

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

WRIT PETITION No.2609 OF 2016

Sudam Rama Mhatre
since deceased, through
1A. A.S. Mhatre & Ors.

... Petitioners

Vs.

Ramchandra Hasma Patil & Ors.

... Respondents

Ms.Neeta Karnik for the Petitioners

Ms.Pallavi Dabholkar for the Respondent Nos.1 to 4

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: AUGUST 1, 2018**

P.C. :

1. Rule. By consent, Rule made returnable forthwith and heard finally.

2. This petition is moved by the appellants who are unsuccessful plaintiffs in Regular Civil Suit No.10 of 1998 which was dismissed by judgment and order dated 17.10.2002 passed by the learned Civil Judge, Junior Division, Vasai. The plaintiffs have filed suit for partition. The said judgment and decree was challenged by the petitioners i.e., the original plaintiffs by filing Regular Civil Appeal No.208 of 2007. During the pendency of the

appeal, the appellants filed application below exhibit 25 under Order 6 Rule 17 for amendment of the plaint which was contested by the respondents/original defendants and the learned District Judge II, Vashi by his order dated 17.12.2015 rejected the said application. Hence, this petition.

3. Ms.Karnik, the learned Counsel appearing for the petitioners, pointed out that the petitioners/plaintiffs have filed the suit for partition as they claimed their right in the property of one Hasha Patil, their grandfather and his widow Sukribai. In the judgement, the trial court has made observations in respect of the claim of the appellants in the estate of Sukribai and held that there are no such pleadings about partition from the share of late Sukribai. In view of these findings, the amendment is sought. She further submitted that this will not cause any prejudice to the defendants in view of the pleadings made by the petitioners i.e., the original plaintiffs in paragraph 2 of the plaint.

4. The learned Counsel for the respondents while opposing this petition has submitted that the petitioners have miserably failed before the trial court to prove that they have share in the suit property and therefore there is no question of accepting any further

claim in the property of Sukribai. She supported the order passed by the learned District Judge and submitted that the trial court has held that the property is owned by the defendants and the plaintiffs have no share in the property.

5. Considered the submissions; perused the plaint; the amendment application and also the impugned judgement and order. It is a suit for partition and hence the trial court or the appellate court first needs to find out whether the plaintiffs have any share in the suit property on the basis of the evidence as well as the overall pleadings in the plaint. Thereafter considering the number of the co-sharers, the Court can pass the order of apportionment as per their entitlement even though the share claimed in the plaint is wrong. In the present case, in Para 2, the genealogy is explained.

6. Under such circumstances, though the trial Court has observed that there are no such pleadings to claim share in the property of Sukribai, the appellate Court, on verification of the pleadings and the evidence, is required to decide the said issue afresh. In fact, in view of the pleadings in para 2, no such application for amendment is warranted. Though the application is

rejected on different Grounds, I am of the view that the amendment itself is not necessary and therefore the order passed by the learner District Judge does not require any interference and hence, the petition is dismissed.

7. The petitioners have to prove their case firstly that they have right in the Suit property. If they succeed on that ground, then, the question of apportionment can be dealt with as per their entitlement by the Court. Even though the shares claimed by the plaintiffs are wrong, that can be corrected by the appellate court.

8. Rule is discharged accordingly.

(MRIDULA BHATKAR, J.)