

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

**INTERIM APPLICATION NO. 451 OF 2024
IN
SECOND APPEAL NO. 98 OF 2021**

Shri. Kashinath Vitthal Patil, since
deceased through his legal heirs and Lrs

1a. Shri. Deepak Kashinath Patil

V/s.

Smt. Sarala Kishor Patil and Ors.

....Applicants

....Respondents

Mr. Anilkumar Patil, for the Applicants.

CORAM : SANDEEP V. MARNE, J.

Dated : 18 January 2024.

P.C. :

1. The application is filed for recall of Order dated 18 January 2023 by which the Second Appeal is dismissed on account of its withdrawal. It is noted that the Applicant/Appellant, Deepak Kashinath Patil was present in the Court and the order dated 18 January 2023 has been passed in his presence. Now after passage of substantial period of time, it appears that the Appellants have change their minds and want to prosecute the Appeals. Such action on the part of the Appellants is deprecated. Once the Appeal is withdrawn, the same cannot be restored.

2. Mr. Patil, the learned counsel appearing for the Applicants would submit that the Appeal was withdrawn under a misconception that since the

Appeal preferred by the Defendants is dismissed by the District Court, there was no cause for the Appellants to feel aggrieved by the Order passed by the District Judge. He would submit that on closer scrutiny on the findings recorded by the Appellate Court, it is seen that the first Appellate Court has set aside the findings of the Trial Court that the suit property is a joint family property. He would submit that the said finding recorded by the first Appellate Court is being misused by some of the Defendants to claim exclusive ownership in the suit property. I am unable to agree with the submission of Mr. Patil. The lower Appellate Court has recorded following findings :

It is pertinent to note that it is nobody's case that the suit property is joint family property of plaintiff and defendant No.1 to 3. There is absolutely no pleadings in this regard. No issue has been framed. There is no evidence led by the parties, but the trial court in absence of pleadings, evidence, documents etc. held that the suit property is joint family property of plaintiff and defendant No.1 to 3. The observations of the trial court referred above are illegal, incorrect and without any base. Therefore, the observations of the trial court that the suit property is joint family property of plaintiff and defendant No.1 to 3 is to be set aside. Therefore, my answer to issue No.5 is in the negative."

3. Thus, the finding of the Trial Court about suit properties being joint family properties is set aside not on merits but on account of absence of issues and evidence. Therefore, the lower Appellate Court's observations cannot be read as if it has arrived at a finding on merits that the suit property is not a joint family property. In my view, therefore it is not necessary to recall the Order dated 18 January 2023. The Application is accordingly rejected.

**NEETA
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SANDEEP V. MARNE, J.