

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.9 OF 2016

Krushna Appa Pednekar & anr. ... Appellants

Vs.

Balkrishna Appa Pednekar & ors. ... Respondents

Mr.Ruturaj Pradip Pawar a/w Mr.S.S. Patwardhan for the Appellant
Mr.K.L. Parab for Respondent No.1

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **2nd FEBRUARY, 2016**

P.C.:

1. This Appeal from order is directed against the order dated 13.4.2015 passed by the Principal District Judge, Sindhudurg, Oros in Regular Civil Appeal No.19 of 2010 thereby remanding the matter to the learned Civil Judge, Junior Division, Vengurla. The appellants in the present appeal are the original plaintiffs in Regular Civil Suit No.48 of 1997, who had filed the suit for possession and perpetual injunction in respect of the suit property and against the present respondents / original defendants in the said suit. (For the sake of brevity, the parties are referred to by their original status). The learned Civil Judge, Junior Division, Vengurla dismissed the suit against which the appeal was preferred by the plaintiffs. After hearing the appeal, the learned District Judge framed two additional issues and remanded the matter directing the trial Judge to reconsider all other issues

after giving an opportunity to both the parties to lead evidence – documentary as well as oral and expedited the same within six months. The learned Counsel for the plaintiffs has submitted that the trial Court framed 9 issues, out of which issue No.1 and 2 are decided in favour of the plaintiffs. He argued that the defendants did not file cross-objection. Under such circumstances, the finding given in favour of the plaintiffs cannot be reconsidered or reversed when there is no challenge to those findings. He submitted that the plaintiffs have relied on the decision of the District Judge in the probate proceedings i.e., MCA No.40 of 1990 decided on 15.12.2005 by the Civil Judge, Senior Division, Sindhudurg, in respect of the will of the father of the plaintiffs dated 1.4.1985. He submitted that unless the said order is challenged by the defendants, the District Court in appeal cannot disturb the said finding while dealing with this suit. He submitted that the said order is not challenged by the defendants.

2. The learned Counsel for the defendants partly supported the judgment and order passed by the learned District Judge i.e., the impugned judgment and order dated 13.4.2015 passed in Appeal. However, he pointed out that in the appeal, the learned District Judge did not give any finding in respect of the issues which were earlier decided by the trial Court. He pointed out that the learned District Judge in his judgement in paragraph 9 has framed two issues and these issues are to

be decided as such issues were not framed by the trial Court.

3. Perused the judgements of the trial Court and the District Court. Defendant No.1 claims to be a step brother of the plaintiffs. The District Court has framed two issues as to whether the defendant No.1 proves his mother Champubai was the first wife of the deceased Appa Pednekar and secondly, whether defendant No.1 proves he is a legitimate son of Laxman and Champubai. Thus, it appears that by framing these two issues, the District Court has put burden to prove these two issues on defendant No.1. The trial Court has framed in all 9 issues and gave a finding on all these issues as per the reasoning mentioned therein. The learned District Judge has reproduced the issues and gave his finding that all these issues would not survive. The learned Counsel for both the sides agreed that the findings given by the trial Court on these issues need not be disturbed if the matter is remanded. The evidence on the two additional issues only can be tendered and to that extent, both the parties agreed that they be given opportunity to lead evidence before the trial Court.

4. In view of this, the order passed by the learned District Judge of remand is considered as under Order 41 Rule 25 of the CPC. The finding given by the trial Court in all the other issues is not to be disturbed by the

trial Court but after framing the two additional issues, the evidence be allowed to be led by the parties on this limited point. To that extent only, the order of the District Court of remand is maintained and about rehearing and redeciding the other issues, the impugned order is hereby set aside. Parties to appear before the trial Court on 22.2.2016 at 11am and the trial Court to proceed with the matter on this limited point and endeavour to complete the trial and decide the same before 30.6.2016. Parties to cooperate with the trial Court in completing the trial in time.

5. Appeal from order is disposed of accordingly.

(MRIDULA BHATKAR, J.)