

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No. 1132 of 2004

1) Rajaram Mahadu Dahatonde
Since deceased through his
legal representatives

1-A) Machhindra Rajaram Dahatonde,
Age 71 years,
Occupation : Agriculture.
R/o Chanda, Taluka Newasa,
District Ahmednagar.

1-B) Kausalyabai Pandharinath Mote,
Age 68 years,
Occupation : Agriculture,
R/o Wadala, Taluka Newasa,
District Ahmednagar.

1-C) Suman Dinkar Bhusari,
Age 65 years,
Occupation : Agriculture,
R/o Telkundgaon,
Taluka Newasa,
District Ahmednagar.

.. Appellants.

Versus

1) Babu Mahadu Dahatonde,
Age 74 years,
Occupation: Agriculture,
R/o Chanda, Taluka Newasa,
District Ahmednagar.

2) Mukinda Mahadu Dahatonde,
Deceased and deleted.

3) Ambadas Damodhar Dahatonde,
Age 50 years,
Occupation : Agriculture,

R/o Chanda, Taluka Newasa,
District Ahmednagar.

- 4) Lilabai Vithoba Pathade,
Age 62 years,
Occupation : Agriculture,
R/o Dhamori, Taluka Newasa,
District Ahmednagar.
- 5) Shilabai Pandurang Tanpure,
Age 59 years,
Occupation : Agriculture,
R/o Lohogaon, Taluka Newasa,
District Ahmednagar.
- 6) Laxmibai Damodhar Dahatonde,
(Deceased)
- 7) Tukaram Chandrabhan Dahatonde,
Age 62 years,
Occupation : Agriculture,
R/o Chanda, Taluka Newasa,
District Ahmednagar.
- 8) Namdeo Chandrabhan Dahatonde,
Age 59 years,
Occupation : Agriculture,
R/o Chanda, Taluka Newasa,
District Ahmednagar.
- 9) Balasaheb Chandrabhan Dahatonde,
Age 52 years,
Occupation : Agriculture,
R/o Chanda, Taluka Newasa,
District Ahmednagar.
- 10) Dattu Chandrabhan Dahatonde,
Age 40 years,
Occupation : Agriculture,
R/o Chanda, Taluka Newasa,
District Ahmednagar.

- 11) Sakharbai Gopinath Khatik
(Deleted).
- 12) Gulabbai Manaji Waman,
Age 52 years,
Occupation : Agriculture,
R/o Chanda, Taluka Newasa,
District Ahmednagar.
- 13) Sampatbai Jagannath Admane,
Age 48 years,
Occupation : Agriculture,
R/o Nipani-Nimgaon,
Taluka Newasa,
District Ahmednagar.
- 14) Janabai Laxman Nawale,
Age 46 years,
Occupation : Agriculture,
R/o Bhende, Taluka Newasa,
District Ahmednagar.
- 15) Sarubai Chandrabhan Dahatonde
(deceased). .. **Respondents.**

Shri. P.V. Barde, Advocate, for appellants.

Shri. N.B. Narwade, Advocate, for respondent Nos.1A to 1G, 3,4,5,7A to 7C, 8A to 8E, 9,10,12, 13 and 14.

Respondent Nos.2,6 and 15 - dead.

Respondent No.11 - deleted.

CORAM: T.V. NALAWADE, J.

DATE : 29th OCTOBER 2015

JUDGMENT:

1) The appeal is filed against the judgment and decree of Regular Civil Appeal No.477/1985 which was pending in the Court of the learned Additional District Judge Shrirampur, District Ahmednagar. First Appeal was filed by the original plaintiff against the judgment and decree of Regular Civil Suit No.360/1980 which was pending in the Court of the Civil Judge, Junior Division, Newasa, District Ahmednagar. The appeal is allowed by the First Appellate Court and the judgment and decree of dismissal of partition suit is set aside and the relief of partition is given in favour of the plaintiff. Both the sides are heard.

2) The appeal is admitted by this Court (other Hon'ble Judge) on following substantial question of law:-

" Whether the exemption from bringing on record the legal representatives of deceased respondent No.2 - Mukinda cannot be claimed by the respondent No.1 - Babu without obtaining leave under Rule 4(iv) of Order 22 of C.P.C. in view of "Zahirul Islam vs Mohd. Usman and others" (2003) 1 Supreme Court Cases 476 and whether the impugned Judgment is vitiated due to such technical difficulty ?"

3) The learned counsel for the appellants was allowed to argue on other points also which are as under :-

(ii) *Whether the Civil Court is bound to draw inference on the basis of certificate of purchase issued under section 32-M of the Bombay Tenancy and Agricultural Lands Act, 1948 that the certificate holder is the absolute owner of the property and it is his self acquired property or whether the members of the joint Hindu family can be allowed to prove in Civil Court that it was joint family property or whether such dispute needs to be referred to the Tenancy Court ?*

(iii) *Whether due to death of a member of the joint Hindu family who is entitled to have his share on partition the entire action of partition abates if his legal representatives are not brought on the record even when he had admitted the suit claim ?*

4) Plaintiff-Babu Mahadu, defendant No.1 Rajaram Mahadu and defendant No.2 Mukinda are real brothers *inter se*. Defendant Nos.3 to 6 are heirs of one deceased brother of plaintiff namely Damodhar and defendant Nos.7 to 15 are heirs of another deceased

brother of the plaintiff namely Chandrabhan. Father of plaintiff, Mahadu died in the year 1935. These facts are not disputed.

5) The suit properties are described in three groups by plaintiff in the plaint. In plaint para 1-A some agricultural lands are mentioned and it is the case of the plaintiff that these lands are left behind by Mahadu and so they are ancestral and joint Hindu family properties of plaintiff and defendants. Similar contention is made in respect of house properties mentioned in plaint para 1-C.

6) It is contended that the agricultural lands mentioned in plaint para 1-B like Gat Nos.475, 202, 496 situated at village Chanda were with Mahadu as tenant and under the Bombay Tenancy Act certificate of purchase is granted. It is contended that after the death of Mahadu, all the sons of Mahadu cultivated the lands as the property of joint Hindu family and on the relevant date they all were cultivating the land and so certificate issued under section 32-M of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short, "the Bombay

Tenancy Act") in the name of defendant No.1 was issued for all the members of the joint family and it was issued in the name of defendant No.1 as Karta of this joint Hindu family. It is also contended that the purchase price of these three lands was paid out of the income of joint Hindu family property. All the properties are situated in village Chanda.

7) It is the case of the plaintiff that the sons of Mahadu started living separate from each other in the year 1972 in different houses of the joint Hindu family but they did not partition the properties. It is his case that the sons of Mahadu started cultivating different portions of the lands separately but the lands described in para 1-B were cultivating jointly.

8) It is the case of the plaintiff that prior to the suit, he requested defendant No.1 Karta to effect partition. It is contended that defendant No.1 flatly refused to do so and so plaintiff was constrained to file the suit. Plaintiff had prayed for partition and separation of his 1/5th share in the aforesaid properties.

9) Only defendant No.1, Rajaram contested the suit and he contended that in view of the contention of the plaintiff that joint status came to an end in the year 1972, the suit itself is not tenable. He contended that in the past Regular Civil Suit No.204/1976 was filed by plaintiff but it was withdrawn. It is contended that cost of the previous suit as directed by the Court is not paid by the plaintiff and so the fresh suit is not tenable.

10) Defendant No.1 contended that land Gat Nos.202, 475, 496, 474, and 498 are owned by him alone. He contended that land Gat Nos.202, 475, 496 were with him as tenant and he became purchaser of these 3 lands under the Bombay Tenancy Act. He contended that land Gat Nos.474 and 498 came to him in the partition and so he became owner of these properties. He, however, contended that 4/5th portion of land Gat No.474 is with his other brothers since 1978 and he is in possession of only 1/5th portion of Gat No.474.

11) Defendant No.1 contended that he started living separate from his brothers in the year 1972 and

since then he has been enjoying his properties separately. He contended that no joint family remained in existence after the year 1972 and he was never Karta of such family. He denied that the purchase price of the aforesaid 3 lands was paid from the income of the joint Hindu family property.

12) It is the case of the defendant No.1 that during implementation of consolidation scheme which was done in the year 1964, as per separate possession of these properties, their names were entered in the revenue record of different lands. It is contended that this record was never challenged by the plaintiff and other defendants. Alternate defence was taken by defendant No.1 that he became owner due to adverse possession. However, there was on specific pleading on this point.

13) Other defendants including defendant No.2 Mukinda filed consent written statement.

14) Issues were framed by the trial Court on the basis of the aforesaid pleadings. Both sides gave evidence.

The trial Court had held that the suit is not tenable as cost of the previous suit, Regular Civil Suit No.204/1976, was not paid by the present plaintiff prior to the presentation of the present suit. The trial Court further held that land Gat Nos.475, 202, 496, 474 and 498 are self acquired properties of defendant No.1. However, the trial Court held that the suit was within limitation as it was filed in the year 1980 when defendant No.1 has taken defence that there was severance of status in the year 1972.

15) During pendency of the first appeal, defendant No.2 Mukinda died. No steps were taken to bring legal representatives of Mukinda on record by the plaintiff in the first appeal. Attempt was made by the legal representatives of Mukinda to come on record in the appeal but their application was rejected by the first appellate Court. This point was argued for the present appellant in the first appeal and it was submitted that entire action is abated. The First Appellate Court has considered this contention and has indirectly held that defendant No.2 Mukinda is exempted from the proceeding. The First Appellate Court has held that land

Gat Nos.474, 498 had come to the share of Mahadu in partition amongst the brothers of Mahadu and defendant No.1 had collected the share of Mahadu for all the sons of Mahadu as Karta. There is also revenue record in that regard which is being discussed at appropriate place. In the present appeal, the learned counsel for the appellants conceded that land Gat Nos.474, 498 had come to the sons of Mahadu as ancestral property. The First Appellate Court has held that the other 3 lands mentioned by the defendant No.1 like Gat Nos.475, 202, 496 are joint Hindu Family properties and they were being cultivated as tenant by all the sons of Mahadu. The First Appellate Court has held that there is no specific pleading of partition in the written statement of defendant No.1 and the partition had not taken place prior to the date of suit.

16) For the consideration of rival claims on merit, some initial contentions, claims made by the defendant No.1 need to be mentioned first though these claims are given up now. It was contended by the present appellants that land Gat Nos.474 and 498 are self acquired properties of defendant No.1. However, he had

admitted that 1/5th portion of Gat No. 474 is in his possession since 1978 and other four brothers are in possession of remaining 5/4th portion of this land. It is not disputed that previously Gat No.474 was bearing Survey No.218 and the previously Gat No.496 was numbered as Survey No.223. Exhibit 42 is the certified copy of Mutation Nos.959 and 960 and it was sanctioned in the year 1937. This mutation shows that partition had taken place amongst 3 branches of Vithoba Babu, Maruti Lalba and Rajaram Mahadu. As defendant No.1 Rajaram was son of Mahadu and Mahadu admittedly died in the year 1935 there was only one possibility that defendant No.1 represented the branch of Mahadu in the partition and he claimed share for the branch of Mahadu and as Karta of joint Hindu family constituted by five sons of Mahadu. This record shows that defendant No.1 collected shares in the properties like Survey Nos.194, 215, 218/3 and 223/2. The other circumstances of the case and this mutation are sufficient to infer that false defence was taken by defendant No.1 in respect of the properties mentioned in this mutation that they are self acquired properties of defendant No.1. It also shows that after the

death of Mahadu, defendant No.1 started acting as Karta of the joint Hindu family of which all the sons of Mahadu were members.

17) So far as lands received under the Tenancy Act are concerned, there is record of following nature.

18) Gat No.475 was having survey No.219 in the past. The 7/12 extracts of few years starting from 1931-32 are produced. They are up to the period 1940-41 and again they are for subsequent period like 1961-62. The record of relevant period, of Tiller's day, is not filed. The record available shows that name of Mahadu was entered in crop cultivation column in the year 1935-36 (Exhibit 54) and the portion of Survey No.219 which was in possession of Mahadu was given number 219/4. It appears that submission was made in the trial Court that Mahadu Lalba mentioned in Exhibit 54 is a different person and this contention of defendant No.1 was accepted by the trial Court. It is already mentioned that in Mutation Nos.959 and 960 name of one of the coparceners is mentioned as Mahadu Lalba. There is one more mutation, Mutation

No.958, which is at Exhibit 53 and it shows that Mahadu Lalba died on 1-6-1935 leaving behind Karta Rajaram (defendant No.1) and four more sons. This mutation was effected in respect of land Survey No.223/2. When there was such record available, the trial Court committed mistake in holding that Mahadu Lalba shown in Exhibit 54 was a different person and he was not father of plaintiff and defendant No.1.

19) The aforesaid record shows that land Survey No.219/4 was initially with Mahadu, predecessor plaintiff and defendant No.1 for cultivation. The 7/12 extract shows that after the death of Mahadu, name of Chandrabhan, son of Mahadu, was entered in the crop cultivation column and it was for the years 1937-38, 1938-39. The record shows that first time in the year 1940-41 the name of defendant No.1 was entered in the crop cultivation column (Exhibit 55). Thus, on one hand there is record to show that first Mahadu started cultivating this land and after him, name of his sons were entered in the crop cultivation column. At Exhibit 50 there is 7/12 extract for the years 1961-62 to 1970-71. This document shows

that for the period 1961-62 to 1965-66 the name of only defendant No.1 was entered in the crop cultivation column of this land but from 1967-68 onwards names of all the sons of Mahadu were entered in the crop cultivation column and they were jointly cultivating this land. It appears that on the basis of certificate issued under section 32-M of the Bombay Tenancy Act, defendant No.1 took steps and then there was revenue proceeding (there is copy of RTS order on the record) and in the revenue proceeding the names of brothers of defendant No.1 were deleted by observing that civil Court can decide the dispute.

20) There is similar record in respect of land Gat No.202, old number of this property was Survey No.69/1. This record also shows that both plaintiff and defendants were jointly cultivating this property and it came to the family under Tenancy Act. There is record of Survey Nos.16 and 17 which shows that name of Chandrabhan was entered in crop cultivation column. There is record in respect of other survey numbers also including Survey No.223 showing that names of all the brothers were

entered in revenue record, in crop cultivation column.

21) In view of the aforesaid record burden was heavy on defendant No.1 to prove that he alone had accepted the land for cultivation from the owners. The record is sufficient to prove that he was Karta of the joint Hindu family constituted by 4 sons of Mahadu and he received that status in the year 1935. For many years all the brothers were shown in crop cultivation column showing that they were cultivating these so called lands acquired under tenancy rights, jointly. In view of existence of the aforesaid record it was necessary for the defendant No.1 to prove to the satisfaction of the Court that the land was accepted by him for himself and not for joint Hindu family. He could have made attempt at least to produce relevant record of the tenancy proceeding. There is copy of statement of defendant No.1 on the record given in one such tenancy proceeding which was in respect of land Gat No.474 (Old Survey No.219/4). Unfortunately this record was not called and the original statement was not confronted to the defendant No.1. In any case the burden was on the defendant No.1, in view of the facts and

circumstances of the present case, to prove that it is his self acquired property and he failed to do so. The aforesaid record and conduct of the defendant No.1 are sufficient to prove on preponderance of probability that land Gat Nos.202 and 498 were being cultivated by all four sons of Mahadu as tenants and land Gat No.475 was initially with Mahadu for cultivation and after his death his sons started cultivating this land. This record is sufficient to hold that the three agricultural lands mentioned in plaint para 1-B are also joint Hindu family properties.

22) Learned counsel for the appellants placed reliance on the decision given by this Court at Principal Seat in *Second Appeal No.375/1993 (between Rajaram Gopal Govekar and Arjun Gopal Govekar)*. It appears that this Court (other Hon'ble Judge) at Principal Seat held that such proceeding falls under section 70B of the Bombay Tenancy Act and it needs to be referred to the tenancy Court. On the basis of this observation, learned counsel for the appellants submitted that in the present matter also when there is dispute about certificate

granted under section 32-M of the Tenancy Act, the dispute ought to have been referred by the Civil Court to the Tenancy Court. He submitted that it was not open to the Civil Court to give finding that this property was cultivated by joint Hindu family and certificate was issued in favour of defendant No.1 as Karta of the joint Hindu family.

23) The aforesaid proposition made by the learned counsel for the appellants is not at all acceptable in this case. Firstly, the bar of jurisdiction under Bombay Tenancy Act is applicable only with regard to the subject matters mentioned in the Bombay Tenancy Act. Secondly, the bar does not mean that for all purposes the jurisdiction of Civil Court is taken away. Under the Bombay Tenancy Act, the tenant's rights are hereditary. Tenancy rights can be acquired by single person or more persons or even by joint Hindu family. The disputes which are between tenant and the landlord are expected to be considered by the tenancy Court. In the present matter, the question is, whether the three properties mentioned in three certificates given under section 32-M of the Bombay

Tenancy Act are joint Hindu family properties. Such dispute can be and needs to be decided by Civil Court. This is partition suit and only on the basis of certificate granted under section 32-M of the Bombay Tenancy Act defendant No.1 cannot contend that it is his self acquired property. No such inference is possible when there are facts and circumstances of the case like present one. This Court has no hesitation to hold that the dispute of the present nature cannot be dealt with under the Bombay Tenancy Act. Reliance is placed on the case reported as **2006 (2) Mh.L.J. 243 (Savitra Bapu v. Rau Rama)**.

24) When it is proved that at the relevant time the parties were members of joint Hindu family and they were having ancestral and joint Hindu family properties, the burden of proof is on the member who claims that particular property is his self acquired property. This burden is more on the Karta of joint Hindu family.

25) In the written statement, defendant No.1 has not come with specific case of partition. He has only referred to the contents of plaint and has contended that

there was severance of status. Partition record is in respect of two properties like Gat Nos.474 and 498 which had come to the share of Mahadu in partition which had taken place in the year 1937 and so there is no specific case of partition amongst the plaintiff and defendants. Mere severance of status of joint Hindu family cannot change the character of joint Hindu family property. Thus even if it is presumed that five sons of Mahadu started living separate as per the case of the plaintiff, in the year 1972 and they were cultivating some portions separately, inference of partition cannot be drawn. There is no specific case of partition of defendant No.1 and this circumstance goes long way against defendant No.1. There is voluminous record to show that these brothers were jointly cultivating the suit properties and such record is even in respect of the three properties received under the Bombay Tenancy Act. Whether the property was joint Hindu family property or it was self acquired property of defendant No.1 is a question of fact and the fact finding Court has given finding against the appellants. In second appeal it is not possible to interfere in this finding and it needs to be held all these properties

are the joint Hindu family properties.

26) Learned counsel for the respondent/plaintiff placed reliance on one case reported as **1987(2) Mh.L.R. 968 (Murlidhar Sonar v. Ramchandra Sonar)**. In this case, the Bombay High Court has held that burden to prove is on the Karta when he claims that particular property was not the property of joint Hindu family. This issue is already discussed by this Court by quoting Hindu law.

27) The other point which is argued in the present matter is the circumstance of not depositing the cost amount in respect of previous suit by the plaintiff. The trial Court has dismissed the suit on this ground. The first Appellate Court has held that the Court can grant permission even after filing of subsequent suit to deposit such cost. It was contended that steps were taken by the appellant, plaintiff in the first appellate Court for seeking such permission and this application was considered by the first appellate Court along with the appeal. The first appellate Court allowed the appeal and set aside the decision given by the trial Court. However, no specific

time was fixed by the first appellate Court for depositing the cost amount. The cost amount was deposited in the trial court by the plaintiff in respect of the present suit on 2-11-2004. On this circumstance this Court has made order dated 31-1-2007 which is as follows :-

"2. Learned advocate for the appellants would submit that non-payment of the costs granted while allowing the earlier suit is a defect which was not cured. He would further submit that L.Rs. of deceased defendant No.2 Mukinda were not taken on record and that also would make the decree unworkable and unexecutable. Learned advocate for the Respondents would submit that costs amount is already deposited in the trial Court on 2.11.2004 during pendency of the Second Appeal and therefore, defect is cured. Such defect can be cured in view of the "Awadabai and others Vs. Parvati and others" (A.I.R. 1990 Bombay 105). Therefore, the first ground is of no avail. . . ."

28) Relevant provision is Order 23 Rule 1 (3) and (5) of Civil Procedure Code and it runs as under :-

"1. Withdrawal of suit or abandonment of part claim:

(1)

(2)

(3) Where the Court is satisfied,--

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it things fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4)

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1) or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

29) The aforesaid provision can be considered in three parts. The first part shows that unless permission is obtained from the court, on the same subject matter fresh suit cannot be filed after withdrawal of the first suit. The second part shows that the court granting permission has discretion to grant or refuse to grant permission and the third part shows that Court may or may not impose condition like payment of cost first before filing of fresh suit. In the present matter permission was granted subject to deposit of cost amount. The record shows that the cost amount was less than Rs.200/-. The other facts show that entire suit filed for relief of partition and separate possession was withdrawn. The subsequent suit was filed

within prescribed period of limitation. The previous suit was contested only by Rajaram (present defendant No.1). The application for withdrawal was filed on 18-6-1980 and only defendant No.1 had claimed the cost of the suit for granting permission. No notice of this application was given to other defendants when many defendants had appeared though they had not filed written statement.

30) On aforesaid point, both the sides placed reliance on the case reported as **(1986) 2 SCC 424 (Konkan Trading Company v. Suresh Govind Kamat)**. In this case the Apex Court has considered provisions of both Order 23 Rule 1 and Section 148 of the Civil Procedure Code. The Apex Court has laid down that even if the order of payment of cost is a condition precedent for filing fresh suit, the defect, if any, can be cured by depositing in the Court the cost within reasonable time and the time can be fixed by the Court before which the second suit is filed. The Apex Court has observed that there is no warrant for taking a hyper technical rigid view which may result in denying to a person access to justice and deprive him of his legal rights. It is observed that when it is possible to

take a liberal view which promotes the ends of justice, such liberal view needs to be taken in such matters. In view of the relevant facts of the present matter which are already quoted, this Court holds that on this technical point present appeal cannot be allowed and the suit filed for relief of partition cannot be treated as not tenable. On the basis of the aforesaid record and circumstance it can be said that the First Appellate Court had granted permission but no specific time was fixed. The amount was, however, subsequently deposited and it was a meagre amount.

31) The last point raised by the learned counsel for the appellant is about abatement of the first appeal itself. Learned counsel submitted that original defendant No.2 died during pendency of first appeal and no steps were taken to bring his legal representatives on record. He submitted that as defendant No.2 Mukinda was necessary party, the first appeal ought to have been dismissed. He placed reliance on provision of Order 22 Rule 4 of the CPC. The provision of Order 22 Rule 4 is as under :

"4. Procedure in case of death of one of several defendants or of sole defendant.--

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where -

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act,

1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the Court shall, in considering the application under the said section 5 have due regard to the fact of such ignorance, if proved."

32) It is already mentioned that defendant No.2 Mukinda had filed consent written statement. Further, the legal heirs of Mukinda had applied in the first appellate Court for coming on the record as respondent but the first appellate Court rejected their application. Name of Mukinda was shown to be deleted. On the basis of the record, presumption needs to be drawn that no exemption was sought as provided in the aforesaid provision. In the present proceeding the legal representatives have filed affidavit and informed that plaintiff has no adverse interests against them and they have no objection for execution of decree given by the first appellate Court. This was done as it is the grievance of the present appellant, defendant No.1 that some properties are in actual possession of Mukinda and they

may create hurdle in execution of the decree. In view of the affidavit filed that practical difficulty will not be there.

33) Learned counsel for the appellant placed reliance on some reported cases on aforesaid point. Facts of the case reported as **(1994) 4 SCC 294 (Kenchegowda v. Siddegowda)** show that initially suit was filed for relief of declaration and attempt was made to convert the suit for making it a partition suit. In view of the facts and circumstances, the Apex Court considered the provision of Order 6 Rule 17 of the CPC. The Apex Court held that causes of action for these reliefs were different and the reliefs were also different and there is point of necessary parties and the absence of the properties which need to be included in the partition suit. In the case reported as **(2009) 14 SCC 294 (T. Gnanavel v. T.S. Kanagaraj)** exemption to bring legal representatives of sole defendant was granted after the pronouncement of judgment. These facts were altogether different. In the present matter though the first appellate Court had refused to the legal representatives of Mukinda to come on the record, the first appellate Court has given finding that the decree can

be executed against them. Thus indirectly the point of exemption is dealt with by the first appellate Court. The facts of two reported cases - (1) **AIR 2002 Bombay 332 (Annabai Kini v. Mithilal Singh)**; and, **2003(2) Mh.L.J. 236 (Parvez Rustom v. Rustom Ardeshir)** (Bombay High Court) were altogether different and so there is no need to discuss the observations made in these two cases.

34) Learned counsel for the respondent, plaintiff, placed reliance on some reported cases. In the case reported as **AIR 1998 SC 277 (Ram Sakal Singh v. Mosamat Monako Devi)** the facts were altogether different. Some legal representatives of deceased defendant were already on the record. Similarly the facts of the case reported as **AIR 1971 SC 1028 (Rani v. Santa Bala)** were different and there was no question of giving any relief against deceased defendant who was a formal party. The facts of the case reported as **AIR 1988 SC 2121 (Collector of 24 Parganas v. Lalith Mohan Mullick)** show that the estate of deceased party was sufficiently represented by party on record and so the facts were different.

35) Learned counsel for the appellant placed reliance on a case reported as **2003(1) SCC 476 (Zahirul Islam v. Mohd. Usman)**. The facts of this case show that plaintiff had not obtained permission as contemplated in Order 22 Rule 4 of the CPC in respect of deceased defendant. Against that defendant already *ex-parte* order was made. The legal representatives of deceased defendant approached the Court to allow them to join as defendants. It was held that such permission to bring on record the legal representatives needs to be granted and the permission was granted to them.

36) In the present case unfortunately the first appellate Court did not grant the permission to the legal representatives of Mukinda though they had come to the Court. In any case they have given no objection for execution of decree and so that point need not to be considered. Further as already observed in reported case by the Apex Court, in such cases the Courts are not expected to take hyper technical approach which will not protect the ends of justice.

37) One more case was cited by learned counsel for the respondent like **AIR 2004 SC 3942 (Shahazada Bi v. Halimabi)**. The facts were different. The defendants were in possession of separate portions and in view of those facts when one defendant died suit only as against him could be treated as abated and the decree was possible as against remaining defendants.

38) On the aforesaid point the first appellate Court has placed reliance on some observations made by the Apex Court in the case reported as **AIR 1972 SC 1181 (Ramagya Prasad v. Murli Prasad)**. The Apex Court has given tests in this regard and they are as follows :-

"It is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is so not because of the procedural defect but because it is part of the substantive law. No exhaustive statement can be made as to the circumstances under which an appeal in such cases cannot proceed. But the Courts have applied one or the other of three tests. The Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondents, and, therefore, it would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant

could not have brought the action for the necessary relief against those respondents alone who are still before the Court, and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed. These three tests are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal."

39) Relevant facts and circumstances of the present case are already quoted by this Court. This Court has no hesitation to observe that, the aforesaid three tests are satisfied in the present case. Thus, there is no force in the third ground also.

40) In the result, the appeal stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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