

vks

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

**SECOND APPEAL NO.734 OF 2016
WITH
CIVIL APPLICATION NO.205 OF 2015
IN
SECOND APPEAL NO.734 OF 2016.**

Dinkar Manku Mahar @ Kamble (decd)
Through Ajay Kamble ... Appellant.
V/s.
Jagannath Rama Mahar
(Bhandare) and ors ... Respondents

Mr. Tejpal S. Ingale a/w Mr. Nikhil Pawar, for
appellant.
Mr. Vivek Patil with Mr. Yogendra Shirwadkar i/by Mr.
Vivek Patil and Associates, for respondents

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 2nd JULY, 2018.

P.C. :

- 1] Heard learned counsel for the appellant and respondents.
- 2] This appeal is directed against the judgment and decree dated 16.8.2013, passed by the District Judge-2 Islampur, which was preferred against the judgment and decree dated 31.8.2006, passed by the Civil Judge Junior Division, Islampur in R.C.S.No.276 of 194.
- 3] The said suit was filed by respondent No.1, the original plaintiff, for partition and separate possession of his 1/3rd share in the

suit property. The trial Court, on the basis of genealogy, held him entitled for partition, but as regards the determination of the share of respondent No.1, the trial Court found that necessary parties, namely Shahabai and Jayabai, the daughters of Rama Mahar were not joined as parties to the suit. Hence the Trial Court has held that in their absence, it would be difficult to determine the share of the plaintiff and accordingly dismissed the suit on this sole ground.

4] When respondent No.1-plaintiff challenged the said judgment and decree in the District Court, the first Appellate Court, confirmed the finding of the trial Court, that defendant Nos 1 to 3 had failed to prove that the partition of the suit property has already taken place. The appellate Court, however, set aside the finding of the trial Court that suit is bad for non joinder of necessary parties, by holding that as Rama has died on 24.7.1941 itself, that is, much prior to the Hindu Succession Act, 1956 came into effect, therefore his daughters Shahabai and Jayabai were not entitled to get share in the joint family property. The Appellate Court, therefore, held that the suit is not bad for non joinder of necessary parties. Accordingly the Appellate Court decreed the suit, granting 1/3 rd share to the respondent No.1 plaintiff.

5] This judgment of the first appellate Court is challenged in this Second Appeal by the present appellants who are the legal heirs

of original defendant No.3, namely one of the brothers. It is submitted that defendant No.3 has died on 15.11.2011, that is during pendency of the first appeal, and as the first appeal is decided on 16.8.2013, without bringing his legal heirs on record, therefore the decree passed against defendant/respondent No.3, therein is a nullity. Hence on this ground itself, as his legal heirs were not brought on record, the matter is required to be remanded back to the first appellate Court.

6] In support of his submission, learned counsel for the appellant has relied upon the judgment of the Apex Court, in the case of **Rajendra Prasad and anr -vs- Khirodhar Matho and ors [1994 (3) SCC 314]**, wherein on the basis of section 33 and Order 1 Rule 9 of the Code of Civil Procedure, it was held that the decree against dead person is invalid.

7] According to learned counsel for the appellant, the trial Court has not passed the decree of partition, but only the first Appellate Court has passed the said decree and as at the time of passing of said decree, legal heirs of defendant No.3; namely present appellants were not brought on record, therefore the said decree of partition is a nullity.

8] This Court would have accepted this submission, but for the fact that here defendant No.3 was very much represented in the

trial Court, as can be seen from the judgment of the trial Court, wherein the common written statement was filed by all the three brothers viz. respondent Nos 1 to 3. The defendant Nos 1 and 2 were the brothers of defendant No.3 and they have raised common contentions in the joint written statement. The same contentions were raised by them in the Appellate Court also and the appellate Court has considered those contentions while deciding the appeal. In the said appeal, all these three defendants had appeared and were represented by the same advocate. Hence the interests of the present appellants were very much represented in the said appeal. In such situation, it cannot be said that the decree has become nullity.

9] Moreover, it can be seen that the trial Court has also rejected all the contentions raised by the defendants in the suit including the contention that there was already partition between the family members. The trial Court has also held that the relations of the plaintiff with the appellants are undisputed, but only for non joinder of necessary parties, trial Court has not passed the decree of partition. However, as rightly held by the appellate Court, if Rama has died in the year 1941 itself, then his daughters Shahabai and Jayabai cannot receive any share in the suit property and therefore, their non joinder does not become fatal to the maintainability of the suit.

10] This was the only aspect on which the appellate Court has

reversed the judgment of the trial Court. Otherwise the judgment and decree passed by the trial Court as regards the other aspects is confirmed by the Appellate Court. The Appellate Court has also considered in detail how the mutation entries cannot amount to the partition as the law relating thereto is also very well settled. Learned counsel for the respondent has also in this respect relied upon the judgment of this Court, in the case of **Mahadu Appa Wanjole -vs Laxman Veerappa Wanjole and ors [2008 (5) Mh. L J. 786]**.

11] Therefore, on factual aspects, when both the trial Court and the Appellate Court have arrived at the same findings, which are based on the legal position and the documentary evidence, then this Court cannot enter into reappraisal of evidence.

12] Hence as no substantial question of law is raised, the appeal holds no merit and therefore, stands dismissed.

13] In view of dismissal of the appeal itself, Civil Application No.205 of 2015 being infructuous stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]