

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

**INTERIM APPLICATION NO. 05 OF 2021
IN
SECOND APPEAL (ST) NO. 3552 OF 2020**

Bhairappa Yashwant Bagale & Ors. ..Applicants
Vs.
Sulochana Vidhyadhar Gangade ...Respondent

Mr. Ashok B. Tajane, for the Applicants.
Ms. Ketaki Gadkari i/b. Ms. Shruti Tulpule, for the Respondent.

**CORAM : C.V. BHADANG, J.
DATE : 22nd JANUARY 2021**

P.C.

. By this application, the applicants are seeking leave to file and prosecute Second Appeal (Stamp) No.3552/2020.

2. According to the applicants, the reason for seeking such leave arises in the following circumstances.

The respondent (plaintiff) had filed Regular Civil Suit No.336/2014 against the applicants. The applicant No.4 (since deceased) happens to be the mother of the applicant Nos.1 to 3 and the respondent. That suit was filed for partition and separate possession of the suit property, more specifically described in para No.1 of the

plaint. The respondent contended that on 19/3/2014 when the partition was demanded, the same was refused, which led the respondent to file the suit, as aforesaid.

3. The applicant Nos.1 to 3 are the original defendant Nos.2 to 4 in the suit. The applicant No.4 (since deceased) was defendant No.1. The defendant Nos.3 and 4 chose not to contest the suit, as a result of which they were proceeded ex parte on 4/3/2014. The original defendant Nos.1 and 2 appeared in the suit, however, did not file Written Statement, as a result of which, the suit was directed to proceed without Written Statement of the defendant Nos.1 and 2 on 4/3/2015. It appears that the defendant Nos.1 and 2 filed application (Exh.17) for setting aside the said order and permitting them to file Written Statement, which was allowed subject to payment of costs. The record discloses that the costs were not paid, as a result of which, the order by which the suit was directed to proceed without Written Statement of the defendant Nos. 1 and 2 stood as it is.

4. The respondent (original plaintiff) examined herself and produced the 7/12 extract of Gat No.50 (Exh.20) and Gat No.53 (Exh.21) alongwith the map of Gat No.53 (Exh.22) and that of Gat

No.50 (Exh.23). The learned Trial Court noticed that in the 7/12 extract the name of the plaintiff as well as the defendants was shown as owners. The learned Trial Court after noticing that the suit was directed to proceed without Written Statement in so far as the defendant Nos.1 and 2 are concerned and the defendant Nos.3 and 4 having proceeded exparte, the learned Trial Court by a judgment and decree dated 18/8/2015, decreed the suit granting 1/5th share to the plaintiff and the defendants each.

5. It is necessary to note that it was only the applicant No.4 (the defendant No.1 in the suit) who chose to challenge the said decree before the learned District Judge in Regular Civil Appeal No.113/2017. The learned District Judge framed the following points for determination.

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether the suit properties are ancestral properties of the plaintiff ?	Yes
2. Whether the plaintiff is entitled for partition ? If yes, what will be her share ?	1/5 share.
3. Whether the judgment and decree of Trial Court is legal and proper ?	Yes
4. Whether any interference is required in the judgment and decree of the Trial Court ?	No

5. What order and decree ?	As per final order, appeal is dismissed with costs.
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6. The learned District Judge by a judgment and decree dated 2/11/2019 dismissed the appeal. The judgment of the first Appellate Court shows that, even in the appeal, it was only the original plaintiff, who appeared and contested the appeal. Thus, the present applicant Nos.1 to 3 neither filed any appeal against the order of the Trial Court nor appeared in the appeal filed by Sushilabai in order to support her if at all, they were aggrieved by the judgment and decree passed by the Trial Court. It is only after the first Appellate Court dismissed the appeal, that the present applicants are seeking to challenge the same by filing the second appeal.

7. The learned counsel for the applicants submitted that the leave is sought for in view of the fact that the applicant Nos.1 to 3 had not filed any appeal before the first appellate court.

8. It is necessary to note that after the decision of the appeal on 2/11/2019, the applicant Sushilabai (the appellant before the first

Appellate Court) expired in the month of December 2019. Thus, when the present application / appeal was filed, in December 2020, the applicant No.4 was long dead.

9. I have heard Mr. Tajane, the learned counsel for the applicants and Ms. Ketaki Gadkari, for the respondent. With the assistance of the learned counsel for the parties, I have gone through the record.

10. At the outset, it is necessary to mention that in order to give quietus to the matter, the parties were heard, not only on the application for leave but also on the second appeal.

11. It is submitted by Mr. Tajane, the learned counsel for the applicants / appellants that one of the co-defendant i.e. Sushilabai having challenged the judgment and decree passed by the Trial Court it was not necessary for the present applicant Nos.1 to 3 to have challenged the same separately. It is submitted that in the suit for partition, the interest of the defendants where there is no intersay dispute between them is common and therefore, the challenge by Sushilabai will enure to the benefit of the present applicants. It is submitted that the leave is sought only by way of abundant caution, in order to avoid any technical objection /

difficulty. The learned counsel in this regard has placed reliance on the decision of the Hon'ble Supreme Court in **Mahabir Prasad Vs. Jage Ram and Others (1971)1 SCC 265.**

12. In so far as the merits are concerned, it is submitted that the Trial Court has failed to frame any issues or to give any reasoning for decreeing the suit. It is submitted that, notwithstanding the fact that the suit went uncontested, the Trial Court was required to ascertain the nature of the property and the entitlement of the respondent (plaintiff) for a decree of partition. It is submitted that the learned Trial Court having failed to do so, it was necessary for the Appellate Court to have gone into the said question which the first Appellate Court has failed to do. In this regard, reliance is placed on the decision of the Madras High Court in **K. Balakrishnan Vs. S. Dhanasekar MANU/TN/4735/2017 .**

13. The learned counsel alternatively submitted that in any event, after the death of Sushilabai, the applicant Nos.1 to 3 being her legal representatives, would be entitled to challenge the judgment and decree passed by the Courts below, in the capacity as the legal representatives.

14. The learned counsel for the respondent has supported the impugned judgment. It is submitted that the applicants are not entitled to challenge the judgment once they had failed to challenge the judgment of the Trial Court and even failed to appear before the first Appellate Court. It is submitted that the suit went uncontested and the first Appellate Court has given detailed reasoning while refusing to interfere with the decree passed by the Trial Court. It is therefore submitted that the appeal does not raise any substantial question of law.

15. I have carefully considered the rival circumstances and the submissions made.

16. As noticed earlier, none of the defendants contested the suit. While the suit proceeded exparte against the defendant Nos. 3 and 4, the suit was directed to proceed without Written Statement of the defendant Nos.1 and 2. The defendant Nos.1 and 2 sought leave to file Written Statement which was allowed on payment of costs but they failed to pay the same, as a result of which, the suit proceeded without written statement of the defendant Nos.1 and 2. Thus, there was no contest on facts in the suit much less any evidence was led. The learned Trial Court has noticed that the 7/12 extract in

respect of the suit property Gat Nos.50 and 53 showed that plaintiff as well as defendants were shown as owners in column No.7. There was absolutely nothing to show that the original plaintiff being one of the daughters of Sushilabai was not entitled to seek the partition. The learned Trial Court granted equal share i.e. $1/5^{\text{th}}$ share each to the plaintiff and the defendants.

17. The record further discloses that the Sushilabai (defendant No.1) alone challenged the decree of the Trial Court in the first appeal in which the applicant Nos.1 to 3 were the respondents. The record discloses that even in the appeal, the present applicant Nos.1 to 3 did not appear and they could have supported the appellant if at all they were aggrieved by the decree of the Trial Court which they failed to do. For the aforesaid reasons, it is difficult to see as to how the applicants can now be permitted to file the second appeal. The reliance placed on the decision of **Mahabir** to my mind is misplaced. That was a case essentially involving the issue of abatement, in the face of the death of one of the party, where the appeal was filed by only one of the persons who had suffered a joint decree alongwith others. The learned counsel for the applicants placed reliance on the following observations in para 7 of the judgment.

Para 7 - Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representative is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act, the proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained.

It can thus clearly be seen that the case of **Mahabir Prasad** turned on its own facts.

18. In the case of **K. Balakrishnan** before the Madras High Court, the suit was filed by the plaintiff seeking injunction in which the plaintiff examined himself and produced certain documents. The suit proceeded ex parte as the defendants did not enter appearance. The suit came to be decreed ex parte which was challenged by the defendants in first Appeal which came to be dismissed. This is how

the matter reached the High Court in a second appeal at the instance of the defendant. On facts, it was found that the impugned judgments were unreasoned. It is necessary to emphasise that whether the impugned judgment is unreasoned or not would evidently depend upon facts and circumstances of each case. Further, it is necessary to note that in the case of **K. Balakrishnan**, the defendant had filed the first appeal, unlike in the present case where the applicant Nos.1 to 3 have failed to challenge the judgment and decree passed by the Trial Court in the first appeal and not even entered appearance in the appeal filed by Sushilabai in order to support her if at all they were aggrieved by the judgment of the Trial Court.

19. I have also gone through the judgment of the Trial Court and the first Appellate Court. The first Appellate Court which is the final fact finding Court has considered the matter in detail after framing points for determination which are reproduced above and has thereafter confirmed the decision of the Trial Court. At the cost of repetition, it is necessary to note that the original plaintiff as well as four defendants are all shown in the 7/12 extract of the suit property and the Trial Court has granted 1/5th share to each of them.

20. The contention that the applicant Nos. 1 to 3 would be entitled to challenge the judgment in the capacity of legal representatives of Sushilabai also cannot be accepted in the facts and circumstances of this case. This is because the respondent would be equally the legal representative being one of the daughter of Sushilabai alongwith the applicants. Looked from any angle, neither the case for grant of leave nor for the admission of the second appeal is made out. In the result, the civil application as well as second appeal are hereby dismissed with no order as to costs. Pending civil applications if any, are disposed of as infructuous.

21. Ad-interim relief, already operating, if any, shall continue to operate for six weeks from 5/2/2021 (the date on which the order is corrected).

C.V. BHADANG, J.

This order is corrected as per speaking to the minutes of the order dated 5/2/2021.