
(2006) 04 BOM CK 0084
In the Bombay High Court
Case No : Second Appeal No. 319 of 2003

Sukhdeo Ambuji Bahakar and Others	APPELLANT
Vs	
Savita Gajanan Kalne	RESPONDENT

Date of Decision : 18-04-2006

Acts Referred:

Citation : (2007) 1 BomCR 515 : (2006) 4 MhLj 384

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : V.M. Deshpande, for the Appellant; S.P. Kshirsagar and S.D. Khati, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Joshi, J.—Heard Advocate Mr. V.M. Deshpande for the appellants and Advocate Mr. S.P. Kshirsagar with Advocate Mr. S.D. Khati for the respondent.

2. In support of the appeal, learned Advocate Mr. Deshpande has pressed two grounds though many are written in the memo of appeal.

3. First ground is based on facts namely whether the branch of Shaligram s/o Ambuji Bahakar is sought to be represented by arraying only Maroti, one amongst sons of Shaligram when it is an admitted position that other legal representatives who are having share are alive.

4. Second ground urged by the learned Advocate Mr. Deshpande is that Subhadra is one of the sisters of defendant Nos. 1 to 4 and Shaligram and upon partition effected in 1974 her share as successor of her father Ambuji was liable to be calculated which would be 1/56th and not 1/49th and consequently the share of the plaintiff and defendant Nos. 1 to 5 shall be increased by 1/56th and will be 6/49th + 1/56th.

5. As to non-impleadment :- According to learned Advocate Mr. Deshpande, this defect of non-impleadment goes to the root namely when all sharers are not

arrayed as defendants, the suit was liable to be dismissed on noticing this defect.

Reliance is placed by learned Advocate Mr. Deshpande on para 9 of the judgment of the Supreme Court, reported in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, , which reads as follows:

As soon as we reach this conclusion it becomes necessary to consider whether the appellant's suit must fail for non-joinder of necessary parties. It is common ground that the appellant has brothers alive, and even in the trial Court respondents 1 and 2 took the alternative plea that if the property was found to belong to appellant's mother, under the relevant Mysore law the appellant and her brothers would be entitled to succeed to that property and the non-joinder of the brothers was, therefore, fatal to the suit. In fact, as we have already indicated, the trial Court had dismissed the appellant's suit on this ground. The decision about the question as to the appellant's title to this property would thus depend upon the construction of the relevant provisions of the Act. Section 10 is relevant for the purpose. Section 10(1) defines "stridhan" as meaning property of every description belonging to a Hindu female, other than property in which she has by law or under the terms of an instrument, only a limited estate. Section 10(2) prescribes an inclusive definition of the word "sridhan" by Clauses (a) to (g). The appellant contends that the property in question falls u/s 10(2) (b), whereas according to the respondent it falls u/s 10(2)(d). There is no doubt that if Section 10(2)(b) takes in the property the appellant would be exclusively entitled to it and the plea of non-joinder of her brothers would fail. On the other hand, if Section 10(2)(d) applies to the property, the appellant will not be exclusively entitled to the property and her brothers would be necessary parties to the suit. In that case the plea of non-joinder would succeed and the appellant's suit would be dismissed on that account. That position with regard to the heirs who succeed to Stridhan property belonging to a Hindu female dying intestate has been provided for by Section 12 of the Act and there is no dispute on that account.

6. This Court finds on the first point of non-impleadment that the branch of Shaligram s/o Ambuji is duly represented and their interest taken together is derived from the right of Ambuji is equal to the share of defendant Nos. 1 to 4 and, therefore, present case is not a case where the class of heirs who represents the share of the branch of father of respondent No. 5 i.e. Shaligram has gone unrepresented.

7. The judgment cited above by the learned Advocate Mr. Deshpande does not govern the situation as emerging in the present case for the reason that it was the case where brother who had interest in the property was not arrayed. In the present case it is seen that branch of Shaligram s/o Ambuji is duly represented and this Court had already observed on the said fact that Shaligram could not have any different share or plea in the property and the legal interest of the property of the defendants is duly represented and therefore the present appellants are not able to get any benefit derived from this defect. The decree is

being sought to be avoided by raising a point which the adversaries ought, which they are not agitating, and one who has suffered the decree is raising this technicality which does not adversely affect the merit of the case.

8. As to whether share of Subhadra would get reduce from 1/49th to 1/56th and consequential increase in the share of the appellant :- Insofar as the question of failure to calculate the share of Subhadra is concerned, according to learned Advocate Mr. Deshpande, her share would be 1/56th and not 1/49th and consequently the share of the plaintiff and defendant Nos. 1 to 5 shall be instead of increase by 1/56 and will be $\frac{6}{49} + \frac{1}{56}$ th.

9. Considering the facts in the subject-matter of which area is around 11 acres of agricultural land in village in Khamgav Taluka and houses made in mud and country roof, and other movable properties such a cattle etc., the situation that emerges is the share of Subhadra will have to be converted into monetary compensation and the margin of loss or gain is so meagre and minute that practically it would not prejudice the appellant and respondents 1 to 5 since their share if the appeal succeeds would improve from $\frac{6}{49}$ th to $\frac{6}{49} + \frac{1}{56}$ th which would mean fluctuation of share between 1.5 to 1.8% which on facts of present case is too meagre to warrant interference.

10. In the circumstances, the questions raised in the appeal, raises academic and legal interest, but does not have any substantial bearing on justice between the parties, on the other hand any order such as admission of second appeal and deferment of adjudication would practically frustrate the free enjoyment of property by all those who would otherwise be free to enjoy the property in their own absolute way and free from the cloud of litigation.

11. Keeping these aspects for doing substantial justice between the parties, the appeal does not Call for any interference and therefore, the same is dismissed.