

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**918 SECOND APPEAL NO.328 OF 2021
WITH
CA/10808/2015 IN SA/328/2021**

JANMOHAMMAD BABULAL PATHAN AND OTHERS
VERSUS
CHAGAN @ CHAGANMAHARAJ GULABBHAI SHAIKH AND OTHERS

...
Advocate for Appellants : Mr. Ruchir Wani h/f Mr. Bajaj Anil S.
Advocate for Respondents No.1 to 3 : Mr. S. P. Salgar h/f Mr. N.V.
Gaware
...

**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 30-09-2021.**

ORDER :

1. Present second appeal has been filed by the original plaintiffs challenging the Judgment and decree passed in Regular Civil Appeal No.138 of 2010 by learned Principal District Judge, Ahmednagar on 15-01-2014.
2. Present appellants/original plaintiffs had filed Regular Civil Suit No.01 of 2004 for partition, possession and injunction before learned Civil Judge, Junior Division, Pathardi, District Ahmednagar. The said suit was partly decreed. The defendants were perpetually restrained from interfering and obstructing the peaceful possession of the plaintiffs over the suit property Gut No.659/2 admeasuring 2 H 42 R

which was purchased as per sale deed dated 06-05-1978. It can be seen from the Judgment of the Trial Court that the suit property was in fact the Gut No.659 (Old Survey No.416, Old Gut No.1075). They were claiming 3 Ane 3 Pai share from the suit field excluding 2 H 42 R. Issues No.3a and 3b before the Trial Court were to the extent whether the plaintiffs have share and whether they are entitled to get partition. The finding was given in the negative and accordingly it appears that the relief of partition was rejected. Hence, the plaintiffs preferred the said first appeal i.e. Regular Civil Appeal No.138 of 2010 and it appears that the original defendants had not challenged the decree in Regular Civil Suit No.1 of 2004. Therefore, the scope of the first appeal was to the extent of the rejected part of the decree of the Trial Court that is to the extent of partition and separate possession.

3. The learned Advocate for the appellants has submitted that the learned Principal District Judge, Ahmednagar wrote the entire Judgment as it the appellants are the original defendants and then dismissed the appeal thereby confirming the decree of the Trial Court. He submitted that there was no application of mind and proper adjudication. There is no compliance of Order 41 Rule 31 of

the Code of Civil Procedure and, therefore, they had even filed the review petition before the same Court i.e. the Review Petition No.1 of 2014, however, it was rejected by the learned Principal District Judge, Ahmednagar on 07-03-2015. He, therefore, submitted that the substantial questions of law are arising in this case and also the fact that is required to be considered is regarding whether to remand the matter to the First Appellate Court for reconsideration of the appeal on its own merits.

4. Learned Advocate for respondents strongly opposed the application and submitted that review petition filed by the appellants, before the same Court, has been rejected. The decree passed by the learned Trial Court is correct wherein all the issues were considered properly. The First Appellate Court has also considered the facts and, therefore, there was no necessity for the First Appellate Court to interfere with the Judgment and decree passed by the Trial Court.

5. At the outset, it can be seen that the title of the Judgment of the First Appellate Court shows that the appeal is filed by the original plaintiffs. The appeal memo before the First Appellate Court also clearly spells out that the appeal is to the extent of refusal of

the relief of partition. Under such circumstances, the points those were framed by the learned First Appellate Court ought to have been in consonance with the scope of the appeal, but it appears that the First Appellate Court under mistake and belief, considered that the appellants are the original defendants and then went on to decide the appeal. There is absolutely no compliance of Order 41 Rule 31 of the code of Civil Procedure and also the decision in *Santosh Hazari vs. Purushottam Tiwari, reported in 2001 (3), SCC 179*. therefore, definitely substantial question of law is arising in this case, however, since the matter requires then reconsideration by the First Appellate court itself, it would be appropriate at this stage itself to remand the matter to the First Appellate Court for deciding the appeal on its own merits.

6. For the above said reasons, the second appeal stands partly allowed.

7. The Judgment and decree passed by the learned Principal District Judge, Ahmednagar in Regular civil Appeal No.138 of 2010 on 15-01-2014 is hereby set aside. The said Civil Appeal stands restored on the file of learned Principal District Judge, Ahmednagar.

8. In view of the fact that the appeal of the year 2010 is now restored, learned Principal District Judge, Ahmednagar to expedite the matter and decide the appeal by the end of 31st March, 2022.

9. Both the parties to appear before the learned Principal District Judge on 11-10-2021.

10. In view of above, second appeal stands disposed of. Pending Civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE
VIRENDRA
J

Digitally signed
by GAWADE
VIRENDRA J
Date: 2021.10.01
12:48:19 +0530