

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APPEAL FROM ORDER NO.91/2015 WITH
CIVIL APPLICATION NO. 13828 OF 2015**

1] CHAYABAI POPAT SURVASE
2] POPAT S/O KRISHNA SURAVASE
VERSUS
CHAMPABAI MOHAN PAWAR

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Advocate for Appellant : Devakate Anant R
Advocate for Respondents : Shri.V.S.Undre For R/sole

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CORAM : S.V.GANGAPURWALA,J.

DATED : 26TH OCTOBER, 2015

ORDER :-

The Suit filed by the present respondent is dismissed. The respondents filed Appeal before District Court. In an appeal filed before the District Court, plaintiff filed application for adducing additional evidence under Order 41 Rule 27 of Civil Procedure Code. The said application is allowed. While allowing the application, the Court has remanded the matter to the trial Court giving opportunity to the parties to adduce evidence. Defendants have assailed the said order before this Court.

2] Mr.Devkate, learned counsel submits that the Court while passing order below Exh.24, has ignored the basic principle. The application for additional evidence has to be decided alongwith appeal. The appeal was not taken up for hearing independently. Application for additional evidence Exh.24 was taken up for hearing. It was decided and allowed and while allowing the said application,

the Court set aside the judgment and decree passed by trial Court remitting the matter to the trial Court. According to the learned counsel, the approach of the District Court in deciding application Exh.24 independently dehors the merits of the appeal is against the judgment of the Apex Court in the case of **Malayalam Plantation Ltd. V/s State of Kerala reported in 2011 AIR SCW 264** and in the **case of Union of India V/s Ibrahimuddin and another reported in 2013 AUR SCW 2752**. The learned counsel further submits that even the said additional evidence was not necessary. The Court on assessment of the documentary and oral evidence led before it had held that the plaintiff failed to prove that she is daughter of Govind. The learned counsel further submits that even if Court wanted to remand the matter, it had only two courses open before it (1) The appellate Court itself ought to have recorded fresh evidence or (2) may have directed the trial Court to record evidence only in respect of additional evidence. The learned counsel relies on the judgment of the Apex Court in the case of **H.P.Vedavyasachar V/s Shivashankara and another reported in 2010(1) Mh.L.J. 877**.

3] Mr.Undre, learned counsel for the plaintiff submits that the additional evidence is relevant and material for effective adjudication of the dispute between the parties. As far as other issues are concerned, the trial Court has not given any finding. The Court has not committed any error in remanding the matter.

4] With the assistance of learned counsel for respective parties, I have considered order passed below. The additional evidence produced on record is in the nature of extract from the school record. The appellate Court has found the same to be relevant. The proposition that an application for additional evidence has to be decided alongwith appeal need not be debated. The same is the

settled principle of law as laid down by Apex Court in the case of Union of India V/s Ibrahimuddin cited supra.

5] In normal course, I would have accepted argument of Mr.Devkate, learned counsel appearing for appellant that even if additional evidence is produced, the Court ought to have kept the appeal with itself and asked trial Court to record evidence on the particular issue on which the additional evidence is allowed. The same also would have been in tune with the judgment of the Apex Court in the case of **H.P.Vedavyasachar** referred supra. Perusing the judgment of the trial Court, it appears that the trial Court had framed about five issues based on the pleadings of the parties. Issue nos.6 and 7 were with regard to compensatory costs and otherwise. As far as issue nos.1 to 5 are concerned, the same were based on the pleadings of the parties. The Court after giving finding on issue no.1 observed that all remaining issues do not survive for consideration. When no finding is given on other issues, it would be unsafe to allow the matter to be retained by the appellate Court and send the matter to the trial Court only with regard to recording evidence on issue no.1 and getting finding from the trial Court in respect of the said one issue only. Had the finding been given by trial Court on all other issues on merits after appreciation of evidence then, recourse suggested by learned counsel for the appellant could have been resorted.

6] The additional evidence is also relevant and material for effective adjudication of the dispute. The plaintiff will have to prove the said document on the touch-stone of preponderance and also opportunity will have to be given to the defendant to disprove the same if it is proved by the plaintiff.

7] Considering aforesaid aspects of the matter, I am not inclined to interfere with the judgment and order passed by appellate Court.

8] However, I would clarify that the evidence will be led by the parties only in respect of additional evidence produced before appellate court and not for any other purpose. The trial Court shall after recording oral evidence in respect of additional evidence allowed by the appellate court shall decide the Suit by giving finding on all issues. The appeal from order as such is disposed of with aforesaid observations. No costs. Civil Application also stands disposed of.

[S.V.GANGAPURWALA,J.]

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