

JPP

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

***SECOND APPEAL NO. 600 OF 2015
with
CIVIL APPLICATION NO. 1333 OF 2015***

Dastagir Akabar Pinjari (Nadaf)
Since deceased through Legal Heirs
1-a. Hamja Dastagir Pinjari (Nadaf)
Age : Adult, Occ.: Service
Residing at Herle, Tal.: Hatkanagale
Dist. : Kolhapur.

1-b. Amirbi Dastgir Pinjari (Nadaf)
Age : Adult, Occ. : Service
Residing at Herle, Tal. : Hatkanagale,
Dist. : Kolhapur.

1-c. Ayesha Sikandar Nadaf
Ag : Adult, Occ. : Household
Residing at Jawahar Nagar, Plot No.9,
Laxmi Vasahat, Kolhapur.

1-d. Jarina Babu Mulla
Age : Adult, Occ. : Household
Residing at Akiwat, Tal. : Shirol,
Dist. : Kolhapur.

...Appellants/Applicants.

V/s.

1. Khudija Farid Nadaf (deceased L.R.)

1) Ilahi Farid Nadaf (deceased L.R.)

1-a. Safina Ilhai Nadaf.

Age : Adult, Occ.: Household

R/o. Nandani Road, Near Kagal Stone

Jaysingpur, Tal.: Shirol, Dist. : Kolhapur.

1-b. Ajit Ilahi Nadaf

Age : Adult, Occ.: Agriculturist

R/o. Nandabu Road, Near Kagal Stone

Jaysingpur, Tal.: Shirol, Dist. : Kolhapur.

1-c. Wahida Ilahi Nadaf

Age : Adult, Occ. : Houshold

R/o. Nandani Road, Near Kagal Stone

Jaysingpur, Tal.: Shirol, Dist. Kolhapur.

1-d. Shri Khaurun Iqubal Nadaf

Age : Adult, Occ.: Agriculturist

R/o. Near Gavchawadi, Shirdhon,

Tal.: Shirol, Dist. : Kolhapur

1-e. Bismila @ Guljar Khalif Nadaf

Age : Adult, Occ.: Household,

R/o. Shirol Railway Station, Shirol,

Tal. : Karad, Dist. : Satara.

... Orig. Plaintiffs.

2. Khursaiyya Nabisaheb Nadaf

Age : Adult, Occ. : Household,

R/o. Rukadi, Tal, : Hatkangale,

Dist. : Kolhapur.

3. Tajbi Sikandar Nadaf

Age.: Adult, Occ. : Household

R/0. Walivade, Tal.: Karveer,

Dist. : Kolhapur.

4. Sikandar Farid Nadaf

Age : Adult, Occ. : Trade & Agriculturist

R/o. Rukadi, Tal.: Hatkanangale,

Dist. : Kolhapur.

5. Aslam Farid Nadaf

Age : Adult, Occ.: Agriculturist

R/o. Rukadi, Tal. : Hatkanangale,

Dist. : Kolhapur.

6. Ayub Farid Nadaf

Age : Adult, Occ. : Agriculturist

R/o. Rukadi, Tal. : Hatkanagale,

Dist. : Kolhapur.

7. Jarina Ajij Nadaf

Age : Adult, Occ. : Household

R/o. Rukadi, Tal. : Hatkanagale,

Dist. : Kolhapur.

8. Tayyab Farid Nadaf (Pinjari)

Age : Adult, Occ.: Labour

R/o. Khotwadi, Tal. : Hatkanangale,

Dist. : Kolhapur.

9. Ismail Dastagir Pinjari (Nadaf)

Age: Adult, Occ: Agriculturist

Residing at Herle, Tal : Hatkanangale

District : Kolhapur.

... Respondents.

Mr. Manoj A. Patil for the Appellants/Applicants.

Mr. Prosper D'souza for the Respondents 1 A to 1 E & 2 to 7.

CORAM : N.M. Jamdar, J.

DATE : 23 January, 2018.

Judgment :-

The Appellant is the Original Defendant. The Respondent – Plaintiff filed the Suit bearing No. 93 of 2001 in the Court of Civil Judge, Junior Division, Hatkanangale, District – Kolhapur. It was the case of the Respondent – Plaintiff that she is the sister of Defendant No.1. According to her, the suit properties were in the name of Defendant No.1 alone. He sold Gat No.1602 and from the sell proceeds, purchased the other lands. Since the properties are ancestral, the Plaintiff has a share in it. The suit was partly decreed by the learned Civil Judge, against which the Appellant filed an Appeal bearing No.132 of 2012 in the District Court, Kolhapur. The learned District Judge by the judgment and order dated 5 December 2014, decreed the suit and declared that the Plaintiffs had 1/3rd share and the Defendants had 2/3rd share in the property. It was also directed that the Plaintiffs are entitled to get mesne profits from the date of filing the suit till they get their actual possession.

2. Heard learned Counsel for the parties.
3. Admit, on the following substantial question of law :-

“ Whether the First Appellate Court erred in directing enquiry as to the mesne profits without there being any discussion as to whether the mesne profits were necessary in the facts of the present case ?”

4. The filing of paper-book is dispensed with. The Appeal is taken up for hearing forthwith.

5. The learned Single Judge, while issuing the notice on 2 September 2015, has restricted the scope of the Appeal to the issue of only mesne profits. The learned Counsel for the Appellants also agrees that at the time of issuance of notice, he had argued the entire appeal however the learned Single Judge having found merit only in the issue of mesne profits, restricted the same to this question. This is the limited scope of the Appeal.

6. Considering the fact that the issue is only regarding payment of mesne profits, to avoid further litigation, it was put to the learned Counsel for the parties whether there could be resolution of the dispute by an amicable settlement. The parties were directed to remain present in the Court. The learned Counsel state that inspite of their efforts, they were not able to convince their respective clients, who did not want to settle the dispute.

7. The learned Counsel for the Appellants submitted that the learned District Judge did not consider various aspects of the matter including the pleadings and the observations of the learned Civil Judge as to why the Respondent – Plaintiff was not entitled to mesne profits. The learned Counsel for the Respondents supported the conclusion reached by the learned District Judge.

8. The learned District Judge, in the impugned order, has dealt with the issue of mesne profits only in few sentences. The learned District Judge held that to get respective shares in the suit property will take some time and therefore, the Plaintiffs are entitled to mesne profits pertaining to the suit property. The Civil Judge had held that the possession of the Appellants was with the permission of the Respondents and therefore, there was no question of granting any mesne profits. Whatever be the merit of this view taken by the Civil Judge, it ought to have been dealt with by the District Judge before directing an enquiry as to mesne profits. If the first appellate court is to set aside to reverse the decree and grant the relief to the appellants then it must be gave reasons, as to why it does not agree with the view expressed by the Trial Court. Therefore, the impugned order will have to be set aside and the matter will have to be remanded back to the First Appellate Court only on the limited issue. The question of law framed will have to be answered in favour of the Appellants.

9. The Second Appeal is partly allowed. Clause 5 of the judgment and order dated 5 December 2014 rendered by the District Judge, Kolhapur is quashed and set aside. Rest of the decree is confirmed. The Appeal is remanded back to the District Court, Kolhapur as regard consideration of Issue No.3 as referred to the impugned judgment and order which is “*whether the Plaintiffs are entitled to have mesne profit*”.

10. It is clarified that the observations made in this order are only to highlight the need for remand and should not be construed as expression of the merits of the rival contentions. The parties will appear before the District Court, Kolhapur on 26 February 2018.

11. Registry to send the writ forthwith.

(N.M. Jamdar, J.)