

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

912 SECOND APPEAL NO.144 OF 2019

ANANDA CHINDHE PATIL AND ANOTHER
VERSUS
ALKABAI SAHEBRAO PATIL

...
Advocate for Appellants : Mr. N. L. Choudhari

CORAM : SMT. VIBHA KANKANWADI. J.

DATE : 22nd MARCH 2019.

PER COURT:

1] The present appeal has been filed by the original non applicants, who want to challenge the judgment and decree passed in RCA No. 169 of 2014, by the learned District Judge - 5 Jalgaon dated 6.12.2017, whereby, their appeal was dismissed with costs. In the said appeal, they had challenged the judgment and order passed in Misc. Civil Application for mesne profits No. 1 of 2009 by the Civil Judge Senior Division, Pachora, District Jalgaon, dated 16.12.2013.

2] The said application was filed by the present respondents under Order XX Rule 12 of C.P.C. She had filed RCS No. 30 of 1992, for partition and possession of agricultural land Gat No.70 situated at village Kurangi against one Bhikubai and the present appellants. The said suit was decreed on 27.2.1998. It was held that the present respondent has 5/16th share and order was passed in respect of fixation of or settlement of mesne profits. After enquiry, the learned trial court has partly decreed the application and

mesne profits has been granted in the slab of years and it was stated that, that amount should be given together with interest @ 8% p.a. As aforesaid, the said order was challenged in RCA No. 169 of 2014 by the present appellants and their application has been rejected.

3] Heard learned Advocate Mr. Chaudhari, for the appellant. It is submitted that the substantial question of law arising in this appeal are that, whether the widow can file a suit for partition and separate possession against her son and only on the basis of said decision, whether she was entitled to claim mesne profits, when there was no partition between them in respect of the ancestral property. It was also submitted that both the courts have not taken into consideration that there was no proper evidence regarding the yield taken in the suit property and whatever income was fixed, was very much on the higher side. Further, when those properties were joint family property of the appellants and respondent, it cannot be stated that only respondent has wrongfully gained anything, the possession of the appellant over the suit land, cannot be said to be wrongful.

4] It is to be noted that the present appeal is filed under Section 100 of the Code of civil Procedure and, therefore, unless substantial question of law has been shown, it cannot be admitted. After perusal of both the impugned judgments, it is not even necessary to issue notice to the respondents. The decision in RCS No. 30 of 1992, holding that the present respondent/original plaintiff had 5/16th share, in the agricultural land, had become final and, therefore, those points, which have not been raised in the

suit, or which could have been raised in that suit, cannot be agitated in this second appeal. Therefore, the issue as regards the entitlement of the plaintiff or maintainability of the suit, cannot be gone into in this appeal, in which, the order for fixation of mesne profits is under challenge.

5] Secondly, as regards income is concerned, it would be a factual aspect and at the most, it may raise a question of law, but, not a substantial question of law, as contemplated under Section 100 of C.P.C. When the both the courts have concurrently held after assessing the evidence that was adduced on record, that the present appellants have taken income from the suit land, to which the respondent was entitled to get and specifically, in pursuance to the decree, the enquiry in respect of mense profits was made. The said concurrent findings need not be interfered with. Hence, no substantial question of law has been pointed out. Therefore, the second appeal is disposed of as not admitted.

**[SMT. VIBHA KANKANWADI]
JUDGE.**

grt/-