

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

**APPEAL FROM ORDER NO. 45 OF 2019**

Subhadrabai Sahadeo Chopade (Dead)  
through LRs.:

1. Ashok S/o. Sahadeorao Chopade,  
Aged about 60 years, Occu. :Service,  
R/o. Pola Chowk, Old City, Akola,  
District : Akola.
2. Kishore S/o. Sahadeorao Chopade,  
Aged about 55 years, Occu.: Service,  
R/o. Shivni Shivar, Bhagat Singh Chowk,  
Akola, Dist. Akola.

.... **APPELLANTS.**  
(Ori. Defendants)

**// VERSUS //**

1. Rajesh S/o. Mahadeorao Chopade,  
Aged about 43 years, Occ. Service,  
R/o. Pola Chowk, Old City, Akola,  
Distt.: Akola.
2. Durgabai W/o. Gajanan Shirsole,  
Adult : Occu: Housewife,  
R/o. Gajanan Yashwant Shirsole,  
Padshi (Zasi), Tq. Sangrampur,  
Dist. Buldhana.
3. Manorama W/o. Vishwanath Nayse,  
Adult , Occu. : Housewife,  
R/o. C/o. Vishwanath Nayse,  
Sangrampur, Dist. Buldhana.

4. Laxmibai W/o. Kailasrao Dhanbhar,  
Adult, Occ.: Housewife,  
R/o. C/o. Kailashrao Harischandra Dhanbhar,  
Dhone Colony, Shivar, Akola, Dist. Akola.
5. Sunita W/o. Malhaar Porakhare,  
Adult, Occ.: Housewife,  
R/o. C/o. Malhaar Pundlik Porakhare,  
Dal Fail, Khamgaon, Dist. Buldhana.
6. Anita W/o. Ravindra Mahore,  
Adult, Occ.: Housewife,  
R/o. C/o. Ravindra Mahadeorao Mahore,  
Anjangaon (Surji), Dist. Amravati.
7. Vimalbai Mahadeorao Chopade,  
Adult, Occ.: household  
R/o. Pola Chowk, Old City,  
Akola, Dist. Akola.

.... **RESPONDENTS.**

(No. 1 is original plaintiff Nos. 2 to 6  
are legal representatives of original  
defendants and number 7 was added  
as party respondent in first appeal)

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Shri M.G.Sarda, Advocate for Appellants.

Shri J.B.Gandhi, Advocate for Respondent No.1.

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**CORAM : ANIL S. KILOR, J.**

**DATED : DECEMBER 07, 2021**

**ORAL JUDGMENT :**

1. This appeal is arising out of the judgment and decree dated 25/04/2019 passed by learned District Judge-2, Akola in Regular Civil Appeal No. 03 of 2010, partly allowing the appeal

and thereby setting aside the judgment and decree dated 07/12/2009 passed by learned 2<sup>nd</sup> Joint Civil Judge Junior Division, Akola in Regular Civil Suit No. 275 of 2009, dismissing the suit for partition and possession and thereby remanded the matter to decide the suit afresh expeditiously.

2. Brief facts of the present case are as follows: (The parties are referred as per their status before the trial Court)

The plaintiff/ respondent No.1 filed a suit for partition and possession. It is the case of the plaintiffs that the suit property was jointly purchased by Mahadeo Sakharam Chopade and his brother in June 1966. As no partition has been effected by metes and bounds till now, the plaintiffs have shares in the property. It is also alleged that the defendants have prepared false and bogus document agaisnt the plaintiff i.e., a Gift Deed.

3. The defendant Subhadrabai Mahadeo Chopade filed written statement and resisted the claim of the plaintiff. The learned trial Court, after considering the oral as well as

documentary evidence, dismissed the suit, vide judgment and decree dated 7<sup>th</sup> December 2009, holding against the plaintiff on merits as well as it was held that the suit was barred by limitation.

4. Feeling aggrieved by the same, the plaintiff preferred an appeal before the learned District Judge-2, Akola vide Regular Civil Appeal No. 03 of 2010. The learned lower appellate Court vide impugned judgment and decree dated 25/04/2019, set aside the judgment and decree of the learned trial Court and remanded the matter back for fresh trial. The said judgment and decree dated 25/04/2019 is under challenge in this appeal.

5. I have heard learned counsel for the respective parties.

6. Shri Sarda, learned counsel for the appellants submits that, the pre-requirement to remand the matter under Order 41 Rule 23A of the Code of Civil Procedure is to reverse the judgment and decree passed by the learned trial Court by giving findings of such reversal. It is submitted that in the present matter, without

considering the findings recorded by the learned trial Court and without dealing with such findings which were held against the plaintiff, the matter was remanded back to the trial Court on the ground that the mother of the plaintiff was not made party to the suit. In support of his contention, he has placed reliance on the judgment of this Court in the case of *Balkrishna Dattatraya Butte ..Vs.. Dattatraya Shankar Mohite*, reported in **1997 BCI 53** and the judgment of the Punjab and Haryana High Court in the case of *Rajpal Singh ..Vs.. Gurmail Singh*, dated 25/11/2014 in **SAO No. 38 of 2009 (O & M)**.

7. Per contra, the learned counsel appearing for the respondent supports the judgment and decree passed by learned lower appellate Court and prays for dismissal of the appeal.

8. To consider the rival contentions of the parties, I have gone through the record and perused the judgment and decree passed by the learned lower appellate Court. After going through the judgment of the learned lower appellate Court, it is revealed

that, no findings have been recorded by the learned lower appellate Court as regards limitation, whereas, suit was dismissed on the point of limitation by the learned trial Court.

9. Same is the position in respect of the findings recorded by the learned trial Court on merits.

10. This Court, in the case of Balkrishna (supra) has held thus:

*“... The order of remand is never passed as a matter of routine or for mere asking. Once the trial Court has examined the case on the basis of the available evidence and has reached conclusion, unless a clear case for remand was made out, the Appellate Court ought not to have remanded the matter. An order of remand under Order 41 Rule 23A cannot be made without considering the merits of the findings recorded by the trial Court. Not only that the merits of the findings recorded by the trial Court are required to be seen but has to be reversed and set aside and if the appellate Court finds that retrial was necessary, a case for remand could be made out. Prior to the year 1976 even where amended provision of Order 41 Rule 23A CPC was not there it was consistently held by the Court that an order of remand can be made only if the findings of the lower court is reversed in appeal. The legal position is now clarified by amending Order 41 Rule 23A which empowers the Appellate Court to remand the matter where the decree is challenged in appeal having been passed in a suit otherwise on a preliminary point and*

*the decree reversed in appeal and retrial is considered necessary. Obviously, therefore, whenever a remand is made under Order 41 Rule 23A the findings recorded by the trial Court have to be examined and reversed in appeal and then retrial, if considered necessary may be ordered”.*

The Punjab & Haryana High Court in the case of *Rajpal Singh* (supra) held thus :

*“The lower Appellate Court has the power to remand the case under Order 41 Rule 23-A of the CPC. However, this Court, in Shahab-Ud-Din’s case (supra) has held that mere fact that the Appellate Court has allowed the application under Order 1 Rule 10 of the CPC is no ground to remand the case for re-trial until and unless the Appellate Court reaches a conclusion that the findings on an issue are not sustainable and the matter requires re-trial.”*

The Punjab & Haryana High Court further held that:

*“In the present case, however, the Appellate Court has not touched the merits on issues No.1 to 4 and 8 which have been discussed in detail by the trial Court referring to the oral as well as the documentary evidence and decided the same against the plaintiffs. All that has been done by the Appellate Court is that since the legal heirs of Desu Ram were not impleaded as a party and issue no.10 was decided against the plaintiffs holding that the suit is bad for mis-joinder and non-joinder of the necessary parties, therefore, after impleading the legal heirs of Desu Ram by a separate order on an application filed under Order 1 Rule 10 of the CPC, just reversed the findings on issue nos. 1 to 4 and 8 which are required to be reversed on merits.”*

11. Thus, from the above referred judgments, it is clear that

the order of remand is never passed as a matter of routine or for mere asking. Once the trial Court has examined the case on the basis of the available evidence and has reached a conclusion, unless a clear case of remand was made out, the Appellate Court should not remand the matter and such remand under Order 41 Rule 23A cannot be made without considering the merits of the findings recorded by the trial Court.

12. It is also required that such findings be reversed and set aside and if the appellate Court finds that retrial is necessary.

13. Prior to the year 1976 even where amended provision of Order 41 Rule 23A CPC was not there, it was consistently held by the Court that an order of remand can be made only if the findings of the lower Court are reversed in appeal. The legal position is now clarified by inserting Order 41 Rule 23A by way of an amendment which empowers the Appellate Court to remand the matter where the decree is challenged in appeal having been passed in a suit otherwise on a preliminary point and the decree is reversed in appeal and retrial is considered necessary.

14. Obviously, therefore, whenever a remand is made under Order 41 Rule 23A the findings recorded by the trial Court have to be examined and reversed in appeal and then retrial, if considered necessary may be ordered.

15. In the present case, as observed herein above that without the reversing of the findings recorded by the learned trial Court on merits, the remand was made for fresh trial. In the circumstances, I am of the considered view that the learned lower Appellate Court has exceeded its jurisdiction while exercising the powers under Order 41 Rule 23A . Accordingly, I pass the following order.

- i) The appeal is **allowed**.
- ii) The impugned judgment and decree dated 25/04/2019 passed by District Judge-2, Akola in Regular Civil Appeal No. 03 of 2010 is hereby quashed and set aside.
- iii) The matter is remanded back to District Judge-2, Akola for fresh decision.
- iv) The learned District Judge-2, Akola is requested to restore the Regular Civil Appeal to its original number

and proceed with the matter to decide the same afresh on merits.

- v) The parties may appear before learned District Judge-2, Akola on 12<sup>th</sup> January, 2022.

The Appeal Against Order is disposed of in the above terms. No order as to costs.

Pending Civil Applications, if any, shall stand **disposed of**.

( ANIL S. KILOR, J )

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