
(2015) 12 BOM CK 0030

In the Bombay High Court

Case No : Writ Petition No. 532 of 1988 and Second Appeal No. 567 of 2005

Mahadev S. More and Others

APPELLANT

Vs

Sukhdeo S. More and Others

RESPONDENT

Date of Decision : 10-12-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100

Hindu Succession Act, 1956 — Section 14, 15, 15(1), 15(2), 15(2)(b)

Citation : (2016) 1 ABR 518 : (2016) 2 MhLj 341

Hon'ble Judges : M.S. Sonak, J.

Bench : Single Bench

Advocate : U.R. Mankapure, for the Appellant; D.S. Sawant, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Sonak, J.—This Court by order dated 3 May 2005 had directed that the writ petition and the second appeal be clubbed and heard together. The reason for this was set out in the order dated 3 May 2005, which reads thus:

1. This Petition was heard extensively for final decision and during the course of hearing it was pointed out that Civil Application No. 1289 of 1995 came to be decided by the learned III Additional District Judge at Satara on 31.1.2005. The Appeal was allowed by setting aside the judgment and decree passed by the Trial Court on 31.8.1994 in RCS No. 105 of 1972. The Appellate Court has declared that the Plaintiffs Sukhdeo Shivba More, his sister Parvatibai, brother Shidu and Arjuna has 1/8th share and Defendant No. 1 Mahadeo Shripati More represented by his legal representatives has 1/2 share in the property. This decree of the Lower Appellate Court has been challenged in Second Appeal under Stamp No. 8323 of 2005 filed on 30.5.2005 before this Court by the present Petitioners.

2. The dispute in the said proceedings as well as in the proceedings giving rise to the impugned order in this Petition are properties of Shankar and succeeded by his wife Anubai, who died on 21.1.1971 and the couple did not bear a child. On

her demise, Shankar's 3 cousins, i.e. Shivba, Mahadu and Balu would have equal share in the property of Shankar but Shivba died in 1957 and Balu died in 1962. The claim of the Respondents in the property of Shankar is based on, inter-alia, the provisions of section 3-1(a) of the Hindu Succession Act, 1956. It was claimed that on the demise of Shivba, his wife Sonabai was alive as on 21.1.1972 and, therefore, alongwith Mahadu, Sonabai had half share in the property of Shankar as per the Respondents. This position has been accepted by the Lower Appellate Court but the present Petitioners have challenged the said decree in the Second Appeal.

3. The record reveals that Balu's wife Gopikabai was also alive on 21.1.1972 and, therefore, the property of Shankar would be subject to division in 3 equal parts, namely, Mahadu-1/3rd, Shivba represented by his wife-1/3rd and Balu represented by his wife Gopikabai-1/3rd.

4. Under such circumstances, this Petition cannot be decided unless the pending Second Appeal is heard and decided finally. It prima facie shows that in the decree passed by the Lower Appellate Court, the share of Balu succeeded by his wife, who was alive on the date of Anubai's death, has not been considered. Both the learned counsel for the respective parties had fairly conceded that all the proceedings pending before this Court, could be amicably settled, but inspite of their sincere efforts, there has been no response more particularly from the Respondents.

5. Registry, is therefore, directed to club this Petition with Second Appeal under Stamp No. 8323 of 2005.

2. The learned counsel for the parties submitted that it would be appropriate if Second Appeal No. 567 of 2005 is taken up for hearing first. In case, Second Appeal No. 567 of 2005 is to be allowed, there would arise no necessity of taking up Writ Petition No. 532 of 1988 for consideration.

3. The Appellants and the Petitioners in the appeal and petition are one and the same. In the Appeal, the Appellants have claimed sole and exclusive ownership to the suit property. In the petition, the Petitioners have claimed to be the agricultural tenant in respect of the suit property. Mr. Umesh Mankapure, learned counsel appearing for the Appellants -Petitioners, has submitted that it is permissible for the parties to raise such alternate pleas without prejudice to one and another. He has submitted that in case, the claim in the appeal fails, it would be necessary to consider the claim in the petition. However, if the claim in the appeal succeeds, there would not be no necessity to consider the claim in the petition.

4. Although, the second appeal was admitted on 2 July 2009, when the matter was taken up for final hearing on 29 January 2015, it transpired that no substantial questions of law as contemplated by Section 100 of Code of Civil Procedure, 1908 (CPC) were framed, at that stage. Accordingly, by order dated 29 January 2015, the following substantial questions were framed and final

hearing was deferred, in order to afford the learned counsel for the parties, further opportunity to address on the same:

a) Whether, since only the original Defendant No. 1, Mahadu was alive on the date of death of Anubai in 1972 and no other male members of the family as described under Section 14 and 16 of the Hindu Succession Act, 1956 were alive on the said date, the property of late Anubai ought to have been only upon Madhu and not others ?

b) Whether the death extract, neither exhibited nor produced in the course of evidence could have been relied upon in preference to admission by the Plaintiff and his witnesses ?

5. For the purposes of appreciating the contentions raised in this appeal/petition, it is necessary to refer to the following admitted genealogy :

6. Sukhdeo S. More instituted Regular Civil Suit No. 105 of 1972 against Mahadu seeking partition and separate possession of half share in the suit property. This was on the basis that Naru, the predecessor-in-title of the parties, had in all five sons, out of which, Gopal had been given in adoption to another family. Thereafter there was partition between four sons of Naru and each were placed in possession of separate shares of the property held by Naru. Tatyaba died some time in 1936 and was succeeded by his wife Vithabai. Upon demise of Vithabai, her share, was succeeded to and divided between Sukhdeo's father Shivba, Mahadu and Shankar's wife Anubai. Anubai died on 21 January 1972, issueless and intestate. In terms of Section 15(2) of the Hindu Succession Act, 1956 (said Act), since Anubai had inherited the suit property from her husband Shankar, the same was required to devolve upon the heirs of Shankar. Sukhdeo and Mahadu being the only legal heirs of Shankar are entitled to half share each, in the suit property. Hence, the claim for partition.

7. Mahadu, on the other hand, claimed that he was the only surviving legal heir of Anubai and Shankar, as, on the date of demise of Anubai on 21 January 1972, Sonabai, i.e., wife of Shivba was not living. In this regard, reliance was subsequently placed upon the statement of Sushila (Plaintiff No. 1A) in the course of evidence that Sonabai had expired one day prior to demise of Anubai. In the alternate, Mahadu claimed that he was a Class-II heir and therefore, in terms of Section 8 read with Schedule to the said Act, was entitled to priority over any legal heirs claiming under Shivba and Sonabai. Apart from all this, Mahadu had raised an independent claim that he was the agricultural tenant in respect of suit property and therefore, there was no question of claim of Sukhdeo claiming any rights to the suit property after the Tiller's day, i.e., 1 April 1957 in terms of provisions of the Maharashtra Tenancy and Agricultural Lands Act, 1948 (Tenancy Act).

8. The Civil Judge, Junior Division at Vaduj (Trial Court) dismissed the Regular Civil Suit No. 105 of 1972 instituted by Sukhdeo. In Regular Civil Appeal No. 128 of 1995, instituted by Sukhdeo, however, III Additional District Judge, Satara

(First Appeal Court) has set aside the judgment and decree dated 31 August 1994 and decreed the Regular Civil Suit No. 105 of 1972, in the following terms:-.

(A) It is hereby declared that Plaintiff, defendant No. 3, defendant No. 4 and defendant No. 5 each has 1/8th share and defendant No. 1 had 1/2 share in the suit properties described in Para-2A and 2B in the plaint.

(B) The Plaintiff is entitled for partition and separate possession of the suit properties described in Para-2B in the plaint as per his share through Court Commissioner.

(C) The Plaintiff is entitled for partition and symbolic possession of the suit lands described in Para-2A in the Plaint as per his share. However, if tenancy issue finally decided in his favour then, he is entitled for physical possession of the suit lands as per his share.

(D) Partition of the suit lands described in Para 2A in the plaint be effected accordingly through the Collector of this District or any subordinate Gazetted Officer appointed by him in this behalf.

9. Similarly, the Authorities under the Tenancy Act, i.e., Tahsildar, Sub-Divisional Officer (SDO) and the Maharashtra Revenue Tribunal (MRT) have concurrently held against Mahadu, in the matter of claim of tenancy to the suit property. The Authorities have further held that on Tillers" day, i.e., 1 April 1957, even as per the case set out by Mahadu, the landlady Anubai was a widow and a disabled landlady. The Tillers" day and the consequently right to purchase the suit property, therefore, stood postponed. There is no record of Mahadu issuing necessary notice with regard to intention to purchase the suit property within a period prescribed under Section 32-F of the Tenancy Act. Accordingly, Mahadu is not entitled to claim the tenancy and/or right to purchase the suit property under the Tenancy Act.

10. Mahadu and now his legal representatives are pursuing Writ Petition No. 532 of 1988 questioning the decisions of the Authorities under the Tenancy Act with regard to claim of tenancy and the Second Appeal No. 567 of 2005 with regard to the claim for exclusive ownership.

11. Mr. Umesh Mankapure, learned counsel for the Petitioners - Appellants, has submitted that Sushila (Plaintiff No. 1A) in the course of her deposition before the Trial Court has clearly admitted that Sonabai had expired a day prior to demise of Anubai. In view of such admission, the First Appeal Court has erred in placing reliance upon the death extract to hold that Sonabai expired on 22 January 1972, i.e., a day after demise of Anubai. On the date of demise of Anubai, i.e., on 21 January 1972, Mahadu was the only legal male heir in terms of Class-II to the Schedule to the said Act. In terms of Section 8 of the said Act, even assuming that Sonabai was living on the date of demise of Anubai, it is Mahadu who was entitled to priority over Sonabai and the persons claiming under Sonabai. Without prejudice, it was also faintly urged that Sonabai, being

widow of Shivba did not answer the definition of the term, "agnate" under Section 3(1)(a) of the said Act and therefore, Sukhdeo, who claims through Sonabai, cannot claim as an "agnate" to the legal estate of late Anubai and Shankar. For all these reasons, Mr. Mankapure urged that the second appeal be allowed and the impugned judgment and decree dated 31 January 2005, be set aside.

12. In the writ petition, Mr. Mankapure submitted that the material on record establishes Mahadu's claim to the tenancy and further, there was no requirement of any intimation/notice under Section 32-F of the Tenancy Act. In the facts and circumstances of the present case, Mr. Mankapure submitted that the findings recorded by the Authorities under the Tenancy Act are vitiated by perversity. For all these reasons, Mr. Mankapure submitted that the decisions of the Authorities under the Tenancy Act are liable to be set aside and Mahadu and now his legal representatives be declared as agricultural tenants of the suit property and entitled to purchase the same under Section 32-G of the Tenancy Act.

13. Mr. R.P. Walwekar and Mr. D.S. Sawant, learned counsel for the Respondents, submitted in unison that there was no admission with regard to the date of demise of Sonabai, as urged. They submitted that the death extract, which is a public document, relied upon by the First Appeal Court, makes it amply clear that Sonabai was very much alive on 21 January 1972, i.e., date of demise of Anubai. The learned counsel further submitted that both Mahadu as well as Sonabai were not Class-II heirs, as claimed, but were agnates. The position that even a widow is an agnate stands settled by the decision of the Division Bench of this Court in case of Nanasaheb V. Devre Vs. Parwatibai S. Chavan and anr. 1980 (O) BCI 73, and the First Appeal Court has rightly followed the same. The learned counsel finally submitted that there is absolutely no material on record to establish the tenancy claim of Mahadu. In any case, they submitted that even as per the case set out by Mahadu, Anubai was a widow on the Tillers' day. Therefore, within the period prescribed under Section 32-F of the Tenancy Act, it was necessary that notice/intimation be issued, which notice/intimation was never issued. There is no perversity in the findings of fact recorded by the Authorities under the Tenancy Act. For all these reasons, the learned counsel for the Respondents urged dismissal of the second appeal as well as the writ petition.

14. The rival contentions now fall for determination.

15. There is no jurisdictional error whatsoever in the First Appeal Court admitting the death extract concerning Sonabai in evidence at the appellate stage. The First Appeal Court had ample powers to admit such document in evidence, considering the provisions contained in Order 41 Rule 27 of the Code of Civil Procedure, 1908 (CPC). Secondly, the death extract is a public document and it is not even the case of the Appellants-Petitioners that the same was not authentic or not obtained from the public records maintained by the State. In fact, there is no record of the Appellants-Petitioners objecting to admission of this document on record. The First Appeal Court was further entirely right in awarding greater

evidentiary value to such public and unimpeached document than the statement of Sushila (Plaintiff No. 1A) in the course of her deposition. Sushila, in the course of her cross-examination, may have stated that her mother-in-law, i.e., Sonabai died one day prior to death of Anubai. This statement is required to be considered in the context. The death extract establishes that Sonabai expired on 22 January 1972, i.e., one day after the demise of Anubai. To the witness, i.e., Sushila, what was crucial was the said difference of one day. Nothing much therefore, turns upon the statement. In any case, it is always permissible to explain an admission. The admission stands suitably explained in terms of the death extract produced on record. There is neither any jurisdictional error or even error of law in the approach of First Appeal Court in awarding greater evidentiary value to the death extract than the statement of witness in the course of cross-examination. In any case, assessment of evidence, does not normally give rise to any substantial question of law. The second substantial question of law framed in this matter will therefore have to be answered against the Appellants-Petitioners.

16. Equally, there is no basis to accept that Mahadu was a Class-II heir in terms of Section 8 and the Schedule to the said Act. If the genealogy is taken into consideration, it is clear that Mahadu, upon demise of Anubai, does not fall into any of the entries in Class-II of the Schedule to the said Act. Mahadu, upon demise of Anubai could have only claimed as an agnate. The claim, in the facts and circumstances of the present case, cannot be exclusive, because on the date of demise of Anubai, i.e., on 21 January 1972, Sonabai, the widow of Shivba, was very much alive. The First Appeal Court has rightly held that both Mahadu/his legal representatives and Sonabai/her legal representatives, being agnates, are entitled to claim to the legal estate of Anubai, in equal measure. There is no question of Mahadu claiming any priority in the matter.

17. In this case, we are concerned with succession to the legal estate of Anubai (Female Hindu), who expired on 21 January 1972. Section 15 of the said Act provides for general rules of succession in case of female Hindus. In terms of Section 15 (1) of the said Act, property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,-

- (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

18. Section 15 (2) of the said Act provides that notwithstanding anything contained in sub-section (1), any property inherited by a female Hindu from her husband or from her father-in-law, shall devolve, in the absence of any son or

daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband. Further, Rule 3 of Section 16 of the said Act provides that devolution of the property of the intestate, upon the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) to Section 15 of the said Act, shall be in the same order and according to the same rules as would apply, if the property had been the father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

19. Applying the aforesaid provisions, including in particular the provisions contained in Section 15(2) (b) and Rule 3 of Section 16 of the said Act, the devolution of the property in the present case shall have to be upon heirs of Anubai's husband viz. Shankar, as if, the said Shankar had died intestate immediately after Anubai's demise on 21 January 1972. For this purpose, reference shall have to be made to the provisions contained in Section 8 of the said Act, which provides general rules of succession in case of males.

20. Section 8 of the said Act provides that the property of a male Hindu, dying intestate shall devolve according to the provisions of this Chapter-II-

- (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

21. Section 9 of the said Act provides that from amongst the heirs specified in the Schedule, those in Class-I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class-II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

22. As noted earlier, neither Mahadu/his legal representatives nor Sonabai/her legal representatives classify as heirs in either Class-I or Class-II of the Schedule to the said Act. Therefore, there was no question of Mahadu/his legal representatives claiming any priority over the claim of Sonabai/her legal representatives. In fact, both claim as agnates and the First Appeal Court was entirely justified in decreeing the suit for partition upon the said basis.

23. Mr. Mankapure, faced with this position, faintly urged that Sonabai did not qualify as "agnate" within the meaning assigned to this term under Section 3(1) (a) of the said Act, since according to him, Sonabai was not related to her husband Shivba "by blood". This contention, however, is no longer *res integra*. The Division Bench of this Court, in case of Nanasaheb Devre (*supra*), has

precisely considered and rejected such contention.

24. The Division Bench of this Court in case of *Nanasaheb Devre (supra)*, has held that the provisions of said Act were meant to codify the law relating to intestate succession among the Hindus and to achieve uniformity and certainty about various otherwise nebulous and shifting matters. This objective has, however, to be understood against the backdrop of existing interpreting system of personal law. Therefore, it would not be appropriate to begin with any legislative premise that the term related "by blood" has been introduced in any narrow sense. Rather, effort will have to be made to reach its applicative connotation. By reference to several precedents and principles, the Division Bench has held that conceptually, the Hindu marriage, as far as the wife is concerned, clearly brings out consanguine results, the wife merging and sharing the particles of the body of her husband and as such that of their common ancestor. Such kinship or consanguinity conceptually as well as physically cannot be less than of the blood relationship. Marriage is not only social but religious fact to a Hindu. It distinctively brings about union of two persons involving acceptance of a female into the family of the male spouse. Relation that ensues, is not restricted to male that marries but to the entire family of the male. Married wife in a family, thus becomes related to it wholly through her male spouse. The definition of the word "related" shows that to be related, persons could be treated as related to each other only if they belong to lawful or legitimate kinship. The definition makes reference to "kinship". The accepted modes by which such kinship results are clearly implied. Kinship is blood relationship. In social unit like family, marriage is an apparent mode of forging such relation. As far as the definition of "agnate" is concerned, the statute contemplates that this relationship should arise firstly, "by blood or adoption", and secondly, wholly through males. The words employed by the defining clauses having reference to blood will have to be understood and interpreted so as to further the obvious object of the Act and as far as possible to provide uniform system of succession. Law is not merely a biological text tracing decent and ascent. It is a sociological sanction in favour of those who can claim succession to the deceased. Sociology and history of given law often speak through the legislated words. The choice of the words "by blood" in the definition along with the word "adoption" is clearly intended to recognise all social modes resulting in the legitimate relationship. The words "by blood" cannot be read as "by birth" so as to restrict them to genetical incidence of family, for legislature, had it intended, would have surely spoken in that way.

25. The Division Bench of this Court at paragraph "17" has observed thus:

17 What then is the meaning of the word blood ? Does it signify only the vital fluid that sustains the life or is it also indicative of relationship which results in kinship by known and accepted modalities ? There are various meanings assigned to the word "blood", including the one biologically attributed. From Webster's Third new International Dictionary, pages 236 and 237, the following

relevant meanings can be extracted :

"Blood" : 1 a. the fluid that circulates in the principal vascular system of vertebrate animals carrying nourishment and oxygen to all parts of the body and bringing away waste products for excretion and that consists of a liquid plasma containing dissolved nutrients, waste products and other substances and suspended red blood cells, leukocytes, and blood platelets-see CIRCULATION, RESPIRATION; COAGULATI-ON;

2a. blood regarded as a vital principle :LIFEBLOOD; broadly: LIFE, b : human blood regarded as a hereditary differentiating factor typical of and specific to a given family, stock lineage, or race (English-) : esp : the national royal-used with the (a prince of the-), c : the whole body of physical traits passed from parent to offspring whether in men, animals, or plant; d : relationship by decent from a common ancestor (the Delaware grape shows a strong strain or vinifera) : KINSHIP CONSANGUINITY (-is thicker than water), e : person related through a common familial or racial descent : KINDRED, LINEAGE, STOCK, RACE; also, obs. : KINSMAN, RELATIVE.

The connotation of the word, therefore, is not merely biological but includes familial, racial and other recognised modes of kinship amongst men. It is futile to submit that the words related by blood should be equated with related by birth, though birth may be the primary incident of relationship between the two human beings. That is, however, of the only incident that brings about human relations into existence. When community of men develops and social relationship evolves, manifold relations come into being and in the context of relations, when the word blood is used, it suitably indicates the relationship by descent from a common ancestor or a kinship or consanguinity amongst a recognised social group. Marriage is an acknowledged social form bringing two beings together amongst the society of Hindus as a result of which the female enters the family of the male and becomes kindred of the family of the male and as such gets related as a kin of that family having common ancestor in the husbands family. The term by blood, therefore, in our view, has no biological or genetic limitation, but, including that, has a wider reach in the context of the personal law of Hindus and takes in female that enters by marriage the family of the male. Only because after the words by blood, the Legislature has put the words or adoption, thus indicating another legal form by which a person becomes the kin in the family, it is not possible to exclude the marriage from the connotation of the term "by blood". To have the relationship of the kind of agnate, it follows that relationship should arise wholly through males and should be a relationship of blood. As we have indicated, even prior to the present enactment, the applicative law held that as a result of marriage, a widow truly became gotraja sapinda in her husband's family. The principle on the basis of which the applicative judgments were rendered was clearly the principle to hold that by marriage the wife shared the community of the common particles of the body and was as such a relative by blood.

26. Applying the aforesaid principles, submission of Mr. Mankapure that Sonabai or her legal representatives could not be included within the expression "agnate" cannot be accepted. The first substantial question of law, will also have to be decided against the Appellants-Petitioners.

27. Neither of the learned counsel made any reference to Balu or his legal representatives being alive upon the date of demise of Anubai. In such circumstances, there arises no reason to consider entitlement of Balu or his legal representatives. Neither Balu nor his legal representatives have objected to the judgment and decree dated 31 August 1994 made by the First Appeal Court.

28. Now turning to Writ Petition No. 532 of 1988, the material on record clearly indicates that on the Tiller's day, ie., 1 April 1957, the landlady was a widow. Therefore, the Tiller's day and consequently the right to purchase the tenanted property stood postponed. The landlady, i.e., Anubai expired on 21 January 1972. Even if, the factum of Sonabai being alive on the said date is excluded, in terms of Section 32-F of the Tenancy Act, the Appellants-Petitioners were required to express their willingness to purchase the suit property within two years from the date of demise of Anubai, i.e., 21 January 1972. Admittedly, no such option was exercised within the said period of two years or for that matter even thereafter. All Courts, i.e., Tehsildar, SDO and MRT, have concurrently held that there was failure on the part of the Appellants-Petitioners to issue notice as contemplated by Section 32-F of the Tenancy Act. There is absolutely no perversity in the record of such finding of fact. Mr. Mankapure was unable to demonstrate as to why the provisions of Section 32-F were not attracted to the case of the Appellants-Petitioners.

29. In fact, there is no material on record which establishes that the Appellants-Petitioners were the tenants in respect of the suit property on the Tiller's day. However, even assuming that they were tenants, there is no dispute that the landlady was a widow on the Tiller's day and therefore, the provisions of Section 32-F of the Tenancy Act were clearly attracted. There is no case made out by the Appellants-Petitioners to disturb the concurrent findings of fact recorded by all three authorities. The petition is, therefore, liable to dismissed.

30. Upon cumulative consideration of aforesaid, there is no merit in the second appeal as well as the petition. Accordingly, both second appeal as well as writ petition are hereby dismissed. The interim orders, if any, to stand vacated. There shall, however, be no order as to costs.