

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO. 237 OF 2023
WITH
INTERIM APPLICATION NO. 3325 OF 2023
WITH
INTERIM APPLICATION (ST) NO. 35672 OF 2025
IN
APPEAL FROM ORDER NO. 237 OF 2023**

- | | |
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| 1) Ashok Shripati Thule (Since deceased) |] |
| Aged about 48 years, Occ: Service |] |
| Through Legal Heirs |] |
| 1A Sulochana Ashok Thule |] |
| Aged about 58 years, Occ: Housewife |] |
| 1B Vishal Ashok Thule |] |
| Aged about 40 years, Occ: Service |] |
| 1C Ashwini Mahesh Sonar |] |
| Aged about 36 years, Occ: Farmer |] |
| 1D Aboli Ashok Thule |] |
| Aged about 23 years, Occ: Student |] |
| 2) Leela Prakash Thule |] |
| Aged about 42 years, Occ: Household |] |
| 3) Vaishali Mahesh Sathe |] |
| Aged about 25 years, Occ: Household |] |
| 4) Mangala Mangesh Khandale |] |
| Aged about 23 years, Occ: Household |] |
| 5) Ganesh Prakash Thule (Since Deceased) |] |
| Aged about 20 years, Occ: Service |] |
| Through Legal Heir |] |
| 5A Snehal Ganesh Thule |] |
| Aged about 26 years, Occ: Housewife |] |
| 6) Gauri R. Garge |] |
| Aged about 18, Occ: Student |] |
| All residing at House No. 180, A Ward, |] |
| Lonavala, Taluka Mawal, Dist: Pune, Lonavala |] |
| | <u>...Appellants</u> |

Versus

- | | | |
|----|--|------------------------------|
| 1) | Shyam Jayaram Mokashi (Since Deceased) |] |
| | Through Legal Heirs |] |
| | Aged about 80 years, |] |
| | Residing at, Gopal Kunj, A Ward, |] |
| | Bhangarwadi, Lonavala Taluka, Mawal, Dist: |] |
| | Pune |] |
| 1A | Shriya Shyam Mokashi |] |
| | Residing at 201, Rajguru Apartments, |] |
| | Baburao Parulekar Road, Dadar |] |
| | (West), Mumbai - 400 028 |] |
| 1B | Paresh Shyam Mokashi |] |
| | Residing at 601, A- Wing, Rustomjee |] |
| | Elanza, Goregaon, Mumbai - 400 065 |] |
| 1C | Mahesh Shyam Mokashi |] |
| | Residing at Flat No. 1, Shreeramgad |] |
| | Apartments, Lane No. 14, Prabhat |] |
| | Road, Pune 411 004 |] |
| | | <u>...Respondents</u> |

*Mr. Rahul Soman a/w Mr. Suyash More, for the Appellant.
Mr. Aumkar Joshi, for the Respondent.*

CORAM : SHARMILA U. DESHMUKH, J.
DATE : AUGUST 6, 2026

ORDER :

1. The captioned Appeal filed under Order 43, Rule 1(w) of Code of Civil Procedure, 1908 (for short "CPC"), is at the instance of the original Plaintiff being aggrieved by the impugned judgment and order dated 4th October, 2022, passed by the District Judge at Pune in Civil Review Application No. 8 of 2022, allowing the review and setting aside the judgment and order dated 30th November, 2021, passed in Regular Civil Appeal No. 718 of 2012.

2. By the impugned judgment, the Appellate Court has allowed the Appeal No. 718 of 2012 and quashed and set aside the judgment and decree dated 19th April, 2012, passed by the Civil Judge, Junior Division, Vadgaon, Mawal, in Regular Civil Suit No. 55 of 1989.

3. A preliminary objection has been raised to the maintainability of the appeal by the Respondents. The Counsel were therefore heard on the issue of maintainability before the hearing on merits.

4. Mr. Joshi, learned counsel for the Respondents, would submit that the Appeal from Order is not maintainable as the provisions of Clause (w) of Rule 1 of Order XLIII of CPC has been deleted by the Bombay Amendment published in the Government Gazette on 11th March, 1926 and by notification of 1st November, 1966, published on 6th October, 1966.

5. He would further submit that in view of an error apparent on record, the Appellate Court had rightly exercised the jurisdiction of review and the impugned order is not merely an order granting review but is a composite order setting aside the decree of the Trial Court in exercise of appellate powers, as against which a Second Appeal would be maintainable. In support, he relies upon decision in the case of ***Kunversi Ratansi Patel vs Pitamberdas Ramdas And Others***¹.

6. Mr. Soman, learned counsel for the Appellant, would submit that the Appeal From Order would be maintainable and the deletion of

1 AIR 1927 Bombay 599

Clause (w) of Order XLIII Rule 1 by the notification dated 6th October, 1966 would not have any effect on the maintainability in view of the Code of Civil Procedure (Amendment) Act, 1976 (for short '**Amendment Act**'), which received the assent of the President on 1st September, 1976. He submits that Section 97 of the Amendment Act of 1976, which is repeal and saving clause provides that any amendment made by the High Court before the commencement of the Amendment Act of 1976 shall except insofar as such amendment is consistent with the provisions of the principal Act, as amended by the Amended Act, shall stand repealed. He submits that in view thereof the notification of 6th October, 1966 deleting the Clause (w) of Rule 1 of Order XLIII stands automatically repealed as the same is inconsistent with the provisions of the principal Act as amended.

7. He submits that the Amendment Act amended Order XLVII by inserting Rule 4 which specifically provides for notice to be given to the opposite party before the application for review is granted and the Parliament did not delete Rule 1(w) of Order 43, which indicates the legislative intent that appeals against order granting review applications shall continue to be maintainable. He submits that in the case of **Waman Ramchandra Bhayde And Others vs Kanta Narayan Patel And Others**², this Court has categorically held that an Appeal Order 43 Rule 1(w) of CPC is permitted against an order granting review

² 2013(1)Mh.L.J. 113

application.

8. He would further submit that the review court has committed a grave error in passing the impugned order dated 4th October, 2022 without any re-hearing on the merits of the Appeal as mandatorily contemplated under Order XLVII Rule 8 of CPC, and is unsustainable order as against which the Appeal From Order is maintainable.

9. I have given my thoughtful consideration to the submissions canvassed.

10. The present Appeal has been filed under Order 43 Rule 1(w) of CPC which provides that an Appeal shall lie from an order under Rule 4 Order XLVII granting an application for review. In 1976, the Code of Civil Procedure (Amendment) Act, 1976 was enacted for amending CPC and Limitation Act. By the Bombay Amendment to CPC, Clause (w) of Rule 1 of Order XLVII came to be deleted on 9th March, 1926. Section 97(1) of the Amendment Act, which is the repeal and saving clause reads as under :

"Any amendment made, or any provision inserted in the principal Act by State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, shall stand repealed"

11. The language of Section 97(1) of the Amendment Act clearly spells out that any amendment which can be termed to be inconsistent with the provisions of the principal Act as amended by the Amendment

Act, stands repealed. The reference in Section 97(1) of the Amendment Act to a High Court is by reason of Section 122 of the CPC, which permits the High Court to make rules regulating their own procedure and the procedure of the civil courts subjects to their superintendence, and may by such rules annul, alter or add to any of the rules contained in the First Schedule to the CPC. The Bombay amendment was exercise of powers under Section 122 of CPC, which omission can no longer be sustained in view of Section 97(1) of Amendment Act.

12. The issue as regards maintainability of appeal against an application granting review is no longer *res integra* and stands decided in ***Waman Ramchandra Bhayde And Others vs Kanta Narayan Patel And Others*** (supra). The Co-ordinate Bench in that case considered the statutory provisions governing review and appeal against order granting review in the context of challenge to an order granting review application and permitting amendment of written statement before the Appellate Court. After noting the statutory provisions, the Court held as under:

“10. Scope of present Appeal needs to be found out within the frame work of the provisions of law and facts of the matter at hand are not determining for the said purpose. Order 47, Rule 1 Civil Procedure Code permits Application for Review of Judgment and Order to be filed, if contingencies stipulated therein exist. Rule 7 specifically lays down that Order rejecting Review is not appealable but order granting such Application can be objected to at once to by the Appeal From Order granting the same or then in an Appeal from the Decree or Order finally passed or made in the suit. Other relevant provision is Order 47 Rule 8. The said provision reads as under:

ORDER XLVII RULE 8 , CIVIL PROCEDURE CODE

"Registry of application granted, and order for rehearing: When an application for review is granted, a note thereof shall be made in the register and the Court may at once rehear the case or make such order regarding to the rehearing as it thinks fit.

11. Rule 8 therefore clearly shows that when an Application for review is "granted", its note is required to be taken in the Register. These words "granted" need to be understood in light of provisions of Order 47, Rule 7, Civil Procedure Code, where it is clarified that Order rejecting Application is not appealable and Order granting the same can be appealed from.

12. The latter part of Rule 8 provides that where an Application is granted the Court granting it may "at once" rehear or make such Order in regard to "rehearing" a Suit as it thinks fit. Thus, in the scheme of Rule grant of Review application and consequential rehearing are expected to be two independent exercises. The Court is permitted and empowered to undertake this latter exercise of "rehearing" at once, but merely because it is taken up at once, it cannot and does not cease to be an independent or separate existence.

13. The Appeal is permitted against Order granting Application for Review under Rule 7. The latter part of Rule 7 shows that such an Order granting Review can also be questioned in a substantive Appeal from Decree or Order finally passed or made in the suit. This Decree or Order finally passed comes into existence only when consequential rehearing is completed by such Court either at once or at some other date. When Order 47, Rules 7 and 8 are read together, it is clear that Appeal permitted under Order 47 Rule 7 read with Order 43 Rule 1(w) of Civil Procedure Code is only against an Order granting Review. This is an order which shows satisfaction of the Court about fulfillment of the requirements of Order 47 Rule 1 of Civil Procedure Code, and therefore, necessity of consequential rehearing of the issue on merits. Adjudication on merits which is after rehearing cannot be subjected to Appeal under Order 47, Rule 7 read with Order 43 Rule 1(w) Civil Procedure Code. Such challenge on merits after rehearing is governed by Section 96 read with Order XLI CPC. (Emphasis supplied)."

13. The decision is an authority for the proposition that an Appeal is permitted under Order XLVII, Rules 7 and 8 read with Order 43 Rule (1) (w) only against an order granting review. The course is not permissible where there is an adjudication on merits after rehearing.

14. The statutory framework of review jurisdiction as contained in Order XLVII is that on presentation of review application, notice is issued to the other party and if the Court is satisfied, the application for

review is granted. The next stage is under Order XLVII Rule 8, which enables the Court to at once re-hear the case or make such order in regard to the re-hearing as it thinks fit. Once the review is granted, the earlier order or decree is revived and matter is re-heard on merits. Upon such rehearing on merits, it may result into sustaining the former decree or may be a variation of the former decree. The right made available against the order granting review is either to challenge the order by filing Appeal under Order 43 Rule 1(w) or file a substantive Appeal from Decree or Order finally passed or made in the Suit.

15. As held in ***Waman Ramchandra Bhayde And Others vs Kanta Narayan Patel And Others*** (supra), the rehearing can take place at once or later and because the rehearing takes place, the same does not cease to be an independent exercise. The consequence of an immediate rehearing does not clothe the order on merits as an order granting review. Resultantly, the order is a Decree or Order passed in Appeal, which can be challenged under Section 100 of CPC.

16. In light of the statutory background, the present facts will have to be examined to ascertain whether the impugned order is an application granting review, or adjudication on merits after the grant of application for review.

17. In the present case, by judgment and order dated 19th April, 2012, the Trial Court dismissed the suit as well as the counterclaim, and being

aggrieved by the dismissal of the counterclaim, the original Defendant filed Civil Appeal No. 718 of 2012 before the First Appellate Court, which came to be dismissed by judgment and order dated 30th November, 2021, against which the original Defendant filed Civil Review Application No. 8 of 2022 and by the impugned judgment and order dated 4th October, 2022, the Civil Revision Application was allowed and the entire Appeal No. 718 of 2012 was allowed.

18. Perusal of the impugned order dated 4th October, 2022 indicates that the Appellate Court framed the necessary issues as to whether the judgment dated 30th November, 2021 demonstrate any error on the face of the record. The other issues framed were as regards the ownership rights of the Respondent in the subject property.

19. Insofar as Issue No. 1 is concerned, the Appellate Court held that while deciding Appeal No. 718 of 2012, the observation was that on 4th December, 1989 there was an order that written statement is not filed and without setting aside the said order, the written statement was taken on record. However, in fact, the order of 4th December, 1989 was set aside, which was not noticed by the Appellate Court and therefore there is error apparent on record.

20. The course which was required to be adopted by the First Appellate Court was thereafter, as contemplated by Rule 8 of Order XLVII, to rehear the case or make such order in regard to rehearing as it

thinks fit. This rehearing could have been taken place at once and the impugned order makes it clear that the Court has thereafter proceeded to rehear the matter and has passed the impugned judgment as under :

"१. पुनर्विलोकन अर्ज मंजूर करण्यात येत आहे आणि नियमित दिवाणी अपिल क्रमांक ७१८/२०१२ बाबत या न्यायालयाने दिलेला दिनांक ३०/११/२०२१ रोजीचा न्यायनिर्णय व हुकूमनामा रद्द करण्यात आला असून प्रस्तुत अपिल खालीलप्रमाणे मंजूर करण्यात आले आहे:-

अ) नियमित दिवाणी अपिल क्रमांक ७१८/२०१२ हे मंजूर करण्यात आले असून विद्वान दिवाणी न्यायाधीश, कनिष्ठ स्तर, वडगांव मावळ यांचा नियमित दिवाणी मुकदमा नंबर ५५/१९८९, निकाल तारीख १९/०४/२०१२ हा न्यायनिर्णय व हुकूमनामा रद्द करण्यात येत आहे आणि दावा खालीलप्रमाणे मंजूर करण्यात येत आहे.

ब) लोणावळा नगरपरिषद येथील हद्दीतील घर क्रमांक २३४ याचे क्षेत्र ७६० चौरस फुट याची दक्षिण उत्तर लांबी २४.६ चौरस फुट आणि पूर्व पश्चिम लांबी १७.६ फुट या वादमिळकतीचा ताबा वादींनी प्रतिवादीस तीन महिन्यांचे आत दयावा.

क) वादींनी, प्रतिवादीला वादमिळकतीचे दावा दाखल तारखेपासून ते पुढे दावा मिळकतीचा ताबा देईपर्यंतचे दरम्यानचे उत्पन्न दयावे. त्यासाठी दिवाणी प्रक्रिया संहिता आदेश २१ नियम १२ प्रमाणे चौकशी अर्ज प्रतिवादींनी दाखल करावा."

21. The impugned order not only allowed the review application but also quashed and set aside the earlier order of 30th November, 2021 and, the judgment and decree of the Trial Court dated 19th April, 2012 and the Plaintiff was ordered to hand over possession of the suit property to the Defendant within a period of three months and pay mesne profits.

22. The impugned order cannot be characterized as an order granting an application for review, but is an order passed after rehearing on merits consequent to the application granting review. Merely because the re-hearing took place at once, the order does not cease to be an adjudication on merits. By reason of the impugned order, there is a fresh decree which has come into existence, which can be challenged only by way of a Second Appeal under Section 100 of CPC.

23. The option available under Rule 7 of Order XLVII, is against an order granting review application, which indicates separate and independent existence of power of review and the appellate powers. The impugned order is consequence of exercise of appellate powers.

24. The impugned order dated 4th October, 2022 is thus a judgment passed upon rehearing on merits as against which Appeal will lie under Section 100 of CPC.

25. In light of the above, the Appeal From Order is not maintainable against the impugned judgment and order dated 4th October, 2022. Resultantly, the Appeal is dismissed with liberty to adopt appropriate proceedings.

26. Considering that the substantial time was consumed in prosecuting the present Appeal From Order which is now being held by this Court to not be maintainable, in the event, the Second Appeal is filed, the Appellate Court to consider the provisions of Section 14 of Limitation Act for the purpose of computing the period of limitation.

(SHARMILA U. DESHMUKH, J.)