



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

**SECOND APPEAL NO.519 OF 2023
WITH
CIVIL APPLICATION NO.12633 OF 2023**

1. Dwarkadas s/o Janardhan Kulthe
2. Suresh s/o Janardhan Kulthe
3. Chandrakant s/o Janardhan Kulthe
4. Deepak s/o Janardhan Kulthe ... **APPELLANTS**
(Orig. Def. Nos.1,2,4 & 6)

VERSUS

1. Sheelabai w/o Santukrao Dabhale
2. Karuna w/o Dyneshwar Tak,
3. Usha w/o Prabhakar Mundik ... **RESPONDENTS**
(Res. No.1/Orig. Plaintiff,
Res. No.2/ Orig. def. No.3,
Res. No.3/ Orig. def. No.5)

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Mr. S. P. Katneshwarkar, Advocate for the Appellants.
Mr. P. N. Sonpethkar, Advocate for Respondent No.1.
Mr. Satish S. Manale, Advocate for Respondent Nos.2 & 3.

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CORAM : SANDIPKUMAR C. MORE, J.

DATED : 19/06/2024.

ORDER :

1. Heard rival submissions at admission stage.

2. The present second appeal appears to be filed against concurrent findings of both the learned courts below. Record shows that respondent No.1 filed RCS No.140 of 2010 against the present appellants as well as respondent Nos.2 & 3 for partition and separate possession of the suit property i.e. Survey No.223/2 admeasuring 4 H. 5 R., situated at Vasmatnagar, Tq. Vasmatnagar alongwith House No.E/205 and 206 (Old) E/287 and 288 (New), admeasuring 2012.85 sq. feet, situated at same place. The learned Joint Civil Judge (Junior Division), Vasmatnagar i.e. the learned trial court under its judgment and decree dated 12/12/2019 partly decreed the suit and thereby granted one-seventh share each to the plaintiff and defendants, namely rival parties in the present second appeal, in the suit land owned by their father Janardhan, admeasuring 2 H. 20 R. and land owned by Champabai i.e. their mother, admeasuring 5 Acres. It is significant to note that no share is allotted in the suit house. Thereafter, original defendants Nos.1, 2, 4 & 6 preferred RCA No.4 of 2020 before the learned District Judge-2, Vasmat, District Hingoli i.e. the learned first appellate court, but in the said appeal the judgment and decree of the learned trial court has been confirmed by dismissing the appeal. As such, the present second appeal is against the concurrent findings of both the learned courts below.

3. The learned counsel for the appellants submits that the learned first appellate court was supposed to decide the appeal by making proper discussion in respect of the entire evidence led by the parties before the learned trial court. According to him, the learned first appellate court has decided the appeal only on the basis of written notes of arguments filed by the present appellants and discarded the same without discussing any evidence on record. As such, he submits that following substantial question of law is involved in this appeal.

- I) *Whether the learned first appellate court has erred in not discussing the evidence recorded in the learned trial court by deciding the first appeal only on the basis of written arguments of the parties and thereby failed to apply provisions of Order-41 Rule 31 of CPC ?*

In support of his argument, he also relied on following judgments.

- A) ***Somakka (dead) by LRS. vs. K. P. Basavaraj (Dead) by LRS. Reported in [2022] 17 S.C.R. 668 &***
- B) ***Judgment of the Hon'ble Apex Court in the case of Malluru Mallappa (D) Thr. LRS. vs. Kuruvathappa and others in Civil Appeal No. 1485 of 2020, arising out of SLP © No. 18092 of 2014 on 12/02/2020.***

4. On the contrary, the learned counsel for respondent No.1 strongly opposed the submissions on the ground that no perversity can be found in the judgment of the learned first appellate court since certain evidence as reflected from evidence recorded in the trial court, has been considered in proper manner. According to him, the present appellants / defendants had admitted relationship between themselves and respondent No.1 / plaintiff and also with other respondents. Moreover, the learned first appellate court has also taken in to consideration the previous partition between father of the parties and appellant No.1-Dwarkadas, who is defendant No.1. He submitted that when the relationship between the parties is admitted by the defendants and the shares of the parties are determined only in the property left by their parents, there was no need to discuss the evidence on record in detail.

5. It is significant to note that after going through the judgment of the learned first appellate court it is evident that though the written notes of arguments of the appellants were considered, but the summary of facts reflected from the evidence recorded by the trial court also finds place in the judgment. Admittedly, the Hon'ble Apex Court in the case of **Somakka (Dead) by LRS.** (*supra*) has made following observation:

“28. *Learned Judge V. R. Krishna Iyer, J., [as he then was a Judge of the Kerala High Court] in 1969, while deciding the case between Kurian Chacko vs. Varkey Ouseph, dealing with a similar judgment of the First Appellate Court which had been disposed of by a brief order, observed as follows :*

‘.... 2. An appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate court.’”

Moreover, the Hon’ble Apex Court has also made following observation in the case of **Malluru Mallappa** (supra) :

“14. *It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons.’*”

6. Admittedly, as per the aforesaid observations, the learned first appellate court is required to reconsider the evidence on record. However, in the instant case, it is not the case that the learned first appellate court did not discuss the evidence at all. On the contrary, certain facts reflected from the evidence recorded by the learned trial court, are there in the judgment of the learned first appellate court. It is most important to note that the learned first appellate court has also considered the fact of earlier partition in the year 1985 which was between father of the parties and appellant No.1-Dwarkadas, wherein father – Janardhan got 2 Acres 20 Gunthas land and appellant No.1 got 2 Acres 20 Gunthas land and mother of rival parties i.e. Champabai got 5 Acres land out of the suit property. It is extremely important to note that the relationship between the parties is not in dispute at all and whatever shares of the rival parties determined by the learned trial court and confirmed by the learned first appellate court, are in the property of their parents. The share obtained by appellant No.1 in previous partition, has not been considered for partition in the instant case. Therefore, even though the learned first appellate court has not discussed evidence in detail, but in the light of aforesaid admitted facts, the shares determined by both the courts below, are apparently decided in proper manner. Therefore, in view

of the concurrent findings recorded by both the learned courts below, no substantial question of law as raised by the learned counsel for the appellants, appears to be involved. Therefore, considering all these aspects, the judgments relied upon by the learned counsel for the appellants, are not helpful. In view of the same, the present second appeal, having no substance, stands dismissed at admission stage. The second appeal is disposed of accordingly.

7. In view of dismissal of the second appeal, Civil Application No.12633 of 2023 also stands disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)

8. After pronouncement of the order, the learned counsel for the appellants requested to continue the interim relief which is granted during the pendency of this appeal. Though the learned counsel for the respondents opposed for such request, but considering the fact that interim relief was running during pendency of the appeal, the same is continued for further period of four weeks only.

(SANDIPKUMAR C. MORE, J.)