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

**SECOND APPEAL NO. 427 OF 2015
WITH
CIVIL APPLICATION NO.10754 OF 2015
AND
CIVIL APPLICATION NO.12068 OF 2015
IN
SECOND APPEAL NO. 427 OF 2015**

1. Suryabhan Kisan Vikhe,
Age: 62 years, Occu: Agriculture,
R/o. A/p. Loni (Bk.), Tq. Rahata,
Dist. Ahmednagar
2. Chandrabhan Kisan Vikhe,
Age: 58 years, Occu: Agriculture,
R/o. A/p. Loni (Bk.), Tq. Rahata,
Dist. Ahmednagar
3. Sopan Kisan Vikhe,
Age: 50 years, Occu: Service,
R/o. A/p. Loni (Bk.), Tq. Rahata,
Dist. Ahmednagar
4. Jalindar Kisan Vikhe,
Age: 48 years, Occu: Service,
R/o. A/p. Loni (Bk.), Tq. Rahata,
Dist. Ahmednagar
5. Vatchalabai Kacharu Shelke,
Age: 64 years, Occu: Household,
R/o. Adgaon, Tq. Rahata,
Dist. Ahmednagar
6. Sushilabai Laxman Kapade,
Age: 60 years, Occu: Household,
R/o. Mahegaon Deshmukh,
Tq. Kopargaon, Dist. Ahmednagar
7. Chandrakala Raibhan Aher,
Age: 57 years, Occu: Household,
R/o. Loni(Kd.), Tq. Rahata,
Dist. Ahmednagar
8. Kesherbai Kisan Vikhe,
Died through L.Rs. of
Appellant Nos. 1 to 7 & 9

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9. Chababai Ashok Raktate,
(Died issueless) ..APPELLANTS

VERSUS

1. Santosh Sanjay Vikhe,
Age: 23 years, Occu: Education & Agril.,
R/o. Loni (Bk.), Tq. Rahata, Dist. Ahmednagar
2. Mahesh Changdeo Vikhe,
Age: 25 years, Occu: Education & Agril.,
R/o. Loni (Bk.), Tq. Rahata, Dist. Ahmednagar
3. Sahebrao Ganpat Vikhe,
Age: 60 years, Occu: Education & Agril.,
R/o. Loni (Bk.), Tq. Rahata, Dist. Ahmednagar
4. Balasaheb Sahebrao Vikhe,
Age: 45 years, Occu: Agril.,
R/o. Loni (Bk.), Tq. Rahata, Dist. Ahmednagar
5. Prakash Sahebrao Vikhe,
Age: 42 years, Occu: Agriculture,
R/o. Loni (Bk.), Tq. Rahata, Dist. Ahmednagar
6. Smt. Sonubai Namdeo Vikhe,
(Died) & Respondent Nos. 1 & 2 are L.Rs.
of respondent No.6 already on record as
per Court's order dtd. 23/9/2016 ..RESPONDENTS

Mr P. B. Shirsath, Advocate holding for Mr P. B. Vikhe, Advocate for appellants;

Mr V. D. Sapkal, Advocate for respondent Nos. 1 & 2

CORAM : N.W. SAMBRE, J.

DATE : 15th June, 2017

ORAL ORDER

One Balaji was blessed with four sons and the predecessor-in-title of respondents Santosh and Mahesh who are original plaintiffs, was legal heir of Kundlik, s/o of Balaji, namely Ushabai. Vide sale deeds Exhs.92

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and 93 executed on 6th September, 1993 land Gat No.304, to the extent of 2 Hectares and 54 R situated at Loni (Bk.), Tq. Rahata, Dist. Ahmednagar was transferred by Ushabai in favour of plaintiffs Santosh and Mahesh. The said plaintiffs instituted a suit being Regular Civil Suit No.35 of 2005 (old R.C.S. No.416 of 1993) on 8th December, 1993 seeking a decree for possession. The learned Trial Court, after considering the rival claims, dismissed the suit by judgment and decree dated 16th December, 2005.

2. An appeal at the behest of the present respondents – plaintiffs being Regular Civil Appeal No.76 of 2006 before the learned District Judge-1, Kopergaon resulted in reversal of the judgment and decree rendered by the Trial Court and the suit of the respondents-plaintiffs came to be decreed. Thus, the present Second Appeal.

3. Amongst other, the substantial question of law sought to be raised is, in absence of any partition between legal heirs of Balaji, Ushabai, the predecessor-in-title of the plaintiffs had no independent title over the suit property and as such she ought not to have transferred the unpartitioned property in favour of the defendants. Another substantial question of law sought to be is raised is, whether the judgment of the appellate court is sustainable when Ushabai was neither added as necessary party nor examined as a witness.

4. So as to substantiate the contentions, both the parties have relied upon the judgment of the Civil Court in Regular Civil Suit No.44 of 1994,

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which was decided by 2nd Joint Civil Judge Junior Division, Shrirampur on 12th August, 2002, whereby the suit instituted by one Dnyandeo and Changdeo Vikhe came to be decreed to which the defendants to the present suit were also parties. The said suit was for possession of the suit property bearing Gat No.308 which was earlier owned by Balaji, which later on came in possession of Sonubai, wife of Namdeo s/o Balaji.

5. In the said suit issue no.1 which was specifically framed and answered in the affirmative reads thus :-

“Do plaintiffs prove that 2 Hectare 01 R land was given to Sonubai from the suit property Block No.308 in the partition amongst Ganpat, Kisan and Sonubai ?”

6. It is not in dispute that the judgment and decree dated 12th August, 2002 passed in Regular Civil Suit No.44 of 1994 was subject-matter of an appeal before the learned District Judge being Regular Civil Appeal No.25 of 2006. The said appeal preferred by the present appellants endorsing the affirmative findings on the issue of partition came to be dismissed. The said judgment of the appellate court was considered and relied upon by the appellate court while decreeing the suit in favour of the respondents-plaintiffs. However, it is worth to observe that whether Ushabai's property which is subject-matter of this suit was not an issue which fell for consideration in the said suit.

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7. A substantial question of law is also sought to be pressed into service by the learned Counsel for the appellants that while considering the judgment in Regular Civil Suit No.44 of 1994 and Regular Civil Appeal No.25 of 2006, the learned appellate court has given complete go-bye to the provisions of Sections 40, 41 and 42 of the Evidence Act. According to him, it was the duty of the lower appellate court to record a finding while considering such judgments as to the extent to which the findings recorded in the judgment rendered in Regular Civil Suit No.44 of 1994 and Regular Civil Appeal No.25 of 2006 are relevant.

8. With the assistance of both the learned Counsel, I have perused the judgment of the lower appellate court which is impugned in the present appeal. Though the lower appellate court has appreciated the evidence of appellant no.4 Jalindar, who in express terms has admitted long standing possession of Ushabai, predecessor-in-title of the plaintiffs, however, has also relied upon the aforesaid two judgments i.e. in Regular Civil Suit Nos.44 of 1994 and Regular Civil Appeal No. 25 of 2006 so as to infer that there was a partition between the parties. While doing so, the lower appellate court has neither considered the issues as were framed under Order XIV, Rules 1 & 3 of the Code of Civil Procedure nor has answered the same and accordingly has given complete go-bye to the provisions of Sections 40, 41 and 42 of the Evidence Act. What could be gathered from the only observations made in paragraph 9 of the impugned judgment is, the lower appellate court has considered these two judgments so as to infer that Balaji was a common predecessor-in-title of all the parties to the suit. However, such judgments in Regular Civil Suit No.44 of 1994 and

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Regular Civil Appeal No.25 of 2006, to what extent answer the issue of partition, is not at all dealt with.

9. Learned Counsel appearing on behalf of the appellants has rightly invited my attention to the judgment of the Apex Court in the matter of **K.G. Premshanker vs. Inspector of Police & anr.**, reported in **(2002) 8 Supreme Court Cases 87**, particularly paragraphs 16, 30 and 31.

Paragraph 31 of the said judgment reads thus :-

“Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under [Sections 40](#) and [42](#) or other provisions of the [Evidence Act](#) then in each case, Court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by 'A' on 'B's property, 'B' filed a suit for declaration of its title and to recover possession from 'A' and suit is decreed. Thereafter, in a criminal prosecution by 'B' against 'A' for trespass, judgment passed between the parties in civil proceedings would be relevant and the Court may hold that it conclusively establishes the title as well as possession of 'B' over the property. In such case, 'A' may be convicted for trespass. The illustration to [Section 42](#) which is quoted above makes the position clear. Hence, in each and every case, the first question which would require consideration is whether judgment, order or decree is relevant?, if relevant- its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case.”

10. Apart from above, reliance is also placed on another judgment of Apex Court in the matter of **R. Hanumaiah & anr. Vs. Secretary to Government of Karnataka, Revenue Department & ors.** reported in

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(2010) 5 Supreme Court Cases 203 in support of the above referred legal proposition.

11. In the backdrop of above observations, in my opinion, a case for remand to the lower appellate Court is made out. In view thereof, judgment of the lower appellate Court decreeing the suit in favour of respondents-original plaintiffs is hereby set aside.

The matter is remanded back to the lower appellate Court with a direction to decide the appeal afresh, in accordance with law, in the light of the observations made herein above.

The parties to the present appeal have agreed to appear before the learned District Judge-1, Kopargaon on 28th June, 2017.

The parties hereto have further agreed that they shall tender written notes of arguments along with case laws and shall cooperate the lower appellate Court in expeditious disposal of the appeal.

It is expected of the learned lower appellate Court that after completing the service on the remaining parties but for those who have appeared before this Court, to decide the appeal expeditiously and in any case within a period of three months from the date of appearance of all the parties before it.

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With the above observations, second appeal stands partly allowed.

In view of above, pending civil applications do not survive and stand disposed of accordingly.

Registry to ensure that the record and proceedings reaches to the learned lower appellate Court in any case by 23rd June, 2017.

(N.W. SAMBRE, J.)

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