

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.304 OF 2014

Shri Baburao Dharma Kamble & Ors. ... Appellants

Vs.

Smt.Aruna Chintaman Kamble ... Respondent

Mr.M.S. Karnik with A.S. Pandire i/b Vyas and Bhalwal for the Appellant
Mr.Kunal Kumbat i/b Sunanda Kumbhat for Respondent No.3

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **29th FEBRUARY, 2016**

P.C.:

1. Learned Counsel for the appellant submits that respondent Nos.1 and 2 are served by publication on 22.12.2015. However, nobody appears for respondent Nos.1 and 2. Respondent No.3 is represented. Hence, the matter is taken up and heard.

2. Respondent Nos.1 and 2, the original plaintiffs, had filed regular civil suit No.199 of 2004 for partition and perpetual injunction which was decreed and the appellants, the defendants, have obtained heirship certificates for the suit property of their ancestor Shri Dharma Kamble. Thereafter, Respondent Nos.1 and 2 have filed Regular Civil Appeal No.112 of 2007 before the District Judge, Raigad at Alibag. While hearing and deciding the said appeal, the learned District Judge, Raigad, formulated the points of determination as follows:

- i) Do plaintiffs prove that they alongwith defendants No.1 to 4 are legal heirs of deceased Dharma Arjun Kamble and on the basis thereof they are entitled to 1/5th share in the plot allotted under 12.5% scheme?
- ii) Is interference in the judgment warranted?
- iii) What order?

3. The findings given to both the issues are in negative. Despite the negative findings to these issues, the learned District Judge remanded the matter to the trial Court for fresh trial. The order of remand under Order 41 Rule 23A is not to be used leniently. I am of the view that when the findings are given to both the issues in negative, the appeal Court should try the appeal afresh and decide the appeal without getting influenced by its earlier order. Accordingly, the order of the appeal Court dated 31.10.2013 is hereby set aside. The matter is remanded to the appeal Court. The appeal Court to give fresh notices to the respondent Nos.1 and 2 and decide the appeal.

4. Appeal is disposed of in the above terms.

(MRIDULA BHATKAR, J.)