

CASE NO.:
Appeal (civil) 7212 of 2002

PETITIONER:
Gulabrao Balwantrao Shinde & Ors.

RESPONDENT:
Chhabubai Balwantrao Shinde & Ors.

DATE OF JUDGMENT: 12/11/2002

BENCH:
V. N. Khare & Ashok Bhan.

JUDGMENT:

J U D G M E N T

Bhan, J.

Leave granted.

Plaintiffs, hereinafter referred to as the appellants, have filed this appeal challenging the final judgment and order dated 2nd February, 2001 passed by Bombay High Court Bench at Aurangabad whereby the High Court while allowing the appeal has set aside the judgment and decree passed by the courts below and held that defendant-respondent No. 1 as the absolute owner of entire suit property.

One Balwantrao Shinde (who died on 27th June, 1954) owned two suit properties, namely, Gat No. 441 (Survey No. 204 admeasuring 2 Hectors 27 Ares at Tarsod, Taluku and District Jalgaon, Maharashtra and Gram Panchayat House No. 2 and 26 at Tarsod, Taluka and District Jalgaon, Maharashtra. Balwantrao Shinde married Anjanabai who died in the year 1940. After her death he married Chhabubai. Plaintiffs-appellants are the children from Anjanabai whereas the respondents are Chhabubai and her children. Appellants filed the suit for recovery of half share of the property left by Balwantrao Shinde whereas respondents claimed ownership of the entire property.

Trial Court on the pleadings of the parties decreed the suit filed by the plaintiffs-appellants to the extent of 11/24th share of the suit property leaving the remaining 13/24th share to the respondents. Respondents being aggrieved filed an appeal. The appellate Court while dismissing the appeal filed by the respondents held that the plaintiffs-appellants were owners to the extent of entire suit property left by Balwantrao Shinde. Respondents thereafter filed the second appeal in the High Court. The High Court formulated the following two questions as substantial questions of law arising from the order of the courts below:

"a) Balwantrao the husband of Chhabubai (Appellant herein Orig. deft. No. 1) had died in the year 1954 before the Hindu Succession Act had come into force. The Appellant No. 1 was in possession of the suit property even before the Hindu Succession Act come into the force but after the Hindu Succession Act the original defendant No. 1 became the absolute owner of the suit property which in her actual possession, as per Section 14 of the Hindu Succession Act. Even if it is taken for granted that after the death of Balwantrao in 1954, original defendant No. 1 come in possession of the suit

property as an alienated owner, her ownership rights had become absolute after the Hindu Succession Act had come into force. Hence the respondents are not entitled to claim any share in the suit property?

b) Did the Lower Appellate Court have jurisdiction to give relief other than relief sought by the plaintiff because the plaintiff had filed a suit for partition i.e. for only half of portion, of the suit property, therefore, could the District Court have passed an Order that plaintiff became the absolute owner of the entire suit property?"

On question No. 1 it was held that Chhabubai possessed the property left by Balwantrao Shinde in lieu of maintenance and after coming into force of the Hindu Succession Act her right was enlarged to full ownership. Under Question No. 2 it was held that the appellate Court could not grant decree for the entire property in favour of the appellants as the appellants themselves had claimed half portion of the property by way of partition. The judgments of the courts below were accordingly set aside and the suit filed by the appellants was ordered to be dismissed. The defendants were held to be the owners in possession of the entire property.

Counsel for the parties have been heard.

Counsel for the appellants vehemently argued that in the absence of any pleadings and evidence to the effect that the Balwantrao Shinde had given the property to Chhabubai in lieu of maintenance, the High Court has erred in recording a finding that the property in possession of Chhabubai was in lieu of maintenance which could be enlarged into full ownership rights on her. Counsel for the respondents virtually conceded that Chhabubai did not either raise the plea nor lead any evidence to prove that the properties were given to her by way of maintenance by Balwantrao Shinde. It is also not disputed that properties in the hands of Balwantrao Shinde were ancestral in nature. We agree with the plea raised by the counsel for the appellants that in the absence of any pleadings to the effect that Balwantrao Shinde had given the properties to Chhabubai by way of maintenance and in the absence of any evidence to that effect, the finding that the properties were given in lieu of maintenance to Chhabubai which right could be enlarged into full ownership right could not be recorded. The High Court was clearly in error in recording a finding to the effect that Chhabubai had become absolute owner of the properties left by Balwantrao Shinde. Another factor which persuades us to take this view is that the properties were ancestral hands of Balwantrao Shinde in which plaintiff No. 1 had a right by birth. The entire property therefore could not have been given to Chhabubai by way of maintenance.

For the reasons stated above, the findings recorded by the High Court on question No. 1 are reversed.

We agree with the view taken by the High Court that since the appellants had claimed only half share of the property by way of partition they could not be declared owners to the entire extent of the property. Finding of the High Court on question No. 2 is therefore upheld.

For the reasons stated above, the judgment of the High Court is modified and the appeal is partly allowed. The judgment of the High Court is set aside to the extent indicated above and the decree passed by the Trial Court is restored. The suit shall stand decreed in terms of the decree passed by the Trial Court. Parties shall bear their own costs.

JUDIS