

(2007) 02 BOM CK 0066

In the Bombay High Court

Case No : Second Appeal No. 264 of 1991

Shri Maruti Rau Mane (since deceased through LRs. Housabai Maruti Mane, Suresh Maruti Mane and Subhash Maruti Mane),
Sau. Housabai Maruti Mane, Suresh Maruti Mane and
Subhash Maruti Mane

APPELLANT

Vs

Shrikant Maruti Mane, Shamrao Rau Mane and Pandurang
Rau Mane (since deceased through LRs. Smt. Balabai
Pandurang Mane, Shivaji Pandurang Mane, Mangal Pandurang
Mane and Kamal Pandurang Mane)

RESPONDENT

Date of Decision : 21-02-2007

Acts Referred:

Hindu Marriage Act, 1955 — Section 16, 16(3)

Citation : (2007) 4 ALLMR 614 : (2007) 5 BomCR 450 : (2007) 109 BOMLR
538 : (2007) 3 CivCC 304 : (2008) 2 DMC 177 : (2007) 3 RCR(Civil) 421

Hon'ble Judges : D.B. Bhosale, J

Bench : Single Bench

Advocate : Archana Kololgi, instructed by T.S. Ingale, for the Appellant; G.S. Godbole, for the Respondent

Judgement

D.B. Bhosale, J.—This second appeal is directed against the judgment and order dated 30.10.1990 rendered by the 3rd Additional District Judge, Kolhapur by which regular civil appeal No. 421 of 1985 filed by respondent No. 1 - plaintiff was allowed and the decree and judgment passed by the trial Court dated 30.9.1985, dismissing regular civil suit No. 61 of 1979 came to be set aside.

2. The suit was filed by respondent No. 1 for partition and separate possession of one half share in the suit properties. The trial Court dismissed the suit for non joinder of Sonabai, the mother of the plaintiff, as party in the suit. It appears that in the appeal the plaintiff-appellant made an application for amendment of the plaint seeking permission to add Sonabai as party defendant in the suit and the said application was allowed and accordingly she was added as defendant No. 9 in the suit. This order of amendment was not challenged either at that stage or

even in the present appeal.

3. Ms. Kololgi, learned Counsel for the appellants fairly stated that she has instructions to confine the challenge in the instant appeal only to the extent of share allotted to the appellants by the appeal court. She submitted that looking to the number of members of Maruti's family, the plaintiff would not be entitled for more than 1/5th share in the 1/3rd share of Maruti. In other words, the appellate court has committed grave error of law in allotting 1/3rd share to the plaintiff out of 1/3rd share of Maruti. She did not raise any other contention.

4. To appreciate the submissions of Ms. Kololgi it would be necessary to reproduce a geneology to bring forth the relationships of the parties so as to find out whether the shares determined by the appeal court are correct and warrant interference by this Court.

The geneology reads thus:

Rau (died in 1961) | _____ | |
| | | Maruti Shamrao Pandurang Akkatai Kashitai D-1 D-5 D-6 D-7 D-8 | Two
wives | _____ | | Sonabai (1st wife) Housabai (2nd
wife) D-9 D-2 | | _____ | | | | | | Suresh
Subhash Sanju Shrikant Rekha D-3 D-4 Plff. (son) (daughter) (son) (son)
(daughter)

5. There is no dispute that Maruti -defendant No. 1, Shamrao -defendant No. 5 and Pandurang defendant No. 6 were entitled for 1/3rd share each in the ancestral coparcenary property. The plaintiff sought partition and separate possession of his share out of 1/3rd share of Maruti. Therefore, in the present appeal we are concerned only with the 1/3rd share of Maruti in the ancestral coparcenary property of the joint family concerning of all the parties to the suit. Maruti had two wives, Sonabai -defendant No. 9 and Housabai - defendant No. 2. Housabai, the second wife has two sons, that is, Suresh - defendant No. 3 and Subhash - defendant No. 4, whereas Sonabai defendant No. 9, the first wife of Maruti, has one son -Shrikant, the plaintiff in the present suit and daughter - Rekha. It is against these admitted facts Ms.Kololgi, learned Counsel for the appellants submitted that Suresh and Subhash are also entitled to have shares in the 1/3rd share of Maruti and the appellate court has failed to consider their share while allotting 1/3rd share in 1/3rd share of Maruti to the plaintiff. In other words, Suresh and Subhash are also entitled for equal shares with Maruti, Sonabai and Shrikant. On other hand Mr. Godbole, learned Counsel for the respondents invited my attention to the judgment in Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others, to contend that defendant Nos. 3 and 4 are not entitled to claim inheritance in ancestral coparcenary property and in view thereof the appellate court has rightly allotted 1/3rd share each to Maruti, Sonabai and Shrikant. Admittedly, Suresh and Subhash are the sons of Housabai, the 2nd wife of Maruti and in view thereof they are the children of void/illegal marriage of Maruti and Housabai.

6. The Apex Court in *Jinia Keotin (Supra)* was dealing with the contention that once the children born out of void and illegal marriage have been specifically safeguarded u/s 16 of the Hindu Marriage Act, 1955 (as amended by Central Act 68 of 1976), there is no justification to deny them equal treatment on a par with the children born of the wife in lawful wedlock by countenancing claims for inheritance even in the ancestral coparcenary property. While rejecting the contention, the Supreme Court observed that Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children is concerned, to the properties of the parents only. The Supreme Court further observed "that though Section 16 was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time, in view of an express mandate of the legislature itself under Sub-section (3), there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would amount to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself". In view of the law laid down by the Apex Court in the aforesaid terms the submission of Ms.Kololgi, learned Counsel for the appellant that Suresh and Subhash, the children of the second wife, are also entitled to equal share with Maruti, Sonabai and Shrikant must be rejected. Suresh and Subhash will be entitled for share only in the 1/3rd share of Maruti in his 1/3rd share in the ancestral coparcenary property and that too only after his death. In the circumstances, I find no reason to interfere with the findings recorded by the courts below holding that the plaintiff is entitled for 1/3rd share of Maruti in ancestral coparcenary property.

7. During pendency of the instant appeal Maruti died. In view thereof 1/3rd share of Maruti in his 1/3rd share in the ancestral coparcenary property will devolve upon Sonabai, Shrikant, Rekha, Suresh, Subhash and Sanju and they all will be entitled for 1/6th share each in 1/3rd share of Maruti in his 1/3rd share in the ancestral coparcenary property. In the circumstances Suresh -defendant No. 3, Subhash defendant No. 4 and their sister -Sanju will be entitled to 1/6th share each in 1/3rd share of Maruti in his 1/3rd share in the ancestral coparcenary property. Similarly Shrikant - original plaintiff, Sonabai -defendant No. 9 and Rekha will also be entitled for 1/6th share each in 1/3rd share of Maruti in his 1/3rd share in the ancestral coparcenary property. Sonabai and Shrikant will be entitled to this 1/6th share in addition to 1/3rd share each allotted to them by the appeal court. The appeal, accordingly, stands disposed of with no orders as to costs.