

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

**APPEAL FROM ORDER (ST.) NO.13111 OF 2016
along with
CIVIL APPLICATION NO. 1235 OF 2016**

Shamrao Murlidhar Gaikwad & Ors. .. Appellants
Vs.
Nalini alias Sumati Yeshwant Kothawale & Ors. .. Respondents

Mr.S.N. Chandrachud for Appellants.
Mr.Prashant More for Respondent no.1.

CORAM : R.D. DHANUKA, J.
DATE : 18th November 2016

P.C.

. By this appeal, the appellants (original defendants) have impugned the order dated 18th January 2016 passed by the learned 5th Ad-hoc District Judge and Assistant Sessions Judge, Pune allowing the Regular Civil Appeal No.548 of 2013 and remanding the matter back to the learned trial Judge under Order XLI Rule 23 of the Code of Civil Procedure, 1908.

2. The defendants had filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 alleging that the suit did not disclose any cause of action.

3. Learned counsel appearing for the appellants (original defendants) submits that since the father of the plaintiffs had sold the suit properties during his life time, the original plaintiffs did not have any right in the suit properties and thus the suit for partition filed by the original plaintiffs was without any cause of action.

4. Learned trial Judge accepted the plea of the defendants and dismissed the suit. In the Regular Civil Appeal No.548 of 2013 filed by the plaintiffs, the first appellate Court considered the averments and the prayers sought by the plaintiffs in the suit and has taken a view that the plaintiffs had claimed their share in the ancestral properties inherited by Late Prabhu as 'Karta.' The plaintiffs had also challenged the alienation on the ground that Late Prabhu and the defendant nos.5 to 7 had alienated the ancestral properties without consent of the plaintiffs.

5. Considering these facts, in my view, the first appellate Court has rightly allowed the appeal filed by the plaintiffs and has remanded the matter back to the learned trial Judge under Order XLI Rule 23 of the Code of Civil Procedure, 1908. Both the parties are allowed to adduce evidence before the learned trial Judge.

6. In my view, there is thus no substance in the submission of the learned counsel for the appellants (original defendants) that there was no cause of action in the suit filed by the plaintiffs and thus the first appellate Court could not have allowed the appeal and could not have remanded back the matter to the learned trial Judge for disposal afresh.

7. Appeal from order is accordingly dismissed. In view of dismissal of the appeal from order, civil application does not survive and is accordingly dismissed. No order as to costs.

R.D. DHANUKA, J.