

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

30 APEAL FROM ORDER NO. 22 OF 2015
WITH CA/3776/2015 IN AO/22/2015

NAVNATH UTTAMRAO MUNDHE AND OTHERS
VERSUS
CHANDRABHAGABAI ARJUN MURKUTE AND OTHERS

...

Advocate for Appellants : Mr. N.B.Khandare And
Mr. M. P. Tripathi

Advocate for Respondents 1 and 2 : Me. Salunke
Sudarshan J

CORAM : V. K. JADHAV, J.

DATE : 21st March, 2016

PER COURT :

1. Being aggrieved by the judgment and order passed by the learned Adhoc District Judge, Majalgaon dated 28.11.2014 in Regular Civil Appeal No.58/2010, thereby the learned Adhoc District Judge pleased to remand the matter for retrial, the appellants/ original defendants preferred this appeal.

2. The brief facts giving rise to the present appeal are as follows:

Being aggrieved by the judgment and decree in R.C.S. No. 53/2009 passed by the learned Civil Judge, Senior Division, Majalgaon dated 26.12.2012 dismissing the suit for partition and separate possession, the respondents/original plaintiffs preferred the R.C.A.

No. 58/2010. The learned Adhoc District judge, Majalgaon, by the impugned order dated 28.11.2013, partly allowed the appeal and thereby set aside the judgment and decree passed by the trial court and remanded the matter for retrial with direction that the trial court shall give opportunity to both the parties to adduce evidence and decide the matter afresh. Hence this appeal.

3. Learned counsel for the appellants/original defendants submits that respondent No.1/ original plaintiff Chandrabhaga Murkute has examined herself before the trial Court by filing her affidavit of evidence and since she was not subjected to cross examination by the appellants/original defendants, on her own, filed evidence closed purshis. The learned counsel submits that the plaintiff Chandrabhaga, at her wisdom, closed her evidence by filing purshis. The trial court dismissed the suit of the plaintiffs for want of documentary evidence and evidence of other witnesses.

4. The learned counsel for the appellants/defendants further submits that during the pendency of the appeal before the lower appellate Court, the

present respondents/original plaintiffs filed application to lead oral evidence as per provisions of Order 41 Rule 27 of the Civil Procedure Code at Exh.21. However, the then Adhoc District Judge No.1, by order dated 04.09.2013, rejected the said application with the observation that there was no due diligence for not adducing evidence before the trial court. The learned counsel further submits that the lower appellate court however remanded the matter to the trial court with the observation that there was no full fledged and final trial of the suit. The learned counsel submits that the order passed by the lower appellate court is not proper, correct and legal and the order calls for an interference.

5. In order to substantiate his case, the learned counsel for the appellants relied on the judgment of the Apex Court in the case of **Kattukandi Edathil Krishnan and another Vs. Kattukandi Edathil Valsan and others**, reported in (2006) 9 SCC 166.

6. I have also heard learned counsel for the respondents/original plaintiffs.

7. It is a matter of record that though Plaintiff Chandrabhagabai has filed an affidavit of evidence

before the trial court, she was not subjected to cross examination by the appellants/defendants, as the defendants and their counsel remained absent when called out. It appears that considering the said fact that her evidence goes unchallenged, the plaintiff Chandrabhaga filed her evidence closed purshis. However, the learned judge of the trial court dismissed the suit for want of documentary evidence and evidence of other witnesses. The learned judge of the trial Court has observed that the plaintiffs have failed to prove relations with the defendants on the face of record. It is true that in the appeal before the lower appellate court, the plaintiffs filed an application Exh.21 for permission to lead additional evidence as provided under Oder 41 Rule 27 of the Civil Procedure Code however, the said application came to be rejected on the ground that there was no due diligence on the part of plaintiff for not adducing evidence before the trial court.

8. It appears that the evidence on record, for the purpose of disposing of appeals either confirming or reversing the order passed by the trial court, is not sufficient and the lower appellate court has thus thought it fit to remand the matter for the purpose of

redetermination of the dispute between the parties.

9. Learned Judge of the lower appellate court, in paras 15 and 16 of the judgment, has made following observations:

"[15] In spite of order of the then District Judge-1, we have to consider request of remand of the suit in the given circumstances. Whether it is proper just and in the interest of justice and will not be prejudice to the defendants. One cannot lost site that if the plaintiff 2 or the plaintiff no.1 was given an opportunity to lead the evidence in the trial court and to prove the documents or to examine the witnesses to establish the relationship that the defendants suit would have been resulted otherwise then one which is resulted.

[16] Thus, there is no full fledged and final trial of the suit before the trial court upon considering the judgment of the trial court, it clearly appears that the trial court has mentioned on page no.10 of the judgment in para 10 that the plaintiffs have not mentioned and shown in which section of Hindu Succession Act, she is claiming the share in the suit property. The plaintiffs have not examined the adjoining agriculturist owner of the suit property or produce any documentary evidence but it is to be noted here that in a suit for partition the possession is to be considered as

a constructive joint possession, if at all the share is established while taking up separated and possession can be handedover to the entitled person."

10. Thus, considering the observations made by the lower appellate court, I do not find any fault in the impugned judgment and order remanding the matter thereby to the trial court for retrial. I accept that there was no full fledged and final trial of the suit before the trial Court. Hence, following order:

O R D E R

- i. Appeal is hereby dismissed.
- ii. In the circumstances, there shall be no order as to costs.
- iii. Civil application also stands disposed of.

(V. K. JADHAV, J.)

JPC