
(2004) 07 BOM CK 0137

In the Bombay High Court

Case No : Second Appeal No. 79 of 1991

Subhadrabai Kachari Khandagale

APPELLANT

Vs

Balwanta Narayan Jadhav and Others

RESPONDENT

Date of Decision : 01-07-2004

Acts Referred:

Citation : (2004) 4 ALLMR 732 : (2005) 1 BomCR 875 : (2005) 1 MhLj 891

Hon'ble Judges : Mohta Anoop V., J

Bench : Single Bench

Advocate : N.S. Badhe, for the Appellant; Amol Deshpande, for the Respondent

Final Decision : Allowed

Judgement

Mohta Anoop V., J.—Heard. The present second appeal has been preferred by the appellant/original plaintiff, against the judgment and decree dated 06-02-1990, passed by the 2nd Additional District Judge, Buldhana, in Regular Civil Appeal No. 89/1986, whereby the appeal was allowed and the judgment and decree of the trial Court granting decree in favour of the appellant against the defendants by holding that the appellants have 1/3rd share to the extent of her father's share i.e. in house property and field was set aside, therefore, this second appeal.

2. This second appeal was admitted on 8-4-1991, on the Points No. 2 and 3, as mentioned in the memo of appeal. Those points are as follows:

"2. Whether the property in the hands of Ananda i.e. plaintiffs father was a separate property in view of his being the sole surviving member of the coparcener after separation/ partition from his brothers? If yes, whether by way of succession the plaintiff being the only legal heir of the deceased Ananda is entitled to inherit the said property of Ananda by way of another mode of succession or whether such property devolves on the plaintiff/appellant by way of succession?

3. Whether the lower Appellate Court and the trial Court has omitted to frame

issue irrespective of the pleadings of parties i.e. "whether deceased Ananda was mad/insane from the beginning and because of which he was disable or not entitled to any share in the ancestral property? If yes, whether the omission to frame this issue has affected the decision on merit?

3. The plaintiff/appellant herein, is the daughter of deceased Ananda. One Narayan who's legal heirs/representatives, are original defendants and the respondent herein, contesting the main suit. As per the appellant, Narayan, Ananda and Hari were the brothers and they had joint family. The ancestral property, including the suit property, bearing Survey No. 6"9/3, ad measuring 4 acres 30 gunthas, and two house properties situated at village Hatadi, Taluq and District Buldhana, involved in the suit. These properties were originally owned by one Kacharu. All these three brothers were the dependent of said Kacharu. Appellant is daughter of deceased Ananda s/o Kacharu. As asserted, the said property was jointly owned by Narayan, Ananda and Hari. Later on Ananda and Hari purchase the share of Narayan, and continued joint cultivation amongst themselves. After the death of Ananda, the appellant continued joint possession till her marriage. This properties are thereafter in the joint possession of the respondents. The appellant, thereafter, had filed a suit for partition and separate possession of her on share. She claimed 1/2 share in the suit property. As ascertained, inherited from the Ananda. The said Ananda, father of the appellant died some time in the year 1940. The alleged executed deed is not on the record. The suit in question was filed on 21-1-1985. The respondents however, resisted the said case by filing their written statement dated 29-1-1986. Subhadrabai i.e. the appellant herein, has examined herself in support of her case. One Balwanta was examined on behalf of the defendants/respondents to support of their defence.

4. In the present case, as Ananda died before 1956, hence his succession will not be governed by Hindu Succession Act, but he will be governed by the General Principle of Hindu Law. The governing law at the relevant time as recorded are Article 24, Article 34, Article 426, as per the commentary from the book of principles of Hindu Law by D.F. Mulla, in 12th Edition at page Nos. 95 and 101. The Article 423, has been referred in the book of Hindu Law by N.R. Raghavacharies, 7th Edition, 484. The relevant paras 9 and 10 of the judgment of the Appellate Court, are reproduced as under:

"9. According to the then prevailing Hindu Law there was no succession to the joint family property of a male Hindu. A joint family property used to go only by survivorship and not by succession prior to 1956. To support this say, I will like to quote here the commentary from the Book of Principles of Hindu Law by D.F. Mulla, in 12th Edition at page 95.

Article 24 Modes of devolution of property : -

(1) The Mitakshara recognises two modes of devolution of property, namely survivorship and succession. The rule of survivorship applies to joint family

property the rules of succession apply to property held in absolute severally by the last owner.

Further at page 101 Article 34 states prepositions for devolution of property according to Mitakshara Law.

Article 34 Devolution of property according to Mitakshara Law.

In determining the mode in which the property of Hindu Male governed by Mitakshara Law devolves on his death, the following prepositions are to be noted:-

(1) Where the deceased was, at the time of his death, a member of joint and undivided family, technically called co-parcenary, his undivided interest in the co-parcenary property devolves on his coparceners by survivorship.

(2)(i) Even if the deceased was joint at the time of his death, he might have left self acquired or separate property. Such property goes to his heirs by succession according to the order given in Section 43 and not to his coparceners.

(ii) If the deceased was at the time of his death the sole surviving member of an co-parcenary, the whole of his property including the co-parcenary property will pass to his heirs by succession according to the order given in section (43)(a).

(3) If the deceased was reunited at the time of his death, his property will pass to his heirs by succession according to the rule laid down in Section 60 below.

Thus according to Hindu Law daughter is not entitled to any share in the joint family property. She is entitled to share only in the self acquisition of her father. Or, if father is a sole surviving coparcener or is separated from his collaterals during his life time.

10. Similarly, I will like to quote her Article 426 from the Book of Hindu Law by Mr. N.R. Raghavacharies in its 7th Edition at page 484, Article 426 runs thus : -

426. Inheritance and heritable property.

The law of inheritance applies only to property held in absolute severally by its last owner. It excludes property which is subject to the rule of survivorship. Thus the only property of a male which is heritable is -

1. his separate and self acquired property,

or

2. property held by him as sole surviving coparcener.

or

3. property held by him after he has become separated from all his coparceners. It will be seen that in cases of property, falling under groups (2) and (3) the property includes also the ancestral property which survived to him or came to

him on partition.

5. The learned Appellate Court, based on above legal submissions. Held that appellant was not entitled to any share in the property, and therefore, judgment and decree was set aside of the trial Court.

6. The learned Advocate Mr. N. S. Badhe, appearing for the appellant, however, relied on Article 34 with Illustration 72, with detail commentary from the book of Mulla of Hindu Law, 17th Edition. He further relied on the commentary as well as submission based on this aspect of "Right of Succession" and law prior to the Hindu Succession Act, 1956. The relevant illustration of Article 34 is reproduced as under :

"A, B and his brother constitute a co-parcenary. A, B dies leaving a daughter. He leaves self-acquired property. He also leaves property inherited by him from his maternal uncle, which, according to law, is his separate property. The undivided interest of A, B in the co-parcenary property will pass to his brother as surviving coparcener, but his self acquired and separate property will pass to his daughter as his heir."

As the basic article itself deal with right of daughter as reproduced in the above paras.

7. The articles as relied by both the parties i.e. Article 24 is also reproduced as under, with illustrations :

"24. Modes of devolution of property - (1) The Mitakshara recognizes two modes of devolution of property, namely survivorship and succession. The rule of survivorship applies to joint family property; the rules of succession apply to property held in absolute severality by the last owner.

(2) The Dayabhaga recognizes only one mode of devolution, namely succession. It does not recognize the rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara joint family has only an undivided interest in the joint family property, a member of a Dayabhaga joint family holds his share in quasi-severally, so that it passes on his death to his heirs as if he was absolutely seized thereof, and not to the surviving coparceners as under the Mutakshara Law.

Illustrations.

(1) A and B, two brothers governed by the Mitakshara school of Hindu- Law, are members of a joint and undivided family. A dies leaving his brother B and a daughter. A's share in the joint family property will pass to his brother, the surviving coparcener, and not to his daughter. But if A and B were separate, A's property would on his death pass to his daughter as his heir.

8. There is no dispute so far as the above and certain provisions prior to Hindu Succession Act, 1956. The question here is whether the plaintiff is entitled to for her share as prayed in the suit. There is no dispute that the property is ancestral

and joint Hindu property. In the present case, after going through the evidence on record, as well as, the written statement filed by the respondents/original defendants, whereby, the respondents infact denied even the existence of joint family. It is specifically asserted that there was no joint family. The specific case was that the property is exclusively owned by said Narayan. It is denied that the property is ancestral property, and/or Hindu property of the brothers. It is therefore, positively asserted that Ananda, Narayan and Hari were never the member of the joint family. Ananda was in same and therefore, he was not entitled for any share in the said property. It is specifically mentioned in the written statement itself, that Narayan had purchased the property, from his own income, the share of Hari. The evidence lead by Balwanta, further indicates that the suit property land was purchased by his father Ananda was lunatic, and therefore, his father i.e. Narayan was looking after and maintaining the property of appellant's father Ananda. It is also the death of Ananda and till the marriage of the appellant, the share of Ananda remained with his father. He also endorsed that no share was allotted to Ananda from the joint estate, because he was lunatic. He further admitted that, before the Revenue Authority they never applied for deleting the name of the appellant from her share. They never took any objection about the existence of the name of the appellant on such record. They failed to file any partition deed and /or sale deed on record. This aspect further endorses one more thing and suggest that the property was not joint family property, at the relevant time of the suit. Once the property is separated by what ever means and method and as observed and admitted by the respondents in their evidence, such property cannot be said to be ancestral property. The inconsistent stand taken by the respondent itself shows that they were not clear about the nature of the property in question and/or its existence, as an ancestral property or as individual property. Once the record shows and as observed by the trial Judge, and as the property even though originally was ancestral property, but partitioned later on by what ever means, such property loses unity and jointness. Such property becomes property of the individual person and/or respective coparcener or sons. Therefore, after the partition, it becomes the property of the respective coparceners. In the present case, once the property was partitioned and some portion of the same was sold and/or purchased by the respondents after, it cannot be said that the property was never partitioned. The property was sold by Hari, as admitted by Balwant, the respondent herein, and the case records as well as their case also reflects that there was partition. Therefore, merely because it was not actually partitioned or divided and name of the appellant was not recorded accordingly on the Government record, or of revenue record, it cannot be said that the property still remains ancestral property.

9. The learned Appellate Court, therefore, on facts itself according to me failed to consider the same provisions which are recorded in the impugned judgment. The illustrations as cited by the parties and is reflected above, further clarify that, if once ancestral property is separated by partition, such property on the death of

the particular coparcener can pass to her daughter as his heir. There is no dispute in the matter, that after the death of Ananda, appellant was the only daughter and heir on the record. Therefore, the contentions of the learned Advocate appearing for the respondent based on the commentaries referred above, and/or the position of law prior to Hindu Succession Act, 1956 cannot be support his case. According to him also, in the fact and circumstances of the case, the appellant being the only heir she has right to claim the property of her father. As there is no other challenge and as contended that the decree as awarded be maintained. I am not therefore, going into the details of the matter, so far as the share of such daughter and her rights as granted by the learned trial Court.

10. It is necessary to refer to case cited by the learned Advocate appearing for the respondent i.e. AIR 2003 NOC 171, Bhaga Pruseeth v. Purni Devi Mothers, to support his case that married daughter will not be entitled for any share in coparcenary property because devolution of property is by survivorship. There is no dispute about this proposition. The facts and circumstances referred above itself sufficient to distinguish the case of the respondent. The circumstances, of this particular case cannot be made applicable, basicable, basically for want of further facts and of the Baggar v. Purni Devi case.

11. The learned first Appellate Court further observed that the said Ananda, was lunatic or insane, and therefore, also was not entitled for the share in the ancestral property. This contention as well as submission of the respondents cannot be accepted. There is nothing on the record to show such provision and/or any material to support the same. Therefore, the question of law, as referred above, need no further elaboration or discussion as on fact itself. This issue was not agitated further by respondents in this appeal also. Non framing of such issue no way affect the basic reasoning and judgment and decree passed by the trial Court.

12. The learned Advocate appearing for the respondents also relied on N. Jayalakshmi Ammal and another Vs. R. Gopala Pathar and another, to support his case, that burden of proof is on the plaintiff/appellant to prove her case. As observed in the present case on the basis of the admitted position, as well as, evidence lead by the parties including the contentions raised on the basis of documents on the record, it is sufficient to reverse the impugned judgment and decree. The fact and circumstances of this N. Jayalaxmi, Apex Court decision is distinguishable and cannot be made applicable to the present case. There is no dispute if properties is ancestral, the surviving brother is entitled to such property. Here we are dealing with the case, where the property was undermined ancestral property. There was partition and there- fore the only daughter, appellant claimed her share of her father Ananda, being the only heir, she is definitely entitled for the property of her father Ananda, by way of succession.

13. The learned Advocate appearing for the appellant support his case apart from the above commentaries, based on Appa Babaji Misal Patil and others Vs. Dagdu

Chandru Misal, since deceased by his heirs Naginbai Dagadu Misal etc. etc. and others, . The rights of such appellant or daughter to claim entitlement of her share, after her father's death as the same became separate property being partitioned at the relevant time entitled to be inherited, being only surviving heir, after the death of Ananda.

14. In view of this, on this fact itself, I am of the view that the Appellate Court's judgment and decree dt. 6-2-1990, deserves to be interfered with. It is accordingly set aside and the judgment and decree passed by the learned trial Court in R.C.S. No. 158/-1985, is restored.

15. In view of the above observations, the second appeal is allowed. No order as to costs.