

(1994) 03 BOM CK 0028

In the Bombay High Court

Case No : Second Appeal No. 74 of 1994

Tukaram Genba Jadhav and Others

APPELLANT

Vs

Laxman Genba Jadhav and Another

RESPONDENT

Date of Decision : 04-03-1994

Acts Referred:

Constitution of India, 1950 — Article 246(2)
Hindu Succession Act, 1956 — Section 14, 22, 4(2), 6, 8
Hindu Womens Right to Property Act, 1937 — Section 3

Citation : AIR 1994 Bom 247 : (1994) 96 BOMLR 227 : (1994) 1 MhLj 991

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : Anil V. Anturkar and Kumbhakoni, V.B. Naik appointed as Amicus Curiae, for the Appellant;

Judgement

1. This appeal is directed against the judgment and decree dated 9th November, 1993, passed by the learned IInd Additional District Judge, Satara, in Regular Civil Appeal No. 63 of 1990 arising from Regular Civil Suit No. 91 of 1984 filed in the Court of Civil Judge, Junior Division, at Khandala.

2. The plaintiffs and defendants Nos. 1 to 3 are brothers. The defendant No. 4 is the sister of the plaintiffs and defendants Nos. 1 to 3. The plaintiff and the defendants are sons and daughter of one Genba Jadhav. The plaintiff filed Regular Civil Suit No. 91 of 1984, for partition and separate possession. The suit properties inter alia included ancestral agricultural lands. Genba died intestate on 22nd February 1972. The First Appellate Court has proceeded on the footing that the share of the deceased Genba in joint family properties got separated immediately prior to his death under S.6 of Hindu Succession Act, 1956 and the sons as well as daughters i.e. the plaintiff and all the defendants including daughter Smt. Hansabai Raghunath Jagtap are entitled to share therein as provided by and under the Hindu Succession Act, 1956. The defendants Nos. 1, 2 and 3 do not want their sister Smt. Hansabai to get any share in the suit properties. The said defendants have therefore, filed this second appeal.

According to the appellants the Hindu Succession Act, 1956 is not at all applicable to agricultural lands and if old Hindu Law is to be applied, the defendant No. 4 in his capacity as daughter of the deceased is not entitled to any share in the agricultural lands. I do not agree with the submissions made by the learned counsel for the Appellants.

3. When this appeal was being heard for admission by this Court, Shri Anil Anturkar, the learned counsel for the appellants submitted that the Hindu Succession Act, 1956 was not applicable to agricultural lands. The learned counsel submitted that there was a conflict of opinion on the subject amongst various High Courts of the country and the appeal deserved to be admitted. The learned counsel submitted that if his first proposition as formulated above was acceptable to the Court, it would follow that the respondent No. 4, sister of the original plaintiffs and defendants Nos. 1 to 3 was not entitled to any share in the ancestral agricultural lands. I found the propositions formulated by Shri Anturkar as somewhat startling. In our High Court, we have always applied Hindu Succession Act, 1956 to all properties of the deceased including agricultural lands except to the extent of specific exclusion made under S.4(2) of Hindu Succession Act, 1956. I thought it fit and proper to examine the question in depth and in detail at the stage of admission of the appeal. By its order dated 1st February, 1994, the Court appointed Shri A. S. Kumbhakoni and Shri V. B. Naik as Amicus Curiae to assist the Court. The office was directed to furnish xerox copies of the paper book to the learned advocates who were appointed by the Court as Amicus Curiae. Shri Kumbhakoni and Shri Naik willingly accepted the responsibility to assist the Court. The Court is thankful to both the learned counsel for their able assistance to the Court as Amicus Curiae. Shri Anil Anturkar also made his submissions in detail. The submissions made by Shri Anturkar were backed by industry and research. So were the submissions of Shri Kumbhakoni and Shri Naik. Since I remained unconvinced with the submissions of Shri Anturkar after going through all the authorities, I thought it unnecessary to issue notice to the respondents. This appeal has been argued almost like a final hearing at the admission stage in public interest. Merely because the submissions made by Shri Anturkar are somewhat novel, I have not hesitated to examine the said submissions on merits and in proper perspective.

4. The only question which arises for consideration of the Court in this appeal is as to whether the Hindu Succession Act, 1956 is not applicable to agricultural lands of the deceased.

5. Section 4(2) of the Hindu Succession Act, 1956 reads as under :

"4(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

Section 8 of the said Act prescribes general rules of succession in case of males. The said section provides that "the property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter -

- (a) Firstly, upon the heirs, being the relatives specified in Class I of the schedule;
- (b) secondly, if there is no heirs 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.

It is common knowledge that the Hindu Succession Act, 1956 revolutionised Hindu Law in several respects and conferred right of inheritance on family heirs, like widow, daughter, mother, widow of predeceased son etc. Section 6 of Hindu Succession Act provides for devolution of interest of a male Hindu in coparcenary property in a manner beneficial to his female relatives if the deceased had left him surviving a female relatives specified in Class I of the Schedule or a male relative specified in that class who claimed through such a female relative. Proviso to S. 6 of the Act is of considerable significance.

6. The learned counsel for the appellant submitted that the Central Legislature has no legislative competence to legislate in respect of succession to agricultural lands. The learned counsel for the appellant submitted that the subject of succession to agricultural lands has always been treated as a subject within the exclusive competence of the State Legislature. The learned counsel submitted that the expression "any property" used in S. 8 of the Act should be interpreted to mean and include only such properties over which the Central Legislature had competence to legislate. The learned counsel relied upon Entry 18 of List II forming part of the VIIth Schedule in the Constitution of India and submitted that the Hindu Succession Act, 1956 fell under Entry 18 of List II of Seventh Schedule to the Constitution. The learned counsel submitted that the Act would be exposed to risk of it being declared as ultra vires if it was held to be applicable to agricultural lands, also. The learned counsel submitted that the appellants were not challenging the vires of the Hindu Succession Act, 1956 but were contending that S. 8 of the Act should be given narrower interpretation by excluding agricultural lands from the purview thereof. The learned counsel also submitted that S. 4(2) of the Act was merely illustrative and the Act did not regulate Succession to Agricultural lands.

7. Shri Kumbhakoni, the learned counsel appearing as Amicus Curiae, submitted that the framers of the Constitution of India had deliberately and advisedly provided in Entry 5 of List III forming part of VIIth Schedule to the Constitution that Union and State Legislature both shall have competence to legislate on the subject of wills, intestacy and succession. Prior to the Constitution coming into force, the Government of India Act, 1935 was the Constitution Act. The learned

counsel submitted that Entry 7 of List III of Government of India Act, 1935 read as under :--

"7. Wills, intestacy and succession save as regards agricultural lands".

The learned counsel submitted that the subject of agricultural lands was no more excluded from the subject matter and content of Entry 5 in List III forming part of VIIth Schedule to the Constitution of India. The learned counsel submitted that the framers of the Constitution have introduced various changes in the legislative entries and the old law has undergone a deliberate change. The learned counsel relied upon doctrine of "Pith and Substance" and contended that the subject legislated upon was within the competence of union legislature and the expression "any property" used in S. 8 of the Act was liable to be interpreted to mean and include all properties of the deceased including agricultural lands save and except what was specifically carved out as an exception, by S.4(2) of the Act. If a local law is in existence in relation to subject of prevention of fragmentation of agricultural holdings or fixation of ceiling or devolution of tenancy rights in respect of agricultural holdings, such local law shall continue to prevail and shall not be affected by provisions of Hindu Succession Act, 1956. The learned counsel submitted that Entry 18 of List II in the VIIth Schedule to the Constitution of India could not be interpreted in a manner so as to wipe out the essential part of Entry 7 in List II. The learned counsel compared and contrasted Entry No. 21 of List II of Govt. of India Act, 1935 with Entry 18 of List II forming part of Seventh Schedule to the Constitution. It is of considerable significance that the subject of "devolution of land" is specifically omitted from Entry 18 of List II forming part of Seventh Schedule to the Constitution though it was very much the integral part of Entry 21 in List II appended to Govt. of India Act, 1935. The learned counsel relied upon Arts. 246(2) and 246(3) of the Constitution of India. Article 246(2) of the Constitution of India provides that notwithstanding anything contained in clause (3) of Art. 246, Parliament shall have power to make law with respect to any of the matters enumerated in List III in the VIIth Schedule. Article 246(3) provides that the State Legislature shall have exclusive power to make law in respect of any of the matters enumerated in List II of the VIIth Schedule "subject to clauses I and II of Art. 246". The constitutional scheme clearly indicates that in the event of their being any conflict, Art. 246(2) shall have overriding effect over Art. 246(3) of the Constitution. As far as Entry 18 of List II is concerned, the learned counsel Shri Kumbhakoni invited attention of the Court to para 5 of the Judgment of the Supreme Court in the case of Accountant and Secretarial Services Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, .

In para 5 of (he said judgment it was clearly observed by the Apex Court that Entry 18 dealing with the subject matter of land shall have to be construed in such a manner as to give a meaning and content to all other entries and not in a manner so as to denude the other entries in the concurrent list of their content. In the said paragraph of the judgment, the Apex Court also observed that if the

contention of the appellant before the Apex Court was accepted, it would mean that the State could have exclusive legislative competence to legislate in respect of devolution of land and building by virtue of the provisions contained in Entry 18 even though wills, intestacy and succession were subject matter of separate legislative head as obvious from Entry 5 of the concurrent list. In my opinion this judgment concludes the controversy against the appellants insofar as the appellants rely on Entry 18 of List 2 in support of his submission.

8. For sake of ready reference, and proper understanding of rival contention, it is necessary to extract Entry 7 of List III of Govt. of India Act, 1935 and Entries 5, 6 and 7 of List III of Seventh Schedule to the Constitution as well as Entry 21 from List III of Govt. of India Act, 1935 and Entry 18 from List III of the Constitution. The said entries read as under :--

A. Entry 7, List III, Govt. of India Act, 1935 :

"Wills, intestacy, and succession, save as regards agricultural land."

Entry 5, List III, VIIth Schedule of Constitution of India :

"Marriage and divorce, infants and minors, adoption, wills, intestacy and succession, joint family and partition, all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

Entry 6, List III, VIIth Schedule of Constitution of India :

"Transfer of property other than agricultural land, registration of deeds and documents."

Entry 7, List III, VIIth Schedule of Constitution of India :

"Contracts including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land." .

B. Entry 21, List III, Government of India Act, 1935 :

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents, transfer, alienation and devolution of agricultural land, land improvement and agricultural loans, colonization, Courts of Wards, encumbered and attached estates, treasure trove."

Entry 18, List III, VIIth Schedule of Constitution of India :

"Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents, transfer and alienation of agricultural land, land improvement and agricultural loans, colonization."

(Note : Subject matter of devolution of agricultural land is omitted from the scope of Entry 18).

9. Let me now survey the decisions rendered by various Courts having some

bearing on the question under consideration.

10. The learned counsel for the appellants relied on the opinion of the Federal Court in Special Reference No. 1 of 1941, in the matter of Hindu Women's Rights to Property, Act, 1937 reported in AIR 1941 72 (Federal Court) . In this case the Federal Court interpreted Entry 7 of List III (the concurrent list) of the Govt. of India Act, 1935. The plain language of the said entry clearly excluded agricultural lands from the scope and ambit of the said entry. In its opinion rendered in the said special reference made to the Federal Court by the Governor General, the Federal Court opined that the expression "any property" used in S. 3 of the Hindu Women's Rights to Property Act, 1937 shall have to be interpreted to mean only such property in respect whereof the Central Legislature could enact law of succession by virtue of the provisions contained in Entry 7, List 111 of Govt. of India Act, 1935. The Federal Court answered the question referred to it by the Governor General by stating that the Hindu Women's Rights to Property Act, 1937 and Hindu Women's Rights to Property. (Amendment). Act. 1938 did not operate to regulate succession to agricultural lands in the Governor's provinces.

11. In Laxmi Debi Vs. Surendra Kumar Panda and Others, , the Division Bench of High Court of Orissa held that the framers of the Constitution had omitted the words "save as regards agricultural lands" from Item 5 of the concurrent list in Schedule VII of the Constitution of India in order to have a uniform Personal Law throughout India. The High Court of Orissa held that the scope and ambit of Entry 5 forming part of VIIth Schedule to the Constitution of India was enlarged by the framers of the Constitution by reason of exclusion of the words "save as regards agricultural lands therefrom. In the context of the change of entries and the object of the framers of the Constitution, the Court held that the decision of the Federal Court in the above referred reference AIR 1941 72 (Federal Court) could not be applied for purpose of interpretation of Entry 5 of the concurrent list in Schedule VII of the Constitution of India. In Nidhi Swain and Others Vs. Khathi Dibya and Others, , the Division Bench of the High Court of Orissa took the same view.

12. Sometime in the year 1960, the High Court of Punjab rendered two reported decisions having bearing on the question under consideration. In the case of Sant Ram Dass v. Gurdav Singh, AIR 1960 P&H 462, D. K. Mahajan, J. held that "succession to "agricultural land was covered by Item 5 of List III of the VIIth Schedule of the Constitution of India and the Hindu Succession Act regulated succession in respect of all properties of Hindus including in respect of agricultural land. Having regard to the change in the language and content of Entry 5 in List III of the VIIth Schedule to the Constitution as contrasted from Entry 7 in List III of Govt. of India Act, 1935, it was held by the Court that the Hindu Succession Act though applicable to regulate succession in respect of agricultural lands was not ultra vires.

13. In Amar Singh and Others Vs. Baldev Singh and Others, , a Full Bench of the High Court of Punjab took the same view. In this case the Full Bench of the High

Court of Punjab held that S. 14 of the Hindu Succession Act, 1956 was valid and the legislation though providing for succession in relation to agricultural land fell within Entry 5 of List III of the Constitution. The Full Bench referred to the constitutional scheme and also referred to the provisions contained in Arts. 246(2) and 246(3) of the Constitution. The Court held that the subject matter of Wills, intestacy and succession was not within the exclusive competence of the State Legislature. In this case, the Full Bench of the High Court of Punjab also relied upon doctrine of "Pith and Substance" and observed that the alleged encroachment of the Entry 18 in the State List, if any, was incidental. If the subject legislated upon falls directly and substantially within the scope and ambit of entry in concurrent list, the question of alleged encroachment in the State List does not arise.

14. In *Baswant Gauda v. Smt. Channabasawwa* reported in AIR 1971 Mys 151, the High Court of Mysore held that the Hindu Succession Act, 1956 came within the ambit of Item 5 of List II of Schedule 7 of the Constitution and that the applicability of the Act to agricultural lands could not be excluded. The High Court of Mysore followed the ratio of the judgment of the Full Bench of High Court of Punjab referred to hereinabove.

15. I shall now refer to the judgments of High Court of Allahabad having bearing on the question under consideration.

16. In *Shakuntala Devi Vs. Beni Madhav*, , the High Court of Allahabad in terms held that provisions of S. 14 of the Hindu Succession Act dealt with matters which came within ambit of Entry 5, List III of Schedule VII of the Constitution. Entry 5 of List III on VIIth Schedule to the Constitution when contrasted with Entries 6 and 7 also provides a definite clue for purpose of understanding the constitutional scheme. Entry 5 of List III in the VIIth Schedule does not exclude agricultural lands from the purview of Entry 5. Entries 6 and 7 dealing with the subject of transfer of property and contracts specifically exclude agricultural lands from the purview of the said entries. Non-exclusion of subject of agricultural lands from Entry 5 and specific exclusion thereof from Entries 6 and 7 is not accidental or incidental but is deliberate in view of intended change in the constitutional scheme.

17. The learned counsel for the appellant heavily relied upon the ratio of the judgment of the Division Bench of Allahabad High Court in the case of *Smt. Prema Devi Vs. Joint Director of Consolidation (Head quarter) at Gorakhpur Camp and Others*, . In this case the Division Bench of High Court of Allahabad was concerned with interpretation of U. P. Zamindari Abolition and Land Reforms Act, which regulated devolution of the tenancy rights a subject specifically referred to in S. 4(2) of Hindu Succession Act. Section 4(2) of the Hindu Succession Act, 1956, specifically provides that the Hindu Succession Act, 1956, shall not affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. To my

mind it is clear from reading of S. 4(2) of the Act that only such laws which fall within the category of laws specified in S. 4(2) of the Act are excluded from the purview of the Hindu Succession Act, 1956 and S. 4(2) of the Act cannot be interpreted to mean that the Hindu Succession Act, 1956 is not at all applicable to regulate succession in respect of agricultural lands. In the above referred case, the Division Bench of the High Court of Allahabad held that having regard to the subject of U.P. Zamindari Abolition and Land Reforms Act, S. 4(2) of the Act shall be applicable and the Hindu Succession Act, 1956 shall not affect the above referred local law under consideration. If understood in proper perspective having regard to the context in which the problem was discussed by the High Court of Allahabad in the above referred case, this judgment of the High Court of Allahabad does not appear to take a view different from the view taken by other High Courts of the country. It is of considerable significance that in this case the Division Bench of High Court of Allahabad in terms approved the ratio of the Full Bench judgment of the High Court of Punjab Amar Singh and Others Vs. Baldev Singh and Others, . It is however, true that in this case the Division Bench of High Court of Allahabad observed that it did not agree with the ratio of the judgment of S. N. Katju, J. Shakuntala Devi Vs. Beni Madhav, . If the ratio of the judgment is interpreted in conjunction with the ratio of the Full Bench judgment of High Court of Punjab referred to hereinabove and is restricted in its applicability to the cases falling under S. 4(2) of the Hindu Succession Act, 1956, it does not strike a different note. If it is interpreted to mean that Hindu Succession Act, 1956 is not at all applicable to regulate succession in respect of agricultural lands, I shall have no hesitation in dissenting with the view taken by the Court in the above referred case.

18. In Rudra Pratap and Another Vs. Board of Revenue, U.P. and Others, , the Division Bench of High Court of Allahabad agreed with the ratio of earlier judgment of Allahabad rendered in the case of Smt. Prema Devi Vs. Joint Director of Consolidation (Head quarter) at Gorakhpur Camp and Others, . It is some what interesting to refer to the editorial note of All India Reporter appended to the Head Note of this judgment. The said editorial note reads as under :--

"The unqualified proposition that the Hindu Succession Act does not apply to agricultural lands does not seem to be correct as it leads to the result that succession to the agricultural land of a Hindu will in no case be governed by the Hindu Succession Act, 1956. Such a result, clearly does not follow from S. 4(2) of the Hindu Succession Act, 1956. Section 4(2) refers only to certain specific matters e.g. the fragmentation of agricultural holdings and provides that if there be any law providing for the prevention of such fragmentation, the operation of such law shall not be affected by the Hindu Succession Act."

19. The learned counsel for the appellant at one stage invited attention of the Court to the judgment of High Court of Rajasthan in the case of Jeewanram Vs. Lichmadevi and Another, . The said judgment, with respect, is not relevant as it

deals with S. 22 of the Hindu Succession Act, 1956. As a matter of fact in his rejoinder, the learned counsel for the appellant himself submitted that reference to S.22 of Hindu Succession Act, 1956 or the decisions based therein were not relevant for purpose of deciding the controversy which is subject matter of this appeal.

20. I shall now refer to the judgment of this Court in the case of Dhananjaya and Others Vs. Gajra and Others, . This judgement deals with the subject of interpretation and applicability of S. 151 of M.P. Land Revenue Code, 1954. The said provision provided for devolution of tenancy rights in respect of agricultural holdings. The subject matter is clearly covered under S. 4(2) of Hindu Succession Act, 1956. With respect, the ratio of this judgment is not relevant for deciding this appeal.

21. The learned counsel Shri Kumbhakoni invited the attention of the Court to several judgments of the Hon"ble Supreme Court interpreting and applying the doctrine of "Pith and Substance". Some of the judgments relied upon by the learned counsel are listed herein for the sake of ready reference :--

(1) Synthetics & Chemicals Ltd. v. State of U.P. ,

(2) Ujagar Prints Vs. Union of India (UOI), .

I have already referred to the judgment of the Hon"ble Supreme Court in the case of Accountant and Secretarial Services Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, . On application of doctrine of Pith and Substance to Hindu Succession Act, 1956, I hold that the subject legislated upon falls under Entry 5 of List III of Seventh Schedule of Constitution and S.8 of the Act is applicable also to agricultural lands without affecting Ideal law concerning prevention of fragmentation, law fixing ceiling and law concerning tenancy rights in agricultural lands.

22. At the initial stage when the matter was first argued, I felt that there was a difference of opinion between several High Courts on the subject as to whether the Hindu Succession Act, 1956 was not applicable to regulate succession in respect of agricultural lands. After going through all the decisions cited at the bar with the assistance of learned counsel for the appellant and the learned counsel who appeared as Amicus Curiae to assist the Court, I have reached the conclusion that there is no real conflict between the various decisions of the High Courts in the country. It may be stated in the passing that our Court has decided hundreds and thousands of matters during all these years on the footing that the Hindu Succession Act, 1956 is applicable to agricultural lands save and except to the extent provided in Section 4(2) of the Act. I am happy to conclude that after due scrutiny of all the relevant case-law on the subject, the conclusion of the Court is the same. In my opinion, there is no merit in the appeal. The appeal fails.

23. In the result the appeal is dismissed.

24. The Registrar, High Court, Appellate Side is requested to furnish a copy of this judgment to Shri Kumbhakoni and Shri Vineet Naik free of cost and also forward a copy thereof to the respondent expeditiously.

25. Issue of certified copy is expedited.

26. Appeal dismissed.