

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO.35 OF 2022

BARKU PUNDLIK PATIL (SINCE DECEASED, THROUGH LR'S)
CHANDRAKALABAI BARKU PATIL AND OTHERS
VERSUS
SUBHASH GOVINDRAO PAGARE AND OTHERS

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Advocate for Appellants: Mr. Sharad V. Natu
Respondent Nos.1 to 5 – served / None present

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CORAM:	ARUN R. PEDNEKER, J.
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Reserved for Judgment on:	12.10.2022
Judgment Pronounced on:	09.11.2022

JUDGMENT:

1. The question that arises for consideration in this appeal is, whether the order of remand passed by the Appellate Court is in consonance with Order 41 Rule 23-A of the Code of Civil Procedure, 1908 ?

2. Heard Mr. S. V. Natu, learned Counsel for the Appellants.

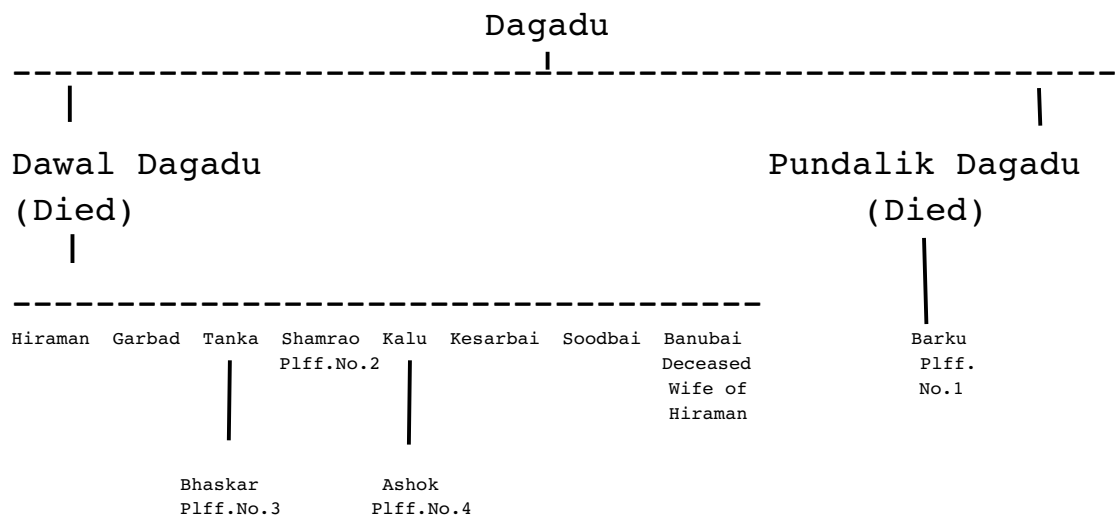
3. Notice is served on the Respondents, however nobody has entered appearance for the Respondents. The Respondents had appeared before the trial court but did not file their written statement. The Appeal before the Appellate Court was also not contested by the Respondents as the lawyer for the Respondents remained absent.

4. The facts as noticed by the Appellate Court, leading to the above question of law in brief can be summarized as under:

A. The Plaintiffs / Appellants had filed suit for possession, based on title and for mesne profit.

B. The subject matter of the suit is an agricultural land bearing Gut No.296/1 admeasuring 2 Hectare 53-R situated within the local limits of village Nandvan Taluka Sakri District Dhule. (Hereinafter referred to as "suit land").

C. It is the case of the Appellant / Plaintiffs that the suit land was originally belonging to the joint Hindu family of grandfather of plaintiff No.1 Shri. Dagadu Vithoba. Following is the genealogy to understand the relationship.



D. According to plaintiffs, after demise of Dagadu Vithoba, land was mutated in the name of his son Dawal Dagadu. After the death of Dawal Dagadu land was mutated in the name of his elder son Hiranman, and wife Banubai. After the death of Hiranman suit land was mutated in the name of Garbad Dawal, Banubai Dawal and Shamrao Dawal. Defendants have no concern with the suit land. They are not relatives or kinsfolk of plaintiffs and has no right in respect of suit land. They took disadvantage of ignorance of Garbad Dawal, and mutation entry No.1538 was taken in 1982 showing that suit land was allotted to defendant No.1 in partition. Suit land is new tenure land, and defendant No.1 is not the relative or family member, and hence by such mutation entry the rights of the plaintiffs are not lost in the suit land. Banubai and Garbad have expired and plaintiffs have become exclusive owners of the suit land.

E. According to plaintiffs, the possession of defendants over suit land is unauthorized and illegal. They have filed an appeal against mutation entries No.1538 and 1581 bearing RTS Appeal No.

12/2013. Said appeal was dismissed on 18/01/2015 and they were directed by revenue authorities to get the dispute settled through Civil Court. It is further the case of plaintiffs that they have recurring cause of action, and hence they filed a suit for above stated relief.

F. Defendants appeared before the learned trial Court but did not choose to file their written statement. Hence, matter proceeded without their written-statement.

G. The learned Trial Court formulated issues as under:

Sr. No.	Issues	Conclusion
1	Do the plaintiffs prove that the suit property is their ancestral property and if yes do the plaintiffs have undivided share in it?	YES
2	Are the plaintiffs entitled for recovery of possession on the basis of title?	NO
3	Are the plaintiffs entitled for mesne profits?	NO
4	What order?	AS PER FINAL ORDER

H. On the first issue, after considering the evidence on record, the learned Trial Court held that the suit property is the Plaintiffs / Appellants ancestral property and the Plaintiffs / Appellants have inherited the same. However, while considering Issue No.2, the learned Trial Court observed that the Plaintiffs / Appellants are not entitled for recovery of the suit property, as the suit is barred by limitation.

I. The Plaintiffs / Appellants filed an Appeal before the Appellate Court challenging the findings of the Trial Court on the Issue No.2 and consequently Issue Nos.3 and 4. The Appellate Court formulated the points for determination as under:

	<u>POINTS</u>	<u>FINDINGS</u>
1)	Whether the judgment and decree rendered by the learned trial court is sustainable?	In negative
2)	Whether, interference at the hands of this Court is required in the judgment and decree of trial Court?	Yes, judgment and decree passed by the trial court is set aside and matter is remanded for conducting hearing of suit afresh.

3)	What order and decree?	As per final order
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J. The Appellate Court after considering the material on record held as under:-

"it appears that the learned trial court has adopted quite casual approach while deciding the suit. In Paragraph No.18 of the Judgment it is mentioned that Plaintiffs have not filed the copy of mutation entry. Details of such mutation entry has not been given. Record indicate that certified copy of mutation entries is filed at Exh.22. A civil court is deciding valuable rights and liabilities of parties and, expected to meticulously go through the evidence and pleadings of the parties. Learned trial court has discussed the issue of limitation in one line and has not deliberated as to which Article or provision of Law of Limitation would be applicable and how suit is barred by limitation. There was no counter evidence or denial on record, and learned trial court was expected to give sufficient reasons for discarding unchallenged evidence. Said exercise has not been undertaken by the learned trial court. The finding recorded by the learned trial court are quite mechanical and they are not sustainable in the eye of law. Point No.1, thus, replied in affirmative and thereafter remanded the matter for fresh consideration by setting aside the Judgment of the Trial Court and directed the Trial Court to re-admit the suit under its original number and to issue fresh notices to defendants, and proceed to determine the suit afresh".

5. Aggrieved by the Judgment of the Appellate Court to remand the case for re-trial, present Appeal from Order is filed.

6. The learned Counsel for the Plaintiffs / Appellants relied upon the Judgment of this Court reported in 2017 (6) Bom.C.R. 360 in the case of Vishnu Dashrath Chavan Vs. Pundalik Dashrath Chavan and 2017 (5) Mh.L.J. 378 in the case of Rampyare Ram Hiranman Prasad Vs. Usha Prasad Rampyare Ram Hiranman, to contend that the facts and circumstances of the present case did not warrant re-trial and exercise of jurisdiction under Order 41 Rule 23A of the Code of Civil Procedure, 1908. The learned Counsel has taken me through the Judgment of the Trial Court to submit that the Trial Court has formulated issues and after examination of the evidence on record has held that the suit land is inherited by the Plaintiffs / Appellants, however, the suit was dismissed on the ground of limitation.

7. The Appellate Court on Appeal while considering the issue of limitation on the basis of material available on record ordered re-trial without the existence of conditions for re-trial as mentioned in Rule 23-A of Order 41. The Appellate Court has not rendered any finding on the point of the suit property being inherited by the Plaintiffs / Appellants. The Plaintiffs / Appellants contend that the

Appellate Court erred in remanding the matter back to the Trial Court and re-opening the suit.

8. The Appellants contend that all the material required to proceed with the determination of Appeal was available before the Appellate Court. However, the Appellate Court has remanded the matter back by exercising powers under Order 41 Rule 23-A, without following the mandate of Order 41 Rule 23-A.

9. Order 41 Rule 23 deals with the remand of case by Appellate Court. Rule 23 deals with a situation where the Court from whose decree an Appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in Appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded. Order 41 Rule 23-A provides that, whether the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in Appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

10. The Hon'ble Supreme Court has considered the scope of power of Remand by Appellate Court under Order 41 Rule 23-A in various Judgments as under:-

10(a). The Hon'ble Supreme Court in the case of Mohan Kumar Vs. State of Madhya Pradesh and others, (2017) 4 SCC 92, at Paragraph No.20, has observed as under:

"20. In other words, the High Court having held that the plaintiff was not able to prove his title to the land in the suit due to non-examination of his vendor, all that the High Court, in such circumstances, should have done was to remand the case to the trial court by affording an opportunity to the appellant to prove his case (title to the land) and adduce proper evidence in addition to what he had already adduced. This, the High Court could do by taking recourse to powers under Order 41 Rule 23-A CPC."

10(b). The Hon'ble Supreme Court in the case of Corporation of Madras and another Vs. M. Parthasarthy and others, (2018) 9 SCC 445, at Paragraph Nos.11 and 15, has observed as under:

11. It is an admitted fact that the respondents (plaintiffs) had filed an application under Order 41 Rule 27 of the Code in their first appeals before the first appellate court (CMP No. 1559 of 1993) praying therein for production of additional evidence in appeals. It is also an admitted fact that this application was allowed and the additional evidence was not only taken on record but also relied on by the appellate court as Exts. P-16 to P-20 for allowing the appeals filed by the respondents which, in consequence, resulted in decreeing all the four civil suits.

15. *Having allowed the CMP No. 1559 of 1993 and, in our opinion rightly, the first appellate court had two options, first it could have either set aside the entire judgment/decreed of the trial court by taking recourse to the provisions of Order 41 Rule 23-A of the Code and remanded the case to the trial court for retrial in the suits so as to enable the parties to adduce oral evidence to prove the additional evidence in accordance with law or second, it had an option to invoke powers under Order 41 Rule 25 of the Code by retaining the appeals to itself and remitting the case to the trial court for limited trial on particular issues arising in the case in the light of additional evidence which was taken on record and invite findings of the trial court on such limited issues to enable the first appellate court to decide the appeals on merits."*

10(c). In the case of P. Purushottam Reddy and another Vs. Pratap Steels Ltd., 2002 (2) SCC 686, the Hon'ble Supreme Court has held that only in exceptional cases, where the conditions stipulated by provisions of Order 41 Rule 23-A of the Code of Civil Procedure, 1908 are satisfied that such an order of remand can be passed.

10(d). The Hon'ble Supreme Court in the case of Shivakumar and others Vs. Sharanabasappa and others, (2021) 11 SCC 277, at Paragraph Nos.26.4 and 26.4.1, has observed as under:

"26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the

mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

26.4.1. ...Such cases where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill- up the lacuna in its case."

11. Applying the law as stipulated above to the instant case, following facts are relevant to determine whether remand under Order 41 Rule 23-A by the appellate court is lawful:-

[i] No application was made before the Appellate Court by the Plaintiffs / Appellants to adduce further evidence.

[ii] Defendants / Respondents have also not made a prayer of remand for re-trial. Defendants have not challenged the Judgment of the Trial Court.

[iii] Remand would prolong the litigation more so where the Plaintiffs / Appellants have not prayed to lead further evidence. The Appellate Court cannot insist upon the Plaintiffs or Defendants to lead evidence.

[iv] The Appellate Court held that the Trial Court has not purportedly decided the suit by meticulously going through the evidence and has directed the whole suit to be decided afresh. However, just because the trial court has erred in appreciating evidence, the Appellate Court cannot remand the case for re-consideration, when it can itself enter into findings of fact by appreciation of evidence, which is already on record.

12. For the above reasons, the Appellate Court ought not to have remanded the matter under Order 41 Rule 23-A.

13. The impugned order of remand by the Appellate Court is set-aside and the First Appeal is restored before the Appellate Court for adjudication in accordance with law.

14. The Appeal is allowed in aforesaid terms with no order as to costs.

[ARUN R. PEDNEKER, J.]