

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO.318 OF 2011

1) Khanderao Damu Pingale
2) Smt. Chandrabhaga Khanderao
Pingale,
Both R/a: chandsi Taluka and
District-Nashik.

...Appellants

Versus

1. Shahadu Walu Pingale
2. Bapu Walu Pingale
3. Sunderabai Ambadas Pingale
4. Chandrabhan Ambadas Pingale
5. Sudam Ambadas Pingale
6. Sheelbai Dashrath Mhaisdhune

All r/o. Chandsi, Taluka & District-
Nashik.

...Respondents

.....

Mr. Sandesh D. Patil for the Appellants.

Mr. Sharad T. Bhosale i/b. Mr. Dilip Bodke for the Respondent Nos.1 to
6.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 13th APRIL, 2018.

ORAL JUDGMENT:-

The Appellants herein, who were the Defendants in the Regular Civil Suit No.219 of 2007 have challenged the judgment and order dated 11th January, 2011 in Civil Appeal No.156 of 2008. By the impugned judgment, the learned District and Sessions Judge, Nashik set aside the judgment and decree dated 25th June, 2008 passed by the

learned Civil Judge, Junior Division, 8th Court, Nashik in Regular Civil Suit No.219 of 2007 and remanded the matter for directions to allow the Respondent -Plaintiff to amend the plaint, to frame the issues as stated in paragraph 9 of the impugned judgment, if necessary to refer the issue to Tehasildar and upon receipt of records from Tehasildar, to decide the suit in accordance with law.

2. The Respondents, who were the Plaintiffs in the suit and the Appellants, who were the Defendants in the suit shall be hereinafter referred to as Plaintiffs and Defendants respectively.

3. The dispute in the suit is in respect of the property surveyed under No.6, Chandeshi, District -Nashik admeasuring 20 acre 39 R. The suit property was originally owned by one Raghunath Shankar Daspute and was purchased by Valu Dnyandeo Pingale and Damu Dnyandeo Pingale by deed of sale dated 25.1.1951. Plaintiffs are the children of Valu Pingale and Defendant No.1 is the son of Damu Pingale.

4. It is not in dispute that during the life time of Valu and Damu Pingale a portion of the suit property admeasuring 1.60 R was sold to Keru Bhaurao Suryawanshi and Yashwant Girija Suryawanshi

and portion of 1.20 R was sold to one Sivram Dheringe. The Plaintiffs claim that out of the remaining property admeasuring 5.67 R they are entitled for 2.83.5 R and the Defendants are entitled for 2. 83.5 R.

5. The Plaintiffs claimed that the suit property was not partitioned. They further claim that though they are entitled for an area admeasuring 2.83.5 R only a portion admeasuring 1.61 R has been shown in their name whereas 3.63 R has been shown in the name of the Defendants. The Plaintiffs therefore have sought the following reliefs :-

“a. The suit property mentioned in para 1 which is in the name of Defendant out of which the area of 2.83.5R to be declared in the name of Plaintiff and the Revenue Officers be directed to make appropriate changes in their records.”

6. The Defendants claim that the suit property was partitioned during the lifetime of father of the Plaintiffs. The western portion of land admeasuring 2.63 R which is surveyed under Gat No.6/2B 1 was allotted to the legal heirs of Valu i.e. the Plaintiffs and the eastern portion admeasuring 3.02 R surveyed under 6/2B 2 has been allotted to Defendants. The Defendants have claimed that since the date of the partition, they are in exclusive possessions of the respective portions of property, as per the allotment of partition deed dated 16.8.1975.

7. The Defendants have stated that subsequently their father has executed another partition deed and allotted the said property to them. The Defendants claim that they are in exclusive possession of the said property admeasuring 3.02 R since 16.8.1975. They have raised a plea of limitation.

8. Upon appreciating the evidence adduced by the respective parties the learned Trial Judge dismissed the Regular Civil Suit No.219 of 2007 mainly on the ground that the Plaintiffs had failed to prove that they are entitled for an area of 2.83.5 R and further held that the suit was barred by law of limitation. Aggrieved by the said judgment and decree, the Plaintiffs herein preferred a Civil Appeal No.156 of 2008 before the District Court, Nashik. By the impugned order dated 11.1.2011 the learned Extra Joint Ad-hoc District Judge, Nashik, allowed the appeal and set aside the judgment and decree dated 18th July, 2008. The learned Ad-hoc District Judge, Nashik, remanded the suit with liberty to the Plaintiffs to amend the plaint and give findings on the issues formulated in paragraph 9(i) and 9(ii) of the judgment. The Defendants have challenged this order of remand in the present Appeal.

9. Mr. Sandesh Patil, the learned counsel for the Defendants has submitted that the Appellate Court has exercised provisions of Order XLI Rule 23 and 23 A of the Code of Civil Procedure in a casual manner. He has submitted that the learned Trial Judge had given a categorical finding on the issue of limitation and that without dispensing with this finding the learned Appellate Court has remanded the matter with leave to the Plaintiffs to amend the suit when in fact the Plaintiffs had not filed any amendment application. It is his contention that the learned Appellate Court has remanded the suit without legal provisions.

10. Mr. Sharad Bhosale, the learned counsel for the Plaintiffs has submitted that there is no dispute as regards the share of the Plaintiffs. He has submitted that the dispute is only regarding the correctness of the survey number. He submits that though the Plaintiffs are entitled for total area of 2.83.5 R the survey entry shows much lessor area and that the said error needs to be rectified.

11. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

12. The short point that falls for my consideration is whether

the Appellate Court was justified in remanding the suit with direction to the Trial Judge to allow the Plaintiffs to amend the plaint and to frame additional issues as formulated in paragraph 9(i) and 9(ii) of the impugned judgment.

13. At the outset, it may be mentioned that the powers of remand are governed by provisions of Rule 23, 23A and 25 of Order XLI of the Code of Civil Procedure. A plain perusal of the aforesaid provisions would indicate that Court can invoke powers under Rule 23 of Order XLI when the Trial Court has disposed of the suit on a preliminary issue and the Appellate Court has reversed it and considered it fit to remand the case for fresh disposal. Order XLI, Rule 23A, which has been inserted in the Code by Act No.104 of 1976, empowers the Appellate Court to remand the suit to the trial Court, when the suit is disposed of otherwise than on a preliminary issue and the decree is reversed in appeal and retrial is considered necessary. Rule 24 enables the Appellate Court to resettle the issues, if necessary and determine the suit finally on the basis of the evidence on record, if such evidence is sufficient to pronounce the judgment. The object of this provision is to obviate the delay and ensure finality to the proceedings.

14. Order XLI Rule 25 of the Code empowers the Appellate Court to frame issues and refer them for trial to the Court from whose decree the appeal is preferred. The powers under Rule 25 can be invoked by the Appellate Court when the Court that passed the decree has omitted to frame or try any issue, or to determine any question of fact. While remitting the issues, the Appellate Court has powers to direct the Trial Court to take additional evidence on such issues. When such issues are remitted in exercise of powers under Order XLI Rule 25 of the Code, the Appellate court continues to be in seize of the matter and in such case the Trial Court has to try the issues referred by the Appellate Court and return the evidence to the Appellate Court together with its findings and reasons thereon. The Appellate Court thereafter has to decide the Appeal on the additional evidence and additional findings recorded by the Trial Court.

15. In the instant case, the trial Court had not disposed of the suit on a preliminary issue but had disposed of the same on merits. Hence, provisions of Rule 23 Order XLI were not attracted. It is seen that the learned Appellate Court has also not taken recourse to Rule 25 of Order XLI but in exercise of powers under Rule 23 A of the code, has

set aside the decree and has remanded the suit.

16. The reasons for ordering remand are spelt out in paragraph 9 of the impugned order which read thus:-

“9. It is also clear from the pleadings in the suit of the plaintiffs that instead of putting their case as per revenue record, they have unnecessarily made allegations against the defendants. Therefore it is also necessary for the plaintiffs to amend their plaint suitably for seeking directions of learned lower court in this regard. Thereafter it is necessary for learned lower Court to frame the additional issues as under:-

i) “Whether the record of landed property of plaintiffs old Survey No.6/2-B-1 admeasuring 2 H 61 R, P.K. 2 R assessment Rs.13.56 and defendants 6/2-B-2 admeasuring 3 Hectar 00 R, P.K.2 R of eastern side assessment Rs.17.00 were correctly shown in their possession after the Consolidation Scheme?

ii) Whether it is necessary to refer the issue to the Tahsildar for correction of revenue record accordingly?

Therefore it is necessary to remand the suit for giving an opportunity to both the parties to file the concerned record if necessary for referring the said issue to the Tahsildar and after receipt of record of compliance from Tahsildar, the learned lower Court is directed to decide the suit giving opportunity to both the parties....”

17. The Appellate Court therefore, remanded the suit with liberty to the Plaintiffs to amend the plaint and directed the trial court to give findings on the issues which are formulated in paragraph 9(i) and 9(ii) of the order. It is pertinent to note that the Plaintiffs had

approached the Court with a specific case that the property was not partitioned. The Plaintiffs had claimed that they are entitled for partition of land admeasuring 2.83.5 R, which is recorded in the revenue records in the name of the Defendants. As stated earlier, the Defendants had claimed that the property was already partitioned during the life time of the father of the Plaintiffs. The Defendants have claimed that the respective portions allotted to them are separately surveyed and are separately and exclusively possessed by them. The Defendants had also raised the plea of limitation. The Plaintiffs had proceeded with the suit knowing fully well the defence set up by the Defendants. They had not sought to amend the pleadings either before the trial court, the appellate court or before this Court. This being the case, the Appellate Court was required to decide the appeal on its own merits, on the basis of the pleadings and the evidence on record. The learned Judge was therefore not justified in permitting the Plaintiffs to amend the plaint and further in framing the issues, which are not based on the pleadings.

18. It is also pertinent to note that the Trial Court had rendered a specific finding that the suit is barred by law of limitation. The Appellate Court has set aside the judgment of the Trial Court, without

rendering any findings on the issue of limitation. The Appellate Court has in fact adjudicated upon grounds which were not set out by the Plaintiffs in the appeal memo. In my considered view, the learned Judge has remanded the appeal mechanically and casually by ignoring the relevant provisions relating to remand. As held by the Apex Court in *Municipal Corporation, Hyderabad, vs. Sunder Singh (2008) 8 SCC 485* powers of remand cannot be exercised only because the appellate court finds it difficult to deal with the entire matter. If it does not agree with the decisions of the Trial Court, it has to come with a proper finding on its own. The Appellate Court cannot shirk its duties.

19. In the instant case, the learned Judge has remanded the suit ignoring these well settled principles. The order of remand therefore cannot be sustained.

20. Under the circumstances, the Appeal is allowed. The impugned judgment dated 11th January, 2011 is set aside. The Regular Civil Appeal No.156 of 2008 stands restored to the file. The Appellate Court is directed to decide the appeal afresh after hearing the respective parties. It is made clear that this Court has only considered the legality of remand and has not expressed any opinion on the merits of the issues involved in the suit or appeal. The District Judge shall

therefore decide the appeal on its own merits and in accordance with law.

21. Parties are directed to appear before the Appellate Court on **6.6.2018 at 11.00 a.m.**

(SMT. ANUJA PRABHUDESSAI, J.)