



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

915 SECOND APPEAL NO. 93 OF 2022

RAJUBAI UTTAMRAO FULZALKE AND ANOTHER
VERSUS
BALUBAI UTTAMRAO FULFALKE AND OTHERS

Mr. H. V. Tungar, Advocate for the Appellants
Mr. A N. Nagargoje, Advocate for Respondent Nos. 4 and 5
Ms. Fatema Kazi h/f Mr. S. S. Kazi, Advocate for Respondent Nos. 3, 8A to 8E, 9 and 10A to 10C.

CORAM : R. M. JOSHI, J.
DATE : 5th AUGUST, 2025

PER COURT :-

1. This Appeal under Section 100 of the Code of Civil Procedure (for short 'CPC') takes exception to the judgment and decree passed by the First Appellate Court in R.C.A. No. 53 of 1992, whereby the First Appellate Court dismissed the Appeal filed by the Respondents-original Defendants against the decree passed in R.C.S. No. 43/1983, dated 29/08/1991, granting decree of partition and separate possession, determining share of parties to the suit.

2. Admittedly, the Respondents-original Plaintiffs filed suit bearing R.C.S. No. 43 of 1983 for partition and separate possession of the suit properties. The said suit came to be decreed on 29/08/1991 with following order :-

"1) It is hereby declared that the plaintiffs 1 and 2 have each 1/156 share. The defendants no. 1 and 13 have each 7/156 share. The defendants no.1 to 7 have 1/8th share each. The defendants no. 2, 3, 14, 15 have each 7/78 share, and defendants no. 8, 9, 10, 11, 12 and 16 each have 1/156 share in the suit property.

2) Preliminary decree be drawn accordingly. Copy of the decree be send to collector for effecting partition and delivering separate possession.

3) A commissioner be appointed in final decree proceeding for suggesting partition of the house property.

4) Defendants do pay cost of the suit to the plaintiffs and bare their own cost."

3. Plaintiffs did not challenge the said judgment and decree. However, Defendants took exception to the said judgment and decree by preferring the Appeal bearing R.C.A. No. 53/1992. This Appeal came to be dismissed and the judgment and decree passed by the Trial Court was confirmed.

4. Now, appellants-Plaintiffs preferred this Appeal with the contention that the Trial Court has committed error while deciding the shares of the parties after recording the findings that the Plaintiffs are entitled for the share in the property which have come to Uttamrao. In nutshell it is the contention of the Appellants that in the operative part the Trial Court ought to have recorded that Defendant Nos.4 to 7 are entitled for 1/8th share each instead of Defendant Nos.1 to 7.

5. Learned Counsel for the Appellants has drawn attention of

the Court to the order passed by this Court dated 01/02/2022 condoning delay in filing of the Appeal. It is his contention that this Court has taken into consideration *prima facie* involvement of substantial question of law herein and in the peculiar facts of the case the delay though enormously long delay came to be condoned. It is his submission by referring to the judgment of the Trial Court that the findings recorded in the body of judgment by the Trial Court indicate that the subject property was shared by Uttamrao and Shyamrao equally and that the heirs of Uttamrao and Shyamrao were entitled for 1/8 shares each in the suit property. In spite of recording such findings, in the operative part it is directed that the Defendant Nos.1 to 7 i.e. Defendant including heirs of Uttamrao to be entitled for 1/8 share each. According to him, since determination of the shares is contrary to the provisions of the law, it becomes a substantial question of law.

6. Learned Counsel for the Respondents opposed the said contention by pointing out that the Plaintiffs have never raised any challenge to the judgment and decree passed by the Trial Court and hence, without challenging the judgment and decree passed by the Trial Court in First Appeal, it is not open for the Plaintiffs to file Second Appeal. It is also sought to be canvassed that the error, if any, committed by the Trial Court only would be a error fact and not error of

law in order to correct the same in the Second Appeal.

7. Learned Counsel for Respondent Nos.4 and 5 is placed reliance on the judgment of this Court in case of *Hindustan Petroleum Corporation Ltd. Vs. Dilip Prabhakar Dingorkar and another, 2006(3) Mh.L.J., 488*.

8. There is no dispute about that RCS No. 43/1983 came to be decreed in favour of the Plaintiffs. Plaintiffs never challenged the judgment and decree dated 29/08/1991 preferring any Appeal and thus have accepted the same. Further there is nothing from record to indicate that, while supporting the final decree any modification was sought before the First Appellate Court in the challenge to the decree made by Defendants before District Court. As no such request was made and rejected, question of challenge to the same in Second Appeal, does not arise. In such circumstances, appeal itself is not maintainable and deserves to be dismissed.

9. At this stage, without prejudice to the rights and the contention of the Appellants, learned Counsel for the Appellants submits that dismissal of this Appeal shall not come in way of the Appellants to get the operative part of the impugned judgment and decree corrected from the Trial Court.

10. If such remedy is available in the law, dismissal of the appeal shall not become an impediment to the Plaintiffs to seek the same.

11. Since no substantial question of law is involved, Appeal stands dismissed.

(R. M. JOSHI, J.)

ssp