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

**SECOND APPEAL NO.819 OF 2016
WITH
CIVIL APPLICATION NO.1133 OF 2016
IN
SECOND APPEAL NO.819 OF 2016.**

Narayan Naga Patil (decd)
through Legal heirs ... Appellants.
V/s.
Smt. Chandrabhaga Rajaram
Thakur ... Respondent

Mr. Milind Parab, for appellants.
Mr. Mayuresh D. Modgi, for respondent

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 19th JUNE, 2018.

P.C. :

- 1] Heard learned counsel for the appellants and respondent.
- 2] Admit.
- 3] By this Second Appeal, the legal heirs original defendant, are challenging the judgment and decree dated 26.2.2016, passed by District Judge-2, Raigad-Alibag, in Civil Appeal No.117 of 2010, thereby modifying the judgment and decree dated 12.7.2010, passed by Joint Civil Judge Junior Division, Pen, in R.C.S. No.104 of 2007, and enhancing the share of respondent plaintiff, in the joint family

properties, from 1/3rd to ½.

4] The said suit was filed by the respondent-plaintiff for partition, on the ground that the suit lands are the ancestral family properties of her father Naga and after his death, she herself and her brother Narayan are entitled to receive ½ shares in the suit property. However, as her brother was not allowing her to cultivate suit lands in the joint possession, she should be granted partition of her ½ share in the suit property.

5] The suit was resisted by her brother Narayan- the predecessor of present appellants, denying that respondent is the daughter of his father Naga and she is his sister. It was submitted that she has no concern with the suit properties. However, her name came to be entered in the suit property alongwith her mother Ramibai by Mutation Entry No.2162. He has challenged the said Mutation Entry and by the order dated 11.10.1975, the said Mutation Entry was set aside. Therefore, it was submitted that as she has no right or interest over the suit property, her suit for partition has to be dismissed.

6] The trial Court has, after appreciating the evidence on record including the testimony of respondent-Chandrabhaga and also the documentary evidence like Mutation Entry No.2162, the School Leaving Certificate of respondent and Certificates issued by the

Sarpanch and Police Patil, stating that she was daughter of deceased Naga, born from his second wife Ramibai, decreed her suit for partition and granted her 1/3rd share in the suit property.

7] The appellant challenged the said judgment and decree before the first Appellate Court and the first Appellate Court confirmed the said judgment and decree of partition, but modified the share of respondent to the extent of $\frac{1}{2}$ holding that there was no evidence to show that either mother of respondent or the mother of original defendant namely, Nagibai was alive.

8] This judgment and decree, passed by the trial Court and as confirmed by the Appellate Court, is challenged in this appeal, by learned counsel for appellant, by submitting that in the plaint respondent has not at all stated that she was the daughter of Naga from his second wife Ramibai. Further it is submitted that the evidence of the appellant as recorded before the trial Court, has remained unchallenged, as respondent failed to remain present for cross examination. The documents on which respondent has placed reliance, like School Leaving Certificate and the Certificates issued by Sarpanch and Police Patil, were not proved properly. Hence, both the trial Court and the Appellate Court, have committed an error in relying upon the said documentary evidence. Thirdly, it was submitted that the Appellate Court has, without there being any

cross appeal or cross objection, modified the share of the respondent from 1/3rd to 1/2, on its own and therefore, the said finding of the Appellate Court also cannot be justified.

9] Considering the short question involved in this Second Appeal, this appeal is heard finally at the stage of admission itself. The point, which is raised for consideration pertains to appreciation of evidence, done by the trial Court and confirmed by the Appellate Court. The case of respondent is that she is the daughter of Naga from his second wife Ramibai. Original defendant Narayan was the son of Naga from his first wife. To prove this case, respondent has relied upon her own evidence and the documents like School Leaving Certificate, Certificates issued by Police Patil and Sarpanch. Both the trial Court and the Appellate Court, having considered this evidence and relied upon it, in my considered opinion, in the Second Appeal, this Court cannot become third Court of facts and reappreciate the evidence on record, especially when no perversity as such is pointed out in the appreciation of evidence and in recording the finding of fact, by the trial Court which is confirmed by the Appellate Court.

10] It may be true that it is not specifically stated in the plaint by the respondent that she is the daughter of Naga from his second wife. However, it is clearly stated that she is the daughter of Naga and defendant Narayan was her brother, therefore, she is claiming her

right in the suit property by way of partition. Therefore, in the plaint there is clear averment that she was claiming herself to be the daughter of Naga. Her evidence is supported from the documentary evidence as considered by both the Courts below which also prove that after the death of Naga, her name and name of her mother Ramibai was entered in the record of rights of the suit land. Both the trial Court and Appellate Court, have also considered the School Leaving Certificate. The case of appellant that he was not cross examined has to be considered in the light of the evidence of respondent because in her evidence itself she has denied all the contentions raised by the defendant in his written statement. She has categorically stated that those contentions are not true and correct and hence non-cross-examination of the defendant does not make much difference.

11] It is only on the appreciation of evidence on record as both the trial Court and the Appellate Court have recorded the finding of fact, this Court cannot interfere therein.

12] As regards the contention that the Appellate Court has modified her share without there being cross Appeal or counter Appeal, that contention also cannot be availed, because it is for the Court to decide the share of the parties on the basis of evidence on record and the legal position. The party may claim whatever share,

but the Court has to consider on the basis of legal position and evidence as to what would be the exact share. Here in the case the Appellate Court has considered that there was no evidence to show that the wife of Naga was alive and in view thereof as per evidence, only respondent and the appellant were proved to be alive, the Appellate Court has, rightly modified $\frac{1}{3}$ rd share to $\frac{1}{2}$. Hence no illegality can be found on that score also.

13] The Second Appeal, therefore, being without merit, stands dismissed.

14] In view of dismissal of appeal, Civil Application No.1133 of 2016 also stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]