and 3. He also relied on a judgment of the Division Bench of this Court in the matter of "Ramchandra Vishwanath Karve v. Savitribai Bhikaji Karve" reported in VLR 1978 page 622 (Vol. LXXX). Learned Counsel Mr. Mete also relied on Division Bench judgment of this Court in the matter of Manohar Deshpande Vs. Menkabai (Smt.) Brahmin and Others, . He also relies on judgment of the Apex Court in the matter of "Vaijanath and Ors. v.

Guramma and Anr." reported in 1999 (2) B.o.m C.R. 502.

5. Learned Counsel Mr. Mahajan has invited my attention to the finding of the first Appellate Court. According to him, joint family property had been partitioned and share was given to deceased Narayan. His share was being cultivated by his wife / defendant No. 1 Tulsabai. Her limited right, accrued by her under the provisions of the Act of 1937, has been enlarged to absolute right under Sub-section (1) of Section 14 of the Hindu Succession Act, 1956 (hereinafter referred to as the said Act of 1956). she was owner of the property and has transferred the property in accordance with the provisions of law to defendant Nos. 2 and 3. The provisions of the Act of 1937 are made applicable to this area with retrospective effect i.e. right from 1937. There is no substance in the appeal and the appeal deserves to be dismissed.

6. Regular Civil Suit No. 85 of 1976 seems to have been filed by the plaintiffs on 24th September, 1976. Genealogy of the parties is given in para 2. Indisputably Patilbuwa was the common ancestor of the parties. Patilbuwa had three sons viz. Dhula, Kushaba and Ayatuba. Dhula was having three sons viz. Rama, Yesa and Barku. Rama was succeeded by a son Hariba, who, at the time of filing of the suit, was alive. From the branch of Kushaba, it appears that only one son Mr. Babu was there. Said Babu Kushaba was not alive at the time of filing of the suit. He was having four sons. Out of these four sons, Narayan and Bhagwan were the sons from one wife and Vithoba and Devrao were two sons from another wife. Narayan Babu, according to the plaintiffs, died 40 years prior to the filing of the suit. After the demise of Narayan, partition had taken place in the year 1954. It was made by Hariba Rama. In that partition fifty per cent share was given to two sons of Bhagwan viz. Dada and Aba i.e. present plaintiffs. Half share was given to plaintiffs' uncles i.e. step brothers of Bhagwan viz. Vithoba and Devrao. In para 3 of the plaint, such partition of 1954 is pleaded. According to these pleadings, the suit properties were allotted to the share of the father of the plaintiffs and has been succeeded by them. The plaintiffs were residing at their grand father's place (maternal grand father) i.e. at village Malwadi Taluka Karmala district Solapur. Behind the back of the plaintiffs, defendant No. 1 Tulsabai got recorded her name in the record of rights in the year 1967. According to plaintiffs, their father Babu died on 9th April, 1966 and certification of the mutation No. 187 is subsequent to his death. Transfer of the suit property by defendant No. 1 Tulsabai in favour of defendant Nos. 2 and 3 is illegal. With this pleading, relief of declaration and cancellation of the sale deed was sought.

7. Written statement of defendant Tulsabai seems to have been filed on 25th December, 1976 at Exhibit-17. According to her, Narayan, her father, died 30 years prior to filing of the written statement. She has pleaded that Bhagwan died on 9th April, 1967. She denied the alleged migration of the plaintiffs to village Malwadi, Taluka Karmala, district Solapur and alleged connivance of herself with the authorities of the revenue department. According to her, at the time of certification of the mutation entry in question, father of the plaintiffs was alive.

In para 8, she has pleaded partition, 30/32 years prior to the filing of the written statement. According to her, since then all co-sharers are cultivating the property independently. To the share of her husband Narayan, land survey No. 20/A, 67/B (1/2 share from Eastern side) was allotted. She applied for recording her name in the revenue record and on verification it has been recorded. At that time, consent was given by father of the plaintiffs and mutation entry No. 187 was certified. She also pleaded that in accordance with the provisions laid down u/s 14 of the Act of 1956 she has accrued full ownership to the suit property. She supports the transaction i.e. transfer of property in favour of defendant Nos. 2 and 3.

8. I have also perused the written statement Exhibit-18 filed on behalf of defendant Nos. 2 and

9. The agricultural lands, indisputably, are the subject matter of the present suit. Plaintiffs and defendant No. 1 are belonging to Hindu religion. The dispute chiefly is in between the members of the Hindu family. The genealogy given in the plaint is not seriously disputed. In view of the substantial question of law, framed by this Court, a glance to histories of devolution of property in relation to Hindus would be appropriate.

10. Hindu law has the most ancient pedigree of any known system of jurisprudence. History of Hindu civilisation flows from the rules of "Smrities" - the institutions which ensconce rules of "Dharma". In course of time, two principal schools of Hindu Law sprang into existence; viz. Mitakshra and Dayabhaga. The Mitakshra school is sub-divided into four minor schools viz. (i) Banaras school, (ii) Mithila school, (iii) Maharashtra or Bombay school (Western India) and (iv) Dravida or Madras school (Southern India). Issues regarding succession, inheritance, marriage, religious usages and institutions are decided according to Hindu law. Exception, of course, is of change by legislative enactment.

11. Dayabhaga school system prevails in Bengal, while Mitakshra system is applicable to other parts of India. Mitakshra system recognises two modes of devolution of property viz. survivorship and succession. The rule of survivorship applies to joint family property and the rules of succession to property held in absolute severality by the last owner. Only one mode of devolution is recognised by Dayabhaga school viz. "succession". The law of inheritance in relation to Hindu women was not uniform. According to Bengal school, the only females recognised as heirs to male are (i) widow, (ii) the daughter, (iii) the mother, (iv) the father's mother and (v) the father's father's mother. It is also relevant to notice that before the Hindu Law of Inheritance (Amendment) Act, 1929, the only females who could inherit to a male, were the five, above mentioned. By the Act of Hindu Law of Inheritance (Amendment) Act, 1929 three more females were given status as heirs viz. (i) the son's daughter, (ii) daughter's daughter and (iii) sister. The Madras school recognises not only the said five female heirs, but also others. These include the son's daughter, daughter's daughter and sister. These heirs are expressly mentioned in the Act of 1929. According to

Bengal school, Banaras, Mithila and Madras school, however female, whether she be a widow, daughter, mother, father's mother or father's father's mother, who succeeds as heir to the property of a male, takes only a limited estate in the property inherited by her, and on her death the property passes not to her heir, but to the next heir of the male from whom she inherited said property. The son's daughter, daughter's daughter and sister, who are mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act of 1929, also take a limited estate, according to these schools, in the property inherited by them from the last male owner.

12. Fundamental and radical changes were made in 1955 and 1956 by various Acts. Hindu Marriage Act (25 of 1955) and the Hindu Succession Act (32 of 1956) are two among these enactments. The Hindu Succession Act of 1956 (hereinafter referred to as the said Act of 1956, for short) came into force on 17th June, 1956. It has codified law of intestate succession among Hindus. Section 14 of the said Act of 1956, subject to certain qualifications, confers full heritable status to a female heir in respect of property acquired by her, whether before or after the commencement of that enactment.

13. Hindu Women's Right to Property Act, 1937 was made applicable to the whole of India except Part B States. Sub-section (3) of Section 1 of the said Act of 1937 provides that if a Hindu governed by Dayabhaga school, dies intestate leaving any property and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow, all his widows together, shall, subject to the provisions of Sub-section (3), be entitled in respect of property of which he dies intestate to the same share as a son. This provision was subject to rider that widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son. Second proviso had provided that same provisions shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son. Sub-section (3) of Section 3 of the said Act of 1937 has provided that any interest devolved on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's Estate, provided, however, that she shall have the same right of claiming partition as a male owner. Section 4 of the said Act of 1937 has made it clear that the provisions of the said Act of 1937 shall not apply to the property of any Hindu dying intestate before the commencement of this Act. This Act has been made enforceable on 14th of April, 1937.

13.1 Indisputably, said Act of 1937 has no retrospective operation. Thus, widow's estate or limited estate or limited interest was created in favour of Hindu widow for the first time by this Act of 1937. In the case on hand, substantial question of law is in respect of application of said provisions of the Act of 1937 to the parties and suit properties. It is indisputable that the village, whereat the suit property is situated, was/ is within the jurisdiction of

Osmanabad District, erstwhile part of the Hyderabad State. The Hyderabad (Application of Central Acts) Act, 1952 is to be noticed. This Hyderabad Act had received assent of the President on 15th October, 1954. It was published in official gazette of the Central Government on 22nd October, 1954. According to the plaintiffs, Narayan died 40 years prior to the filing of the suit. While, according to defendant No. 1, Narayan died 30 years prior to filing of the written statement. Considering the stance taken by the plaintiffs and defendant No. 1 it can be said that Narayan died in or about 1936 or 1946. Fact remains that, the Hyderabad (Application of Central Acts) Act, 1952, was made applicable to this area of Hyderabad State from 22nd October, 1954.

14. The stance taken by the defendant No. 1, therefore, resorting to Section 3(3) of the said Act of 1937, cannot be accepted. In other words, defendant No. 1 Tulsabai is not entitled to the benefit of the provisions of Hindu Women's Right to Property Act, 1937 since it was not made applicable to Marathwada Religion/part of the then Hyderabad State, up till 22nd October, 1954. This substantial question of law, therefore, needs to be answered against the defendant No. 1.

15. The plaintiffs have pleaded partition in the year 1954. According to the plaintiffs, at the time of partition, Narayan, the husband of defendant No. 1, was no more and, therefore, share of the branch of Babu Kushaba, to the extent of 1/2 share, was given to Bhagwant i.e. father of the plaintiffs for himself and for deceased Narayan. Plaintiffs have also pleaded their migration to village Malwadi, Taluka Karmala and have tried to justify inaction on their part in relation to certification of mutation entry No. 187. Firstly, documentary evidence Exhibit-53 relied upon by the plaintiffs for alleged partition of 1954, needs to be considered. In fact, there is no documentary evidence in support of the contention of plaintiffs that Hariba partitioned the joint family properties in the year 1954. Exhibit-53 refers the name of Bhagwan Babu alone. Names of other coparceners or members of the joint family and details of allotment of properties to their share, is not given in this Exhibit-53. No other credible documentary evidence for said partition of 1954 alleged by the plaintiffs has been brought on record.

15.1 The oral evidence is led on behalf of the parties. Evidence of plaintiff Dada is not sufficient in support of such plea of partition of 1954. Cross examination of plaintiff Dada, on the contrary, indicates that, after the demise of his father, plaintiffs were given 4 Annas share in the suit lands and defendant No. 1 Tulsabai had cultivated her share for one year and, thereafter, she sold her share to defendant No. 2. He also admits, in the cross examination, that before disposal of the suit property, in favour of defendant No. 3, by defendant No. 1, it was cultivated by defendant No. 1 for a period of two years. He denied the suggestion that the Defendant No. 1 Tulsabai was cultivating the suit lands, during the life time of his father. P.W.2 Vithoba is closely related to the parties. His evidence, in fact, goes against the plaintiffs. Apart from the agricultural lands, he states, that 1/2 share of the house property was in possession of defendant No. 1 Tulsabai and 1/2 share was in favour of the plaintiffs. He further states that said

possession was since 20 years. In relation to death of father of the plaintiffs, he refers the day of Padwa of the year 1967.

15.2 Thus, from the oral evidence of the plaintiff and his witness P.W.2 Vithoba, it cannot be said that they have proved the partition of 1954 giving 1/2 share to plaintiffs and remaining 1/2 share to their step brothers, viz. Vithoba and Devrao. This evidence, on the contrary, supports the theory of defendant No. 1 that in the partition, share of her husband Narayan was given to him and Narayan, during his life time, was cultivating the said properties. After his demise, Tulsabai cultivated the suit lands. It is true that, there is no crop statement, or record of rights, showing cultivation of Narayan i.e. deceased husband of Tulsabai. But, then, equally, it is true that cultivation of Tulsabai, defendant No. 1, for couple of years, is apparent from the 7/12 extracts, which are part of the record of the Courts below. These entries are supported by the admission of plaintiff in cross examination. Therefore, it appears that the suit properties were in possession of the defendant No. 1 Tulsabai. The plaintiffs have failed in their attempt to substantiate or produce on record the material for alleged 1954 partition, without share to Narayan.

16. The date of death of Bhagwan is disputed by the plaintiffs. According to them, Bhagwan died on 9th of April, 1966. Exhibit-33 is a death extract, produced on record. This exhibited document indicates that Bhagwan Babu died on 9th April, 1967. Cause of death is also recorded in this document Exhibit-33. Having regard to this document and admission of P.W.2 Vithoba, it can be concluded that Bhagwan died on 9th April, 1967. The plaintiffs have alleged, in the plaint, that mutation entry No. 187 was certified behind their back and in connivance with revenue officials. Advocate for the plaintiffs has relied on some judicial pronouncements of this Court. He relied on the judgment of this Court in the matter of Prabhudas Narayan Gedam and Others Vs. Municipal Council, and in the case of "Shri Tapovan Brahmacharya Ashram v. Vithaldas Morarji Thakkar and Ors." reported in 1992 (2) M.L.R. 739. There is no dispute for the proposition in relation to record of rights.

The record of right does not create or extinguish title. However, in the present case, mutation entry No. 187 seems to have been certified by the revenue official i.e. Naib Tahsildar, Paranda on 14th December, 1966. This mutation refers to service of notice and non-receipt of any complaint from noticee. This mutation also makes a reference that the concerned person was present and admitted the contents of the mutation. This mutation is vehemently criticised by the learned Counsel for the plaintiffs. Though it is true that mutation in the record of rights does not create any right, title, or interest, however, it has presumptive value u/s 157 of the Maharashtra Land Revenue Code, 1966. This presumption is rebuttable. However, such evidence has to be led by the person not accepting the mutation entry. In the case on hand, it was for the plaintiffs to lead evidence in rebuttal for this mutation entry No. 187. Such evidence, indisputably, was not led by the plaintiffs. However, beyond presumption u/s 157 of the Maharashtra Land

Revenue Code, no greater importance can be given to this mutation.

17. The defendant No. 1 has specifically resorted to Section 14(1) of the said Act of 1956. It is relevant to consider the provision laid down u/s 14(1) of the said Act of 1956. It lays down that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation is appended to this Section 14(1). It provides that "property" includes moveable as well as Immovable property acquired by a female Hindu by inheritance or device or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person whether a relative or not, before at, or after her marriage, by her own skill or exertion, or purchase or by prescription or in any other manner, whatsoever, and also any such property held by her as Stridhana immediately before the commencement of this Act. The purpose of Section 14(1) is to make a widow, who has a limited interest, a full owner in respect of the property in question, regardless of whether the acquisition was prior to or subsequent to the commencement of the said Act of 1956. The intention of the Legislature was to do away with the concept of limited ownership in respect of the property owned by a Hindu female. Even if the widow had acquired the interest in the property and is possessed of the property after the commencement of the Act, her limited right would mature into an absolute interest or full ownership. All that has to be shown by her is that she had acquired the property and that she was possessed of the property at the point of time when her title was called in to question. Section 14(1) comes into operation at the point of time when the widow has an occasion to claim or assert the title to the property. The expression "possessed" pertains to the acquisition of right or interest in the property or control over the property and not to the actual physical possession or constructive possession of the property acquired by force without any legal right. Useful reference can be made for this proposition to a judgment of the Apex Court in the matter of Jagannathan Pillai Vs. Kunjithapadam Pillai and Others, . In the case on hand, plaintiffs and their witness Vithoba had admitted in the oral evidence that defendant No. 1 Tulsabai was in possession of the suit property for one or and 2-3 years prior to disposal of the suit property in favour of defendant Nos. 2 and 3 as her share. From the date of filing of the suit, it is clear that such acquisition and possession of the suit property, admitted by plaintiffs and their witness, is after operation of the Act of 1956. The defendant No. 1 asserted the title and sold the suit properties. That has been questioned in the suit by the plaintiffs. Therefore, in my view, pre-existing right of the defendant No. 1, in relation to the suit properties, has been enlarged to full ownership u/s 14(1) of the said Act of 1956.

18. Mr. Mahajan, learned Counsel for the defendant No. 1 has also invited my attention to a judgment of the Apex Court in the matter of Seth Badri Prasad Vs. Srimati Kanso Devi, in relation to Section 14(1) of the said Act of 1956. He also justifiably relied on a Division Bench judgment of this Court in the matter of Tulsabai Deshpande (died) through L.R. Madhavrao Narayanrao Deshpande and

Others Vs. Sakharam Bhanu Chavan and Others, . The Division Bench of this Court, in the matter of Tulsabai (supra) has considered the provisions laid down u/s 14(1) and 14(2) of the said Act of 1956. The properties in the matter of Tulsabai (supra) are from village Barahalli, Taluka Mukhed, district Nanded, erstwhile part of the State of Hyderabad. I am in respectful agreement with the view taken by the Division Bench of this Court in the matter of Tulsabai (supra).

19. Advocate Mr. Mete relied on a judgment of the Apex Court in the matter of Vijay Pal Singh and another Vs. Deputy Director of Consolidation and others, . Advocate for the plaintiffs has also invited my attention to the judgment of Apex Court in the matter of Vaijanath and Ors. (supra). The Apex Court has considered the provision laid down u/s 1(3) of Hindu Women's Right to Property Act, 1937 and Hyderabad (Application of Central Acts) Act, 1952 as well as Constitution of India. It is interesting to note that earlier judgment relied upon by learned Advocate for the plaintiffs, reported in AIR 1941 PC 72, is referred by the Apex Court in the matter of Vaijanath and it is held that the ratio laid down in AIR 1941 PC 72 does not apply to the said Hyderabad Act of 1952 passed by the Legislature of the State of Hyderabad and assented by the President on 22nd July, 1953. Thus, the submission on behalf of the plaintiffs that agricultural lands cannot be said to be property and subject matter of Hindu Women's Right to Property Act, 1937, does not hold water. However, in the facts and circumstances of the case, and in view of the view taken by me, in the foregoing paragraphs, the position emerging would not benefit the defendant No. 1. Legal position that the agricultural lands can be said to be property in relation to provisions of Hindu Woman's Right to Property Act, 1937, has, thus, attained the finality.

20. I have also perused the judgment of the Division Bench of this Court, cited on behalf of the plaintiffs, in the matter of Manohar Deshpande Vs. Menkabai (Smt.) Brahmin and Others, . Facts are noted, which are distinct and different.

21. The judgment and order passed by the learned District Judge needs to be upheld. The second appeal, filed on behalf of the plaintiffs, in view of the foregoing observations, and the view I have taken, needs to be dismissed after answering the substantial question of law accordingly. 22. Second appeal stands dismissed, without any order as to costs.