



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL APPLICATION (CAS) NO.45 OF 2025

IN

SECOND APPEAL NO.224 OF 2024

Deepak S/o Shankarrao Dhanwatay

Vs.

Shobha Prakash Dhanwatay and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Shri R.L. Khapre, Senior Advocate assisted by Shri C.S. Dhore,
Advocate for appellant.

Shri A.C. Dharmadhikari, Advocate for respondent nos.1 and 2.

CORAM : M.W. CHANDWANI, J.

ARGUMENTS WERE HEARD ON : 11.02.2025.

ORDER PRONOUNCED ON : 29.04.2025.

1. By the present application, the appellant seeks leave to file second appeal against the judgment and order dated 01.07.2024 passed by the learned District Judge-8, Nagpur in Regular Civil Appeal No.53/2019.

2. Brief background of the case is that, the appellant is the brother of respondent nos.3 and 4, brother-in-law of respondent no.1 and uncle of respondent no.2. Respondent nos.3 and 4 filed a suit bearing RCS No.2195/2012 for declaration that the Will executed by their father in favour of respondent nos.1 and 2 is a false and fabricated document and also sought injunction. The appellant in the suit was defendant no.3. The suit against appellant/defendant no.3 proceeded *ex parte* as no relief was sought by respondent

no.3 and 4 against the appellant and ultimately, the suit came to be dismissed on merits. Respondent nos.3 and 4 filed a first appeal bearing Regular Civil Suit No.53/2019, wherein, the appellant was party respondent no.3. Meanwhile, the appellant had applied before the trial Court for setting the *ex parte* decree aside. However, the said application came to be withdrawn by him. The first appeal came to be dismissed by the impugned judgment and decree dated 09.07.2024. After dismissal of the appeal, the appellant has filed the appeal. Since, he had not filed first appeal, the question of maintainability of the second appeal filed by the appellant arose upon which, the present leave to file appeal has been prayed for.

3. Mr. R.L. Khapre, learned Senior Counsel appearing on behalf of the appellant vehemently submitted that the appellant has interest in the suit property. The judgment and decree in the suit which proceeded *ex parte* against the appellant, directly and substantially affects the right of the appellant. The appellant never received summons of the trial Court and when notice in the appeal came to be served, he came to know about the suit at the stage of appeal. According to him, it is the appellant who is the affected party. If the suit and the first appeal would have been allowed, he would have gotten the consequential relief. Substantial right of the appellant has been affected and therefore, the appellant has every right to file second appeal. To buttress his submission, he seeks to rely upon the

following decisions.

(i) *The Province of Bombay Vs. Western India Automobile Association* ¹,

(ii) *Konda Lakshman Bapuji Vs. State of A.P. and others* ²,

(iii) *Koodi Vs. Baboo and others* ³,

(iv) *Hardevinder Singh Vs. Paramjit Singh* ⁴, and

4. Mr. A.C. Dharmadhikari, learned counsel appearing on behalf of respondent nos.1 and 2 vehemently objected the submissions made on behalf of the appellant. According to him, defendant no.3 who supported the plaintiffs is not being adversely affected by the decree. According to him, he has not challenged the Will executed by their father in favour of the daughter-in-law and the granddaughter. Even he did not file first appeal against the decree of dismissal of the suit because he is not the aggrieved party.

Next, Mr. Dharmadhikari would submit that the appellant applied for setting aside *ex parte* decree before the trial Court but he withdrew the said application and therefore, the appellant has waived and abandoned his right. Another argument of the learned counsel for respondent nos.1 and 2 is that, not having filed the first appeal, the appellant cannot file the second appeal.

1 AIR 1949 BOMBAY 141

2 AIR 1977 AP 427

3 AIR 1959 RAJASTHAN 127

4 2013 AIR SCW 447 : 2013 (9) SCC 261

5. It is a matter of record that a suit was filed by respondent nos.3 and 4 against respondent nos.1 and 2 and no relief was sought against the appellant. Had the suit been allowed, he would have certainly benefited by the decree in the suit as he would have gotten a share in the property of his father which has been bequeathed by him to respondent nos.1 and 2 by way of the Will. Therefore, albeit no relief in the suit was sought against him, the appellant is aggrieved and could have maintained the first appeal. (*See para 3 of Province of Bombay (supra) relied by the appellant.*)

However, the question is, having not preferred the first appeal and having withdrawn the application for setting aside *ex parte* decree before the trial Court, can he be allowed to file the second appeal?

6. By withdrawing the application for setting aside *ex parte* decree and an omission to file first appeal before the first appellate Court, the appellant has abandoned his right to file an appeal against the decree. He cannot be allowed to file second appeal under the pretext of challenging the judgment and decree of the first appellate Court. Permitting such application at the instance of the appellant will amount to permitting the appellant to directly challenge the judgment and decree of the trial Court when he has chosen not to challenge the judgment of the trial Court before the first appellate Court. No doubt, a respondent before the first appellate Court can maintain the second appeal irrespective

of the fact that the appeal was dismissed, provided that he must be affected by the finding recorded by the first appellate Court. (*See case of Konda Laxman Bapuji (supra) relied by the appellant*). In the present case, no new finding has been recorded by the first appellate Court but the findings recorded by the trial Court that the Will executed by deceased Shankarrao in favour of respondent nos.1 and 2 is valid are conferred. The adverse finding, if any, was recorded by the trial Court and not by the first appellate Court. As noticed earlier, the appellant has chosen not to file any appeal before the first appellate Court; rather, he withdrew the application for setting aside *ex parte* decree filed by him before the trial Court and therefore, he cannot maintain the second appeal having abandoned his right to file an appeal before the first appellate Court. A reference can be made to the decision of Madras High Court in the case of *Perumal Vs. Gurunathan and others* ⁵ and the decision of Punjab and Haryana High Court in the case of *Joginder Singh vs Jugal Kishore* ⁶.

7. So far as decision of the Supreme Court in the case of *Hardevinder Singh* (supra) is concerned, in that case a suit was filed by the plaintiff, brother of defendant nos.5 and 6, for declaration that the Will is forged. Defendant no.5 supported the claim of the plaintiff. The suit came to be decreed; whereas, on appeal filed by the beneficiary of the

⁵ AIR 1996 Mad. 415

⁶ (2016) 12 P&H CK 0063: [RSA No. 175/2015 (O&M)]

Will, the first appellate Court allowed the appeal on merits as well as on account of settlement with the appellant, the original plaintiff. In that scenario, the Supreme Court has held that a person prejudicial or adversely affected by the decree can maintain the appeal. Here the question is that, a person who has not preferred the first appeal can maintain the second appeal despite of having withdrawn the application for setting aside *ex parte* decree filed by him before the trial Court. Therefore, the case of ***Hardevinder Singh*** (*supra*) will not be helpful to the appellant. If the appellant was aggrieved by the judgment and decree passed by the trial Court, he should have filed first appeal. Having failed to do so, he cannot maintain the second appeal. As noted earlier, allowing second appeal amounts to indirectly allowing the appellant to challenge the decree of the trial Court against which he has not filed first appeal. Therefore, leave to file the second appeal is refused. Consequently, the second appeal is **dismissed**.

8. Pending application(s), if any, stand(s) disposed of.

JUDGE

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