

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

APPEAL AGAINST ORDER NO.11 OF 2021

Appellant : Deorao S/o Chindhuji Belkhode,
(Ori. Plaintiff)
On R.A. Aged about 57 years., Occ. Agriculturist,
R/o Makardhokda, Tah. Umred, Distt. Nagpur

-- Versus --

Respondents : 1] Pandurang S/o Chindhuji Belkhode,
(Ori. Def. No.2)
On R.A. Aged about 51 years, Occ. Service,
R/o Chichghare Layout, Narayan City, Umred,
Tah. Umred, Distt. Nagpur.

(Ori. Def. No.3) 2] Dilip S/o Chindhuji Belkhode, (Deceased)
(Ori. Def. No.3)

2[i] Smt. Ranjana Dilip Belkhode,
Aged about 38 years, Occ. Housewife.

2[ii] Prajwal S/o Dilip Belkhode,
Aged about 19 years, Occ. Education,

2[iii] Ku. Manasi D/o Dilip Belkhode,
Aged about 19 years, Occ. Education,

All (2[i] to 2[iii]) residents of
Bholebaba Nagar, Near Ambedkar School,
Hanuman Nagar, Nagpur.

(Ori. Def. No.1) 3] Shankar S/o Chindhuji Belkhode,
Aged about 59 years, Occ. Agriculturist,
R/o Makardhokda, Tah. Umred, Distt. Nagpur.

(Ori. Def. No.4) 4] Sau. Vimal Manohar Bazare,
Aged about 44 years, Occ. Housewife.
R/o Plot No.354, Bholebaba Nagar,
Hanuman Nagar, Nagpur.

WITH

SECOND APPEAL NO.143 OF 2021

Appellant

(Ori. Plaintiff)
On R.A.

: Deorao S/o Chindhuji Belkhode,
Aged about 57 years., Occ. Agriculturist,
R/o Makardhokda, Tah. Umred, Distt. Nagpur
(Ori. Plaintiff) (On RA)

-- Versus --

Respondents

(Ori. Def. No.2)
On R.A.

: 1] Pandurang S/o Chindhuji Belkhode,
Aged about 51 years, Occ. Service,
R/o SECOND Chichghare Layout,
Narayan City, Umred, Tah. Umred,
Distt. Nagpur.

(Ori. Def. No.3)

2] Dilip S/o Chindhuji Belkhode (Deceased).

2[i] Smt. Ranjana Dilip Belkhode,
Aged about 38 years, Occ. Housewife.

2[ii] Prajwal S/o Dilip Belkhode,
Aged about 19 years, Occ. Education,

2[iii] Ku. Manasi d/o Dilip Belkhode,
Aged about 19 years, Occ. Education,

All (2[i] to 2[iii]) residents of Bholebaba Nagar,
Near Ambedkar School, Hanuman Nagar,
Nagpur.

(Ori. Def. No.1)

3] Shankar S/o Chindhuji Belkhode,
Aged about 59 years, Occ. Agriculturist,
R/o Makardhokda, Tah. Umred, Distt. Nagpur.
(Ori. Def. No.1)

(Ori. Def. No.4)

4] Sau. Vimal Manohar Bazare,
Aged about 44 years, Occ. Housewife.
R/o Plot No.354, Bholebaba Nagar,
Hanuman Nagar, Nagpur.

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Mrs. V.P. Thakre, Advocate for the Appellant.
Shri A.P. Thakre, Advocate for the Respondents.
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CORAM : S.M. MODAK, J.
DATE : 15th SEPTEMBER, 2021.

J U D G M E N T :-

This Court while issuing notice in the second appeal has framed the following substantial questions of law:

- i) Whether the First Appellate Court was right in appreciating the evidence of defendant No.2 in respect of Gat No.42 by holding it as a self-acquired property of defendant No.2?*
- ii) Whether the First Appellate Court was right in not remanding the matter in respect of Gat No.42?:*

02] In this second appeal, the plaintiff has challenged the decision given by the first appellate Court so far as the nature of Gat No.42 is concerned. It is one of the suit land. The plaintiff considered it as a joint family property, whereas defendant No.2- Pandurang considered it as his self-acquired property acquired by availing a loan from the society. Whereas, the first appellate Court considered it as self acquired property.

03] Whereas, the plaintiff has preferred this 'appeal from an order' against the direction given in the impugned judgment dated

11/02/2021 passed by the first appellate Court. By the said judgment, the suit was remanded and the trial Court was directed to conduct a fresh enquiry. Defendant No.2-Pandurang was permitted to adduce evidence on the basis of the documents filed before the first appellate Court as per Exh.27. While passing the order of remand, the first appellate Court excluded Gat No.42 from the scope of enquiry to be conducted by the trial Court. In this appeal from an order, the Court has issued the notice to the respondents.

04] All the respondents have appeared in both the proceedings through learned Advocate Shri A.P. Thakre. Considering the scope of enquiry of both these proceedings, they are taken up for final hearing by consent. In view of that, the second appeal and the appeal against an order are admitted and taken up for final hearing. They have waived the notice too.

05] The following points arise for my determination :

S.N.	Points	Findings
(i)	Whether the first appellate Court was right in appreciating the evidence of defendant No.2 in respect of Gat No.42 by holding it as a self acquired property of defendant No.2?	<u>In the negative</u> (was not right)

(ii)	Whether the first appellate Court was right in not remanding the matter in respect of Gat No.42?	<u>In the negative</u> (was not right)
(iii)	Whether the first appellate Court was right in remanding the matter for fresh consideration to the trial Court?	<u>In the affirmative</u>
(iv)	What order?	<u>As per final order</u>

S U I T

06] The plaintiff has filed the suit for partition. Defendant Nos.1 to 3 are his brothers, whereas defendant No.4 is his married sister. He has sought for partition in respect of four lands described in the schedule. Both the parties have adduced evidence before the trial Court. The plaintiff has examined himself and on behalf of defendant Nos.2 & 3, defendant-Pandurang entered into the witness box. So also, they have examined one Lemon Wasudeorao Balpande and one Maroti Domaji Waghade. Defendant No.4 also entered into the witness box.

07] After appreciating the evidence, the trial Court came to the conclusion that the suit properties including Gat No.42 are the

joint family properties. The trial Court refused to consider Gat No.42 as self-acquired property of defendant No.2. So also, the trial Court has refused to accept the objection about maintainability of the suit on the ground of partial partition.

08] Defendant No.2 and legal heirs of deceased defendant No.3-Dilip preferred R.C.A. No.724/2016. The plaintiff, defendant No.1 and defendant No.4 are the respondents therein.

FIRST APPEAL

09] Before the first appellate Court, defendant No.2-Pandurang sought permission to produce certain documents. They are as per the application at Exh.27. It consists of

- (a) suit notice given by the plaintiff (there is no mention of Gat No.42 in that suit notice and contention of defendant No.2 is that the plaintiff was aware that the suit land is a self-acquired property of defendant No.2)
- (b) one unregistered partition-deed and
- (c) one relinquishment-deed.

The first appellate Court was pleased to grant permission to defendant No.2 to produce those documents. In paragraph 45 of

the impugned judgment, there are observations to that effect.

10] The other ground for remand is “not including one house property in partition suit by the plaintiff”. The observation to that effect finds place in paragraphs 40 to 44. It was the contention raised on behalf of the defendants that the house property, wherein the plaintiff resides, ought to have been included in the partition suit. The first appellate Court has accepted that contention.

ORDER OF REMAND

11] It is pertinent to note that it was obligatory for the plaintiff to produce the suit notice before the trial Court. It is more important when the defendants have pleaded that in that notice Gat No.42 is not included. When the first appellate Court came to a conclusion to remand the suit, it was justified on its part to permit defendant No.2 to produce other documents as per list at Exh.27. It is further more necessary for doing complete adjudication of dispute between the parties. It is also important that if at all the plaintiff is asking for partition, all the properties belonging to the joint family ought to have been included. Though the trial Court has not accepted the said contention (while answering Issue No.5), the first appellate Court has accepted that contention. It is also true that if at

all, there has to be a partition through the Court, all the properties ought to have been included.

12] So, this Court finds that the reasons given by the first appellate Court for remanding the suit are certainly acceptable. The order of remand is justified in view of the reasons quoted above. This Court does not find any illegality in passing the said order. Though, it is true that the order of remand need not be passed in a routine course, but when there are justifying circumstances, the appellate Court can certainly exercise the power under the provisions of Order 41 Rule 23-A of the Code of Civil Procedure. It empowers the first appellate Court to remand the matter, if the suit is decided on a point other than the preliminary points. Hence, the order of remand is sustainable.

SECOND APPEAL

13] The first appellate Court, though has remanded the suit, has not avoided the temptation to give finding in respect of one of the suit lands i.e. Gat No.42. This approach on the part of the first appellate Court cannot be sustained in the eyes of law. It was not proper on the part of the first appellate Court to express an opinion on merits so far as Gat No.42 is concerned. In fact, when the order

of remand is to be passed, the first appellate Court is expected only to give reasons, which support the order of remand. The first appellate Court ought to have prevented itself from expressing an opinion in respect of Gat No.42. In fact, the trial Court ought to have been directed also to conduct an enquiry in respect of Gat No.42.

14] The finding to that effect finds place in paragraphs 11 to 15. There are two versions. One is, Gat No.42 is a joint family property as per the plaintiff, whereas, defendant No.2 pleaded that it was acquired by him by obtaining loan from the society. The trial Court in paragraph 14 has considered the evidence of the witness Lemon Balpande. The trial Court concluded that Gat No.42 is not a self-acquired property of defendant No.2, whereas the first appellate Court, while reappreciating the evidence, has concluded that Gat No.42 is a self-acquired property of defendant No.2. This approach ought to have been avoided when the first appellate Court had come to a conclusion that the matter needs to be remanded. In view of that, the said finding cannot be sustained. It needs to be set aside. Hence, I answer Point Nos.1 & 2 in the negative and Point No.3 in the affirmative and proceed to pass the following order :

ORDER

- (i)** Second Appeal No.143/2021 is allowed.
- (ii)** Appeal Against Order No.11/2021 is dismissed.
- (iii)** The finding given by the first appellate Court in respect of Gat No.42 that it is a self-acquired property of defendant No.2 is set aside.
- (iv)** The trial Court is directed to conduct an enquiry in respect of Gat No.42 also.
- (v)** Rest of the directions given in the impugned judgment are maintained.
- (vi)** Both the proceedings are disposed of with no order as to costs.

(S.M. MODAK, J.)