

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO. 12799 OF 2018
IN SECOND APPEAL NO. 784 OF 2017**

Sau. Devkabai Jagannath Badgujar ...Applicant

Versus

Meena Ramesh Badgujar & Ors. ...Respondents

.....

Mr. P. N. Kutti, Advocate for Applicant.

Mr. A. V. Rakh, Advocate H/F Mr. G. V. Wani, Advocate for
Respondents No. 1 to 3.

Mr. D. R. Shelke, Advocate for Respondent No. 5.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17-01-2019.

ORAL ORDER :

01. Heard Mr. P. N. Kutti, learned Advocate for Applicant, Mr. A. V. Rakh, the learned Advocate holding for Mr. G. V. Wani, learned Advocate for Respondents No. 1 to 3, Mr. D. R. Shelke, learned Advocate for Respondent No. 5.

02. Present application has been filed by the original respondent in the second appeal, who was original plaintiff in Special Civil Suit No. 52 of 2003. The said suit was for partition, injunction and receiving share in the service benefits. The suit was decreed on 11.11.2011. The defendant No. 1 had filed R. C. A. No. 15 of 2012. It

came to be dismissed on 16.6.2017. The said Judgment and decree passed in R. C. A. is under challenge in the second appeal. The second appeal is not yet admitted. However, a conditional order was passed to the appellant No. 1 that she should deposit an amount of Rs. 2,00,000/- in the Court on or before 5.3.2018. Accordingly, the amount has been deposited. The applicant submits that she is aged 80. It is stated that she and her husband were completely dependent on the deceased son. She is suffering from various ailments and therefore, she has prayed for withdrawal of the amount.

03. Affidavit-in-reply has been filed by the respondents No. 1 to 3 to the application stating that both the Courts below have committed wrong in coming to the conclusion that applicant is entitled to withdraw an amount of Rs. 1,74,895/-. The Courts have not considered the deductions made in the amount. Though the Courts below relied upon the document Exh. 55, the deductions mentioned therein have been over looked which was in fact the expenses incurred for the medical treatment of the deceased Ramesh. According to her, the applicant is not entitled for any relief. It is stated that she is not in dire need of money because the entire ancestral property consisting agricultural lands is with her and respondent

No. 4. The respondent No. 2 Kalpesh has filed suit for partition and separate possession bearing R. C. S. No. 50 of 2012 before the Civil Judge, Senior Division, Erandol and it is still pending for adjudication. She has therefore prayed for rejection of the application.

04. The learned Advocate appearing for the respondents No. 1 to 3 to the application has disputed the figure of amount deposited and also the fact that though the decree is said to have been passed to the extent of 1/4 share from 6,99,580/- i.e. Rs. 1,74,895/-. However, in fact the respondent No. 1 had received the amount of Rs. 3,55,067/- only from original defendant No. 5. He has given calculation as to how much has been received and it appears that as per Exh. 55 which was before the learned Trial Court. The calculation given is marked Exh. "X". It may not be necessary at this stage to go into the calculations. Since it was a money decree to the extent of share of the plaintiff is concerned, when both the Courts below had decreed the suit to the extent of 1/4 th share i.e. 1,74,895/- and it was granted alongwith the interest, it appears that this Court while issuing the notice had directed the appellant to deposit amount of Rs. 2,00,000/-. According to the calculation given by respondents No. 1 to 3, they have received amount of Rs.

3,55,067/- and 1/4 th of the same has also been calculated by them to the extent of Rs. 88,766.75/-. If this fact is taken as true then atleast the present applicant would be entitled to get that much amount and therefore, there will be no hurdle in allowing the applicant to withdraw amount of Rs. 88,766.75/- from the deposited amount. Taking into consideration the dire need of the amount, withdrawal of this amount will suffice as regards the other calculation and entitlement of the applicant is concerned, it is then subject to the second appeal.

05. Therefore, in the interest of parties, following order is passed;

ORDER

- (i) Civil application is partly allowed.
- (ii) Applicant is allowed to withdraw the amount of Rs. 88,766.75/- from the amount deposited by the appellant in the Second Appeal No. 784 of 2017 in this Court.
- (iii) For rest of the contentions, the points are kept open and with this the application stands disposed of.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-