

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

**REVIEW PETITION NO. 7 OF 2019
IN
SECOND APPEAL NO. 742 OF 1992**

Narayan Babaji Chavan and ors.

....Petitioners

V/s.

Datta Keshav Chavan and ors.

....Respondents

Mr. Tanaji Mhatugade for the petitioners.

Mr. Surel S. Shah for respondents / original appellant.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 25th JUNE, 2019.**

P.C.:-

. The petitioners herein who are the original respondents in Second Appeal No.742/1992 have sought review of the order dated 04/02/2019 whereby this Court had quashed and set aside the impugned judgment dated 07/08/1992 in Regular Civil Appeal No.78/1987 and remanded the matter to the Additional District Judge, Kolhapur with directions to decide the application under Order 41 Rule 27 of the CPC after hearing the respective parties and keeping in mind the scope of application under Order 41 Rule 27 of the CPC. In the event the application was allowed, the learned District Judge was directed to record additional evidence by giving an opportunity to the plaintiffs to cross examine the witness and thereafter to decide the

appeal on merits within a period of six months from the date of receipt of the order.

2. The dispute between the parties was in respect of the agricultural land under Survey Nos.291 sub Division 1 and 2, 292 sub division 5, 7, 9, 12 and 14 and sub division 294/2 and a house bearing Grampanchayat No.1070-B situated at village Mudshingi, Taluka – Karveer, District – Kolhapur (shall be hereinafter referred to as 'the suit property').

3. The petitioners claimed that they had 2/3rd share in the suit property whereas, the defendant nos.2 to 6 were entitled for 1/3rd share in the suit property and had therefore sought partition and possession of 2/3rd share. The original defendant no.1 had claimed exclusive right to the entire property on the basis of the Gift Deed dated 05/06/1970. The Trial Court has held that the defendant no.1 had not examined an attesting witness to prove the gift deed and hence the said gift deed could not be read in evidence. The Trial Court, therefore, decreed the suit holding that the plaintiffs were entitled for 2/3rd share in the suit property.

4. In an appeal filed before the District Court, the defendant no.1 had filed an application under Order 41 Rule 27 of the CPC seeking leave to permit him to examine the attesting witnesses. The learned District Judge dismissed the application as well as the appeal mainly on the ground that the claim of the defendant no.1 was barred on the principles of constructive res judicata.

5. The order of the District Court was challenged before this Court in Second Appeal No.742/1992. The Second Appeal was disposed of by judgment and order dated 04/02/2019. It is pertinent to note that in the course of the hearing, the learned counsel for the respondents herein had made a statement that the impugned judgment was passed without disposing of the application under Order 41 Rule 27. The said statement was not controverted by the learned counsel for the petitioner. Non disposal of the application under Order 41 Rule 27 of CPC was one of the grounds of remand.

6. Mr. Tanaji Mhatugade, learned counsel for the petitioners submits that the matter was remanded only for the purpose of deciding the application under Order 41 Rule 27 of CPC. He submits that after the remand order, the petitioners have learnt that the application

under Order 41 Rule 27 was already disposed of by order dated 07/08/1992. He therefore contends that the remand order needs to be reviewed / recalled.

7. Mr. Surel Shah, the learned counsel for the respondent has conceded that the application under Order 41 Rule 27 was disposed of on 07/08/1992. He stated that he had made an erroneous statement on the basis of erroneous instructions given by the party as well as by the advocate on record. He has tendered apology for making a wrong statement.

8. In the light of above statement and fact situation, the directions to the learned District Judge to decide the application under Order 41 Rule 27 and to follow the consequential / incidental procedure are required to be recalled.

9. It is pertinent to note that the appeal was not remanded only because of pendency of the application under Order 41 Rule 27 but was also remanded on the ground that the District Judge, Kolhapur had not rendered findings as regards admission of execution of the gift deed. It has been categorically observed in paragraph 13 of the

judgment that “ *the learned District Court has not recorded a finding that the plaintiff has admitted execution of the gift deed. The learned District Judge has held that the plaintiff, against whom the document was sought to be used, had admitted execution of the document. In the absence of such finding, the learned District Judge was not justified in dispensing with the rigour of Section 68 on the premise that the executant, who was not a party to the proceedings, had not disputed the execution of the document.* ”

10. Hence, I am not inclined to accept the contention of the learned counsel for the petitioners that the entire order needs to be recalled. Under the circumstances and in view of discussion supra, following order is passed :-

(i) the Review Petition is allowed to the extent that the directions contained in the order dated 04/02/2019 to decide the application under Order 41 Rule 27 of the CPC is recalled.

(ii) The District Court is directed to decide the appeal on its own merits.

(iii) Considering that the suit is of the year 1979, the learned District Judge is directed to decide this appeal as expeditiously as possible and

in any event within a period of three months from the date of receipt of this order.

(iv) Interim relief, if any, as regards execution of the judgment and decree, to continue till the disposal of the appeal.

(v) Review Petition stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)