

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.530 OF 2014
WITH
CIVIL APPLICATION NO.1286 OF 2014
WITH
CIVIL APPLICATION NO.841 OF 2016**

Raghunath Laduram Marwadi @Sharma ... Appellant/Applicant

Versus

Sou. Kantabai Ratanlal Narunad

Since deceased through heirs

1A. Ratanlal Dhanraj Narunad

And Others

... Respondents

.....

Mr. S.A. Rajeshirke for the Appellant/Applicant.

Mr. Jaydeep Deo for Respondent Nos.2, 4, 5, 6 and 8.

.....

CORAM : S.C.GUPTE, J.

DATE : 16 JANUARY 2017

P.C. :

. Before I take up this Second Appeal, I may dispose of a civil application filed by the Appellant herein for bringing on record legal heirs of deceased Respondent No.7. For the reasons stated therein, Civil Application No.841 of 2016 is allowed in terms of prayer clauses (a) and (b). The amendments to be carried out within a period of two weeks from today.

2 This Second Appeal challenges a judgment and order passed by the District Court at Sangli in Regular Civil Appeal No.185 of 2003. By this judgment and order, learned District Judge allowed the Respondents'

appeal and set aside the judgment and decree dated 31 July 2003 passed by the Civil Judge, Junior Division, Jath in Regular Civil Suit No.68 of 1998.

3 The suit was for partition of the property inherited by the Plaintiffs and Defendants through their deceased father. The property is said to be a self acquired property of their deceased father. One of the grounds on which the suit was dismissed by the Trial Court was that the property was owned by a joint family and there were two other properties owned by the family, namely, a property at Jath in Maharashtra and another property at Village Lakhani, Taluka Shahapur, District Jaypur in the State of Rajasthan; that these two joint family properties were not included in the partition claimed in the suit; and that a partial partition of a joint family property was not permissible. This finding was set aside by the learned District Judge in his impugned judgment and order. The order of the Trial Court is reversed by the First Appellate Court on the ground *inter alia* that in a partition suit, if the plaintiff excludes any particular property, the plaintiff will have no right to file a fresh suit for claiming share in such excluded property and that his right to claim a share therein will come to an end, but such exclusion is no ground to non-suit the plaintiff.

4 When the second appeal came for admission on 30 April 2015 before this Court, this Court was of the view that the second appeal raises the following substantial question of law, namely :

“Whether the suit instituted by the Plaintiff for partition and separate possession is maintainable for non-inclusion of

properties as held by the learned trial Judge while answering Issue No.1B?”

5 In other words, the substantial question to be considered by this Court, in the second appeal, was whether or not a partial partition of an ancestral property was possible under the provisions of Hindu Law applicable to the parties. This, of course, is premised on the footing that the property owned by the parties is an ancestral property. In the first place, there is no finding by the First Appellate Court in its impugned order and judgment that the property sought to be partitioned is an ancestral property of the father of the parties. Infact, it is not disputed by the Appellant even before this Court that the particular property, of which partition is sought in the suit, is a self acquired property of the father. What is claimed is that since there is an ancestral property owned by the family of the parties, this particular property must be treated as joint family property in the hands of the father. In the absence of any pleading to this effect, particularly raising a plea of throwing of his self-acquired property into the common hotchpot by the father, it would be difficult to arrive at such finding.

6 Be that as it may, what emerges from the record of the case is that as far as the Jath property is concerned, by an amendment application made before the First Appellate Court, this property was included in the description of the property for partition. Infact, this Court by its order dated 30 April 2015 has noted that as far as properties situate in Jath were concerned, it was not in dispute that in the amendment application, these properties were already included. It is, however, now submitted across the

Bar by learned Counsel for the Appellant that this concession, in response to which these observations are made by the Court on 30 April 2015, was made earlier by him through a misunderstanding. It is submitted that one particular property amongst the Jath properties, namely, property at Survey No.411, was not included in the description of the property sought to be partitioned even after the amendment. Learned Counsel for the Respondents has produced before this Court the original amendment application of the Respondents before the District Court. This application refers to this very survey, namely, Survey No.411, as renumbered and included in the description of the property. This amendment was admittedly allowed by the District Court. There is thus no merit in the Appellant's contention before this Court that the property situated in Jath is excluded from the description of the property.

7 That leaves only one other property allegedly owned by the joint family, namely, the property at Village Lakhani in the State of Rajasthan. As far as this property is concerned, the First Appellate Court has found that there was no proof tendered on record to show that the father of the parties, namely, deceased Laduram, was possessing any ancestral property at Village Lakhani in the State of Rajasthan. Learned District Judge infact commented on the incorrect appreciation of the evidence on record by the Trial Court that deceased Laduram was possessing property at his native place in Lakhani. The Appellants before the District Court (original Plaintiff and Defendant No.1) had not admitted that there was any ancestral property owned by deceased Laduram in Village Lakhani. There was no proof tendered by the Appellant herein before the Trial Court that the deceased possessed any ancestral property at Village Lakhani. Both

Appellant No.1 (original Plaintiff) and Appellant No.2 (original Defendant No.2) before the District Court in their respective depositions had maintained that they did not know as to whether there was any ancestral property of their father at Lakhani. And yet, relying on this evidence, the Trial Court came to the conclusion that deceased Laduram possessed ancestral property at his native place in Lakhani. Learned Counsel for the Appellant submits that original Defendant No.1 has admitted in his deposition before the Trial Court that he had earlier deposed before the Tahsildar that his father was having property at Village Lakhani, Taluka Shahapur, District Jaypur, in the State of Rajasthan. That is but a matter of appreciation of evidence. There is no admission in the present suit either on the part of the Plaintiff or Defendant No.1 that their father, deceased Laduram, had any ancestral property at Village Lakhani in Rajasthan as at the date of partition suit. The observation and finding of the First Appellate Court, namely, that there was no record to show that deceased Laduram was possessing any ancestral property in Village Lakhani in Rajasthan and that the conclusion of the Trial Court in this behalf was wrong and based on an incorrect appreciation of evidence, cannot be faulted in this second appeal. The existence or otherwise of a joint family property is a question of fact. The conclusion of the First Appellate Court in this behalf, which is based on appreciation of evidence before the Court, cannot be said to be vitiated by any error of law, much less a substantial error of law, which calls for interference by this Court.

8 In the premises, what emerges is that there is no finding of the First Appellate Court as to the existence of any joint family property owned by deceased Laduram, which was not included as part of the divisible property

in the suit. This being the position, the question as to whether non-inclusion of an ancestral property in a suit for partition of joint family property, is really academic in the present case.

9 The second appeal, in the premises, does not give rise to any substantial question of law and the same is, accordingly, dismissed. In the circumstances of the case, there will be no order as to the costs.

10 In view of the dismissal of the second appeal, Civil Application No.1286 of 2014 does not survive and the same is also dismissed.

(S.C.GUPTE, J.)