

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER No. 404 OF 2017
WITH
CIVIL APPLICATION NO. 523 OF 2017**

Sou. Reshma Shivaji Khot & Ors. ... Appellants
Vs.
Smt. Sulabai Laxman Shirole ... Respondent

Mr. Umesh Pawar a/w. Utkarsh Desai i/b. Mr. Prashant Bhavake,
Advocate for the appellants.
Mr. Dilip Bodake, Advocate for the respondent.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **22nd September, 2017.**

P.C.:

This Appeal from Order is directed against the judgment and order dated 20th October, 2015 passed by the Ad-hoc Judge-2, Kolhapur in Regular Civil Appeal No. 123 of 2009 thereby remanding the matter before the trial Court.

2. The appellants are original plaintiffs, who filed the Regular Civil Suit No. 70 of 2003 for declaration and injunction that they are the owners of the suit property on the basis of Will dated 30th July, 1993 executed by Late Rakhmabai Narayan Shelke, who is the grandmother of the plaintiffs. The suit is filed by the appellants/plaintiffs against their paternal aunt/daughter of

Rakhmabai, who claimed her right in the suit property on the basis of subsequent Will dated 18th February, 1996. The suit was decreed against which the respondent/original defendant no. 1 filed Regular Civil Appeal No. 123 of 2009. The said Appeal was argued by the counsel for both the parties. After hearing the submissions, the learned Appellate Judge held that the trial Court has committed an error in not framing proper issues and therefore, the learned Judge invoked his power under Order 41 Rule 23(A) of Code of Civil Procedure and remanded the Appeal by setting aside the judgment and order dated 27th February, 2009 with a direction that the trial Court to frame additional issues as mentioned in paragraph 18 of the judgment and to decide the suit afresh. The trial Court is also directed to give permission to both the parties to adduce evidence, if necessary.

3. In paragraph 18 of the impugned judgment, following issues were framed:

- (i) Whether the defendant no. 1 proves that will deed dated 18th February, 1996 executed by Rakhamabai is valid and legal?
- (ii) What is the effect of subsequent Will on the earlier Will

dated 30th July, 1993?

(iii) Whether the suit is within limitation?

4. Being aggrieved by the judgment and order dated 20th October, 2015 passed by the Appellate Court, the appellants/plaintiffs filed this Appeal from Order under Order 41 Rule 23(A) of CPC. Hence, the substantial question of law is framed as follows:

“Whether the Appellate Court has committed error in remanding the matter on the ground that the trial Court has failed to frame necessary issues?

5. The learned counsel for the appellants has submitted that the respondent/defendant no. 1 in fact has led evidence on the basis of subsequent Will dated 18th February, 1996. The respondent did not produce the original Will but has produced photocopy of the Will. The learned counsel further argued that sufficient evidence is tendered by both the parties which is before the Appellate Court and the Appellate Court on the basis of that evidence can proceed with the matter. It is not necessary for the Appellate Court to remand the matter back to the trial Court on this issue. The learned counsel submitted that the issue of limitation, being a legal issue, the

Appellate Court itself can frame additional issue and call upon the parties to argue the matter. In support of his submissions, the learned counsel relied on the judgment of Single Judge of this Court in the case of **Rameshkumar Balubhai Sukhadia & Anr. vs. Kumwardevi Shamlal Rathor (Decd.) through LRs & Anr., reported in 2010 (7) Mh. L.J. 249.**

6. Per contra, the learned counsel for the respondent supported the order of the Appellate Court. He pointed out the portion in the written statement where the respondent/defendant has averred about the subsequent Will and right of the respondent/defendant in the suit property on the basis of said subsequent Will. The learned counsel submitted that point of limitation was also raised by the defendant in the written statement. He submitted that it was the duty of the Court to frame issue to that effect and as the issue was not framed in respect of proof of subsequent Will, the defendant did not adduce requisite evidence.

7. Heard the submissions, read the impugned judgment of the Appellate Court so also the trial Court, plaint and the written statement. The appellants/plaintiffs claim their right on the basis of

first Will dated 30th July, 1993. The dispute pertains to the property which belongs to Rakhmabai, grandmother of the plaintiffs and mother of respondent/defendant. The respondent/defendant is having the counter claim in the suit property on the basis of subsequent Will dated 18th February, 1996. The respondent/defendant has set up her defence in the written statement by making such averments. Hence, it was necessary for the trial Court to frame a separate issue in respect of proof of validity of the subsequent Will and on which the burden lies on the respondent/defendant. Similarly, when the point of limitation is raised, that issue ought to have been framed.

8. In the case of **Rameshkumar Balubhai Sukhadia** (*supra*), the Single Judge of Bombay High Court while dealing with the cope of Order 41 Rule 23A and Section 107(2) of the Code of Civil Procedure on the point of powers of the Appellate Court remanding the matters, has held that if the trial Court has not considered any legal aspect then there is no impediment for the Appellate Court not to adjudicate the legal points. It is not necessary to remand the matter back to the trial Court on legal aspects, as the Appeal is a continuous proceedings of the suit.

9. The propositions laid down in the case of **Rameshkumar Balubhai Sukhadia** (*supra*) cannot be disputed, however, in the present case, the proof of subsequent Will is factual issue and similarly, question of limitation is always a mixed question of facts and law.

9. After considering the submissions and during the course of discussion, I am of the view that by remanding the entire matter and making the parties to lead evidence from the beginning will be cumbersome on the parties, as the plaintiffs and defendant no.1 are involved in this litigation since 2009. Thus, the order directing the trial Court to frame additional issues and allowing the parties to lead evidence on the same issue is legal and correct. It is not necessary to remand the matter under Order 41 Rule 23A of CPC, however, as the Appellate Court has framed the issues, these issues can be referred to the trial Court and the Appellate Court and trial Court to follow the procedure laid down under Order 41 Rules 25 and 26 of the Code of Civil Procedure. Thus, the evidence recorded by the trial Court of the plaintiffs, defendant and their respective witnesses shall remain as it is as a part of the appeal proceedings, as issue nos. 1 and 3 which are framed in paragraph 18 of the judgment of the

Appellate Court are to be referred to the trial Court. Hence, following order is passed:

- (i) The order of the Appellate Court remanding the matter to the trial Court is hereby set aside;
- (ii) The Appellate Court is directed to refer issue nos. 1 and 3, which are framed in paragraph 18 of its judgment,, to the trial Court and further directions under Order 41 Rule 25 are to be given;
- (iii) The evidence recorded by the trial Court of the plaintiffs and defendant shall remain as part of the proceedings of the Appeal.

10. Appeal from Order is disposed of. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)