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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 11269 OF 2024
IN
SECOND APPEAL NO. 688 OF 2018**

Ashok Ramchandra Kutwal and ... Applicants
others

vs.

Shantabai L. Kutwal and others ... Respondents

**WITH
SECOND APPEAL NO. 455 OF 2023
WITH
CIVIL APPLICATION NO. 1570 OF 2018
IN
SECOND APPEAL NO. 455 OF 2023**

Sau. Archana Prabhakar Kutwal and Anr ... Appellants/Applicants

vs.

Shantabai L. Kutwal and Ors ... Respondents

Mr.Sushant Prabhune through VC for Appellants/Applicants in SA/688/2018.

Mr. Mahesh Rawool a/w. Praveen Dabhade and Mr. Sahil S. Ghule, for Respondent Nos. 4 to 6 in SA/688/18 and for Appellants in SA/455/2023.

Mr. G.N. Salunde a/w. Mr. D.N. Gondhali, for Respondent Nos. 1 and 2.

CORAM : GAURI GODSE, J.

DATED : 4th SEPTEMBER 2024

ORDER:

INTERIM APPLICATION NO. 11269 OF 2024

1. This application is for recalling the order dated 2nd February 2024 and for restoration of the second appeal. There is a delay of

36 days in filing the application. Learned counsel for the applicants submits that none had appeared on behalf of the appellants; hence, on 2nd February 2024, the appeal was dismissed. He submits that the reasons for the delay in filing the application and reasons for not appearing on 2nd February 2024 are explained in the application in paragraph no.2.

2. Learned counsel appearing for respondent nos. 1 and 2, i.e. original plaintiffs, submits that if the application is to be allowed, the learned counsel for the appellants be directed to argue the second appeal immediately, as the appeal has been pending since 2018. For the reasons stated in the application, delay is condoned, and the application is allowed in terms of prayer clauses (a) and (b).

3. Learned counsel for the appellants was called upon to argue the second appeal on merits. Heard learned counsels for the parties on the merits of the Second Appeal. This Second Appeal is preferred by defendant no. 4 to challenge the concurrent judgments and decrees for partition and separate possession.

4. Learned counsel for the appellants submits that the suit for partition and separate possession was filed claiming share through Parvati. He submits that Parvati had one daughter by the name Kalavati, who was not initially made party to the suit. In view of the

objections raised on behalf of defendant no.4, Kalavati was added as a party defendant no.5. He submits that since Kalavati was added as a party defendant if Kalavati's share was to be determined, the $\frac{1}{2}$ share granted to the plaintiffs would have to be modified.

5. Learned counsel for the appellants further submits that the plaintiffs had initially filed a suit for partition and separate possession which was dismissed in default. He submits that the plaintiffs had suppressed filing of the earlier suit and its dismissal. He thus, submits that the suit is liable to be dismissed on the ground that the material aspect regarding the dismissal of the suit was suppressed from the court.

6. Learned counsel for the appellants thus submits that the second appeal would require consideration on the aforesaid two grounds regarding suppression of the material facts and determination of respective shares of the parties in view of Kalavati's share. For examining the submissions made on behalf of the appellants I have perused the pleadings as well as both the judgments. The suit was filed on the ground that Parvati-original holder of the property had three children, i.e. Ramchandra, Laxman and Lilavati. It is the plaintiffs' case that Lilavati expired, and she

had no heirs and legal representatives. Hence, plaintiffs claimed $\frac{1}{2}$ share. Plaintiffs are claiming through Laxman, and defendants nos. 2, 3, 4 and 6 are heirs and legal representatives through Ramchandra (defendant no.1). Plaintiffs further contended that defendant no.5, i.e Kalavati Taware was not concerned with the suit property. However, defendant no.4 got the sale deed executed in favour of defendant no.6, i.e., defendant no. 4's wife through Kalavati. It was thus the plaintiffs' contentions that defendant no.5 Kalavati was not concerned with the suit property or the family.

7. Defendants nos. 7, 8 and 9 are purchasers claiming through defendant nos. 1 and 4. Admittedly, the sale deed was executed during the pendency of the suit. After considering the rival contentions regarding Lilavati being the daughter of Parvati and defendant no.4's claims that Kalavati was the daughter of Parvati, the trial court recorded findings of facts by accepting that deceased Lilavati as claimed by the plaintiffs was the daughter of Parvati. Thus, by accepting the relationship between the parties described by the plaintiffs, the trial court accepted that the plaintiffs and defendant no.1 would get $\frac{1}{2}$ share each in the suit property. The trial court referred to the oral evidence led by the plaintiffs and defendant no.4 and accepted the plaintiffs' evidence that deceased Lilavati was the daughter of Parvati, and defendant no.5 (Kalavati) was not

concerned with the suit property.

8. Learned counsel for the appellants relied upon the findings recorded by the trial court in paragraph 10 of the judgment to point out that even the defendants had examined independent witnesses to support their contentions that Kalavati was the daughter of Parvati. It was, thus, contended by the learned counsel for the appellants that both the courts have not properly appreciated the evidence on record, which indicates that Kalavati and not Lilavati was the daughter of Parvati.

9. The reasons recorded by the trial court indicate that in the revenue proceedings, it was contended that Parvati's daughter was Kalavati. However, even in the said proceedings, the present plaintiffs pleaded that Kalavati was not Parvati's daughter and that the deceased Lilavati was Parvati's daughter. The trial court also referred to defendant no.4's oral evidence, where he initially stated that his aunt (father's sister) was Lilavati; however, he subsequently changed his statement and said that his aunt was Kalawati.

10. In any event, it is not in dispute that Parvati's daughter expired issueless. Thus, even if the name of the deceased daughter was Lilavati or Kalavati, it would not make any difference in the determination of shares of both the sons of Parvati. Thus, I do not

find that any consideration is required by this court on the point regarding the name of the deceased daughter. Even otherwise, the contentions raised regarding the name of Parvati's daughter would require reappreciation of facts and evidence on record, which is not permissible under Section 100 of the Civil Procedure Code, 1908.

11. The trial court, after examining the pleadings and evidence, specifically held that Lilavati was Parvati's deceased daughter. The First Appellate Court, after examining the pleadings on record, recorded the findings of facts. Hence, the first point argued on behalf of the appellants does not raise any question of law that requires consideration by this court.

12. The second point argued by the learned counsel for the appellants is with regard to the earlier suit for partition and separate possession, which was dismissed in default. I do not find any substance in the said point. It is not the case of the appellants that the dismissal of the earlier suit would affect the claim for partition and separate possession on merits. It is not even the case of the appellants that the present suit is not maintainable in view of the earlier suit being dismissed in default. The suit for partition and separate possession is based on a continuous cause of action. When it is not disputed that disposal of the earlier suit would not

affect the plaintiffs' right to seek partition and separate possession, I do not find any substance in the argument that the suit for partition and separate possession deserved to be dismissed on the ground of dismissal of the earlier suit for default. Thus, even the said point would not require any consideration by this court as the same does not raise any substantial question of law.

13. Both the courts concurrently held on facts that the plaintiffs are entitled to $\frac{1}{2}$ share in the suit property. In view of the concurrent findings recorded by both the courts, none of the grounds require any consideration by this court.

14. The second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed. In view of dismissal of the Second Appeal, all other pending Interim Applications are dismissed as infructuous.

15. Learned counsel for the appellants seeks continuation of stay already granted by this court. Since the appeal is arising out of a decree for partition and separate possession, the procedure for the division of the suit property shall go on. However, there will be a stay for the actual handing of possession for a period of eight weeks.

SECOND APPEAL NO. 455 OF 2023

16. This Second Appeal is preferred for challenging the concurrent judgments and decrees for partition and separate possession. This appeal is preferred by defendants nos. 8 and 9, who are purchasers of the suit property during the pendency of the suit. Learned counsel for the appellants has raised similar grounds as raised in the Second Appeal No. 688 of 2018.

17. For the reasons recorded in the order dismissing the Second Appeal No. 688 of 2018, this second appeal is also dismissed for want of any substantial question of law.

18. Hence, the Second Appeal is dismissed. In view of dismissal of the Second Appeal, pending applications are disposed of as infructuous.

19. Learned counsel for the appellants seeks continuation of stay already granted by this court. Since the appeal is arising out of a decree for partition and separate possession, the procedure for the division of the suit property shall go on. However, there will be a stay for the actual handing of possession for a period of eight weeks.

(GAURI GODSE, J.)