IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.118 OF 2022
WITH
INTERIM APPLICATION NO.668 OF 2022
IN
APPEAL FROM ORDER NO.118 OF 2022
WITH
APPEAL FROM ORDER NO.117 OF 2022
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IN
APPEAL FROM ORDER NO.117 OF 2022

1. Vitthal Kashinath Veerkar ...Appellants
2. Murlidhar Kashinath Veerkar (orig. Plaintiffs)
3. Chandrakant Kashinath Veerkar
4. Laxmibai Kashinath Veerkar

Versus

Vishwanath Kashinath Veerkar deceased through legal heirs-
1a) Lilawati Vishwanath Veerkar (name deleted as per Exh.160)
1(b) Anil Vishwanath Veerkar
1(c) Sunil Vishwanath Veerkar
1(d) Prakash Vishwanath Veerkar
1(e) Shailaja Vivek Bhoj formerly known as Shailaja Vishwanath Veerkar
1(f) Sangita Kishor Ubale
1(g) Saisha Kalyan Dalavi
1(h) Kalyan Ramchandra Dalawi
2. Balkrishna Kashinath Veerkar (deceased) through his L.Rs.
2(a)Jayashri Tatyaba Kshirsagar,
2(b) Rajashri Kiran Kirve
2(c) Arvind Balkrishna Veerkar
3. Manda Anant Veerkar
4. Dipak Anant Veerkar
5. Pradip Anant Veerkar

6. Sumati Jitendra Medhekar
7. Anandi Bhanudas Veerkar
8. Archana Nilesh Dalavi
9. Rupali Vitthal Hadake
10. Lilawati Murlidhar Kirve
11. Kusum @ Kastur Ashok Shinde ...Respondents
12. Keshar @ Anusaya Murlidhar Dalavi (orig. Defendants)

...

Mr. Sugandh Deshmukh for the Appellants.
Mr. T.S. Ingale for Respondent Nos.1(d) to 1(g), 2(a), 2(b), 4 to 6.
Mr. D.D. Rananaware for Respondent Nos.1(b), 1(c), 2(c), 3 and 7.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 21st JULY, 2022.

ORAL JUDGMENT :-

1. The Appellants in both these appeals, who shall be hereinafter referred to as the Plaintiffs, have challenged the common order dated 04/05/2021 passed by the learned District Judge-3, Satara, in Regular Civil Appeal Nos.44 of 2019 and 45 of 2019, respectively. By the impugned judgment, the learned Judge set aside the judgment and decree dated 01/12/2018 passed by the Trial Court in Regular Civil Suit No.204 of 2010 and remanded the Suit with directions to the Trial Court to decide the matter afresh after giving opportunity to both the parties to lead further evidence.

2. The brief facts necessary to decide these appeals are as

under:-

The Plaintiffs claim to have half share in the properties under Survey No.11/1 (Old), 24/1 (New)(part) admeasuring 55R and half share in Land Revision Survey 13/1 (old), 26/1 (new) admeasuring 87 R situated at Koregaon, District-Satara. The said property hereinafter referred to as 'the suit property' was originally owned by Tukaram Virkar. He had two sons by name Keshav and Kashinath. Kashinath had two wives viz. Indrayani and Laxmibai (Plaintiff No.4). The Plaintiff Nos.1 to 3 and Respondent Nos.10,11 and 12 are the children of Tukaram and Laxmibai (Plaintiff No.4). Whereas Respondent Nos.1, 2 and Anant and Bhanudas, both deceased are the children of Tukaram and Indrayani. Respondent No.3 is the widow and Respondent Nos.4, 5 and 6 are the children of deceased -Anant. Respondent No.7 is the widow and Respondent Nos.8 and 9 are the children of Bhanudas. Respondent Nos.1 to 9 shall be hereinafter referred to as the Defendants.

3. It is the case of the Plaintiffs that by judgment and decree dated 25/04/1974 in Special Civil Suit No. 11 of 1960, the suit property was allotted to Kashinath and his 7 sons. In the said suit, the inter se shares of Kashinath and his 7 sons were not determined.

Hence, the Plaintiffs filed Special Civil Suit No.30 of 1972 for declaration and partition, which came to be partly decreed on 25/04/1974, wherein it was declared that the Plaintiffs have 4/9th share in the suit property and a decree of partition was granted. The declaration sought by the Plaintiffs that they are not liable to pay the sales tax in respect of the suit property was rejected.

4. The Plaintiffs claimed that they cleared the sale tax and filed execution proceedings being Special Darkhast No.52 of 1981 for actual partition and possession of the suit property. The Plaintiffs claim that they were put in possession of the suit property under Possession Receipt dated 30/06/1985. Since the decree was satisfied, the Plaintiffs withdrew the execution proceedings.

5. The Plaintiffs claim that they are in exclusive possession of the suit property. The Plaintiffs filed Regular Civil Suit No.204 of 2010 for perpetual injunction before learned Civil Judge, Junior Division, Koregaon, with a grievance that the Defendants were interfering with their possession.

6. The Defendants claimed that the compromise decree in

Special Suit 11 of 1960 is illegal. They further claimed that the Plaintiffs are the illegitimate children of Tukaram and have no right in the ancestral property. They denied that by judgment in Special Suit No.30 of 1972 the Plaintiffs were put in possession of the suit property. The Defendants also claimed that the Plaintiffs had not paid the arrears of sale tax, which was a condition precedent for partition. They claimed that they had no notice of the execution proceedings and that they learnt about the same only after filing of the suit. The Defendants also raised a counter claim with a prayer for mandatory injunction to demolish the house constructed by the Plaintiffs in the property under Survey No.26/1.

7. Based on the pleadings of the respective parties, the learned Judge framed the issues and recorded the evidence of the Plaintiffs and Defendants. The Trial Court heard the parties and thereafter recast the issues and after considering the evidence on record decreed the suit and dismissed the counter claim. Being aggrieved by the decree, the Defendants filed an appeal before the District Court.

8. During the pendency of the appeals, the Defendants filed three separate applications before the District Court viz. (i) Application

at Exhibit-20 to issue witness summons to the competent person from the Sales Tax Department and to permit them to examine the said witness (ii) Application at Exhibit 23 with the prayer to remand the matter to the Trial Court for not affording an opportunity to examine Sunil Kharade, the witness to possession receipt; and (iii) Application at Exhibit-26 to issue summons to the adjoining owner-Ramchandra Barge and to permit them to examine the said witness to prove their possession.

9. The District Judge by the impugned order dated 04/05/2021 partly allowed both the appeals and set aside the judgment and decree in Regular Civil Suit No.204 of 2010 and remanded the matter for fresh trial. Being aggrieved by this order, the Plaintiffs have filed these appeals.

10. Mr. Sugandh Deshmukh, learned counsel for the Plaintiffs submits that the sales tax receipts were not relevant to decide the issue of possession. He submits that the suit filed in the year 1972 was decreed in the year 1974 and that the Plaintiffs were put in possession of the suit property under Kabjepatti (Possession Receipt) dated 13/06/1985 in execution of the decree in Dakhast No.52 of 1981. He

submits that there is no challenge to the decree or kabjepatti. He further submits that even if the sales tax receipts were held to be relevant, the Court could have drawn adverse inference for withholding material evidence. He further submits that the Trial Court has not framed any additional issue but had only recast the issues. He submit that no prejudice has been caused to the parties since both the parties have adduced evidence based on the pleadings. Learned counsel for the Plaintiffs further submits that the Defendants have not assigned any reasons for not examining the witness-Ramchandra Barge. He submits that having failed to adduce evidence, despite opportunity given by the Trial Court, the Defendants could not invoke provisions under Order 41, Rule 27 of the CPC for adducing additional evidence. He submits that even otherwise the Appellate Court was not justified in remanding the case and ordering retrial when the Appellate Court has every power to record the evidence at the appellate stage. He has relied upon decisions of this Court in ***Vishnu Dashrath Chavan vs. Pundalik Dashrath Chavan, 2017 (5) Mh.L.J. 163*** and unreported decision in ***Bharat Kisan Mekale vs. Ravikumar Jethappa Kurne, Appeal from Order No.213 of 2020.***

11. Per contra, Mr. T.S. Ingale and Mr. D.D. Rananaware,

learned counsel for Defendants submit that judgment dated 25/04/1974 passed in Special Civil Suit No.30 of 1972, under which the Plaintiffs are claiming rights to the suit properties itself mandates payment of arrears of the sales tax. He submits that the Defendants were compelled to file application at Exhibit-20 before the first appellate Court to examine the Sales Tax Officer since the Plaintiffs have failed to prove payment of arrears of sales tax, which was a condition precedent for partition of the suit property.

12. Learned counsel for the Defendants submit that the witness -Sunil Kharade was a material witness to prove that the Kabjepatti, under which the Plaintiffs were allegedly put in possession of the suit properties is not genuine. Learned counsel for the Defendants further submit that the Trial Court recast the issues at the fag end, after the evidence of both the parties was closed. The grievance of the Defendants is that the Trial Court decided the suit without giving an opportunity to the parties to adduce additional evidence on the recast issues. Learned counsel for the Defendants has relied upon the judgment of the Hon'ble Supreme Court in ***Narayan vs. Kumaran 2004 (4) SCC 26*** to contend that in an appeal under Order 43 Rule 1 (u) parties are not entitled to agitate question of facts.

13. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties. The records reveal that the Appellate Court has remanded the suit on the following grounds:-

(i) no opportunity was given to the parties to adduce additional evidence after the issues were recast.

(ii) That the Defendants were not given reasonable opportunity to examine the witness Sunil Kharade

(iii) Plaintiffs had failed to produce sale tax receipts, which are relevant to decide the issue and hence an opportunity has to be given to the Defendants to examine the sales Tax Officer to produce the said receipts.

(iv) No opportunity was given to the Defendants to examine the adjoining owner- Ramchandra Barge.

14. The question for consideration is whether the learned Judge was justified in remanding the matter and ordering retrial on the aforesaid grounds.

15. It is pertinent to note that Section 107 (1) (d) of the CPC confers powers on the Appellate Court to take additional evidence or to require such evidence to be taken, subject to such conditions and limitations as may be prescribed. It would also be relevant to refer to the provisions under Order 41 Rule 27, 28 and 29 of CPC, which relate to admission of additional evidence at Appellate stage and prescribe the mode of taking additional evidence. These provisions read thus:-

Rule 27. Production of Additional Evidence in Appellate Court.

> **(1)** The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if-
>
> > **(a)** the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted,or
> >
> > **(aa)** the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
> >
> > **(b)** the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,
>
> the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Rule 28. Mode of taking additional evidence.

Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

29. Points to be defined and recorded.

Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

16. A plain reading of these provisions would indicate that additional evidence is admissible at appellate stage in the following circumstances:- (1) When the lower court has refused to admit evidence, which ought to have been admitted. (2) if a party was unable to produce such evidence despite exercise of due diligence or (3) when the Appellate Court, requires such additional evidence to enable it to pronounce judgment or for any other substantial cause. The admissibility of document under clause (b) would depend upon

whether or not the Appellate Court requires additional evidence to pronounce judgment or any other substantial cause. Whenever the Appellate Court allows additional evidence under Order 41 Rule 27, in terms of Rule 28 of Order 41 the Appellate Court can itself take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to record the additional evidence and to transmit the same to the Appellate Court. Where additional evidence is directed or allowed to be produced, Rule 29 mandates the Appellate Court to specify the points to which the evidence is to be confined. These provisions do not contemplate setting aside of judgment and remand of case.

17. The power of remand is conferred under Section 107(1)(b) of CPC, which can be exercised under the circumstances specified in Order 41 Rule 23, 23A and 25 of CPC. The suit can be remanded under Rule 23 only when a suit is disposed of upon a preliminary point and the decree is reversed in appeal. Rule 23A enables the Appellate Court to remand the suit to the trial court when such suit is disposed of on merits and the Appellate Court considers that a retrial is necessary for proper adjudication of the case. Whereas, when the evidence on record is sufficient to finally determine the suit, Rule 24 enables the Appellate

Court to pronounce judgment, after resettling the issues, if necessary, notwithstanding the judgment of the trial court has proceeded wholly on some ground other than that on which the Appellate Court proceeds. This Rule is intended to bring finality to the proceedings, without shuttling the parties from court to court, and to ensure speedy justice. Rule 25 empowers the Appellate Court to frame issues and refer them for trial to the Court from whose decree the appeal is preferred. The power under Rule 25 can be invoked by the Appellate Court when the Trial Court has omitted to frame or try any material issue or to determine any question of fact, which is essential for a decision on merits. While remitting the issues the Appellate Court can direct the trial court to take additional evidence on such issues. The trial court can try only such issues as are referred to it and return the evidence to the Appellate Court with its findings and reasons thereon. The Appellate Court which continues to be in seisin of the matter has to decide the appeal on merits on receipt of the additional evidence and findings recorded by the Trial Court.

18. Reverting to the facts of the present case, it is not in dispute that the Trial Court had recast the issues after recording the evidence and hearing the parties and decided the suit without giving an

opportunity to the parties to adduce additional evidence. This was one of the reasons of for remand.

19. The records reveal that the Trial Court had framed the following issues:-

> 1] Whether plaintiff is entitled for relief of perpetual injunction, as prayed?
>
> 2] Whether plaintiff No.1 to 11 in counter claim, defendant Nos.8 to 12 are entitled for declaration as to ownership of suit property?
>
> 3] Whether compromise decree in Spl. Civil Suit No.11/1960, decree in Spl. Civil Suit No.30/1972 and proceeding in Regular Darkhast No.52/1981 are illegal and not binding on plaintiff Nos.1 to 11 and defendant No.8 to 12?
>
> 4] Whether defendants are entitled to counter claim, as prayed?
>
> 5] What order and decree?

These issues were recast as under:

> 1) Whether plaintiffs prove that they are in possession of suit property?
>
> 2) Whether plaintiffs prove that defendants caused obstruction to their lawful possession?
>
> 3) Whether plaintiff is entitled for relief of perpetual injunction, as prayed?
>
> 4) Whether plaintiffs (to counter claim) prove that they

are owners and in possession of suit property?

5) Whether plaintiffs (to counter claim) prove that, defendant to counter claim have caused obstruction to their possession?

6) Whether plaintiffs (to counter claim) prove that, defendant (to counter claim) have illegally raised construction in survey No.26/1?

7) Whether plaintiff No.1 to 11(in counter claim) defendant Nos.8 to 12 are entitled for declaration as to ownership of suit property?

8) Whether compromise decree in Sp. Civil Suit No.11/1960, decree in Spl. Civil Suit No.30 of 1972 and proceeding in Regular Darkhast No.52/1981 are illegal and not binding on plaintiff Nos.1 to 11 and defendant No. 8 to 12?

9) Whether Counter claim is not maintainable in view of Delay Application 20/11 and writ petition no.10485/2012?

10) Whether defendants are entitled to reliefs in counter claim, as prayed?

20. It is pertinent to note that the object of settling the issues is to pinpoint the real and substantial point of difference between the parties. Hence, the trial Court is required to frame specific issues based on material proposition of fact or law; affirmed by one party and denied by the other. In ***Makhan Lal Bangal vs Manas Bhunia And Ors AIR 2001 SC 490*** the Hon'ble Supreme Court has held that the stage of framing of the issues is important in as much on that day the scope of

trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The correct decision of civil lis largely depends on correct framing of issues. Hence, an obligation is cast on the Court to read the plaint/petition, and the written statement/counter, if any, and then determine the material proposition of fact or law on which the parties are at variance. The Supreme Court has reiterated that the object of an issue is to determine the real dispute between the parties, narrow the area of conflict and to tie down the evidence, arguments and the decision to a particular question in dispute.

21. In the instant case, the Plaintiffs had filed a suit for perpetual injunction. The issues which ordinarily arise in a suit for perpetual injunction are (i)whether the Plaintiff is in possession of the suit property and (ii) whether the Defendant has obstructed his possession. Similarly, in a suit or counter claim for declaration of title, the Plaintiff or the Defendant as the case may be, is required to prove that he is the owner in possession of the suit property, denial of the title and /or interference with possession. As noted above the Plaintiffs claimed to be the owners in possession of the suit property and filed a suit for perpetual injunction alleging interference with his possession.

Whereas the Defendants interalia claimed to be the owners in possession of the suit property and alleged interference by the Plaintiffs by construction of an illegal structure in the suit property. The Defendants raised a counter claim seeking declaration of their title and further sought demolition of the alleged illegal structure.

22. The Trial Court framed only one general issue viz. whether the Plaintiff is entitled for relief of perpetual injunction as prayed. Similarly, the issue in the counter claim, which related to the declaratory relief was also general in nature i.e. whether the Defendants are entitled for declaration as to the ownership of the suit property. It was under these circumstances, that the learned Judge split issue No.1 into three separate issues. While retaining the issue No.1 as framed earlier and renumbering it as issue No.3, the Court also framed two separate issues relating to possession of the suit property and obstruction thereof. Similarly, with reference to the declaratory relief claimed in the counter claim, while retaining issue No.2, and renumbering it as issue No.7, the Trial Court framed additional issues relating to title and possession of the suit property, and obstruction thereof by constructing an illegal structure. The additional issues are not inconsistent with the issue Nos.1 and 2, as framed earlier. In fact

these additional issues were included in the earlier two issues.

23. Pertinently, both the parties well understood their respective pleadings and led evidence in support of their contention and touching the issues. Furthermore, it is not the case of the Defendants that they had gone to the trial without knowing the questions in issue and that any prejudice was caused to them for having failed to adduce evidence on additional issues. In such circumstances, deciding the suit and counter claim without affording any further opportunity to the parties to adduce additional evidence does not vitiate the trial and is not a ground for remand.

24. The case has also been remanded in view of the applications at Exhibits-20, 23 and 26, filed by the Defendants, under Order 41 Rule 27 of the CPC. The application at Exhibit-20 was filed to issue summons to the sales tax officer to prove that the Plaintiffs had not paid the sales tax arrears, which according to the Defendants was a condition precedent for decree of partition. Application at Exhibit-23 was filed seeking leave to examine Sunil Kharade whereas application at Exhibit-26 was filed seeking leave to examine the adjoining owner-Ramchandra Barge.

25. The learned District Judge also allowed the application at Exhibit-20 and granted leave to the Defendants to examine the Sales Tax Officer in order to prove that the Plaintiffs had not paid sales tax in respect of the suit property. It appears that the suit property was attached for non-payment of arrears of sales tax. In the partition suit (Special Civil Suit No.30 of 1972) the Plaintiffs interalia sought a declaration that they were not liable to pay sales tax in respect of their 4/9th share and that the said amount was due from the Defendants. The learned Judge rejected the said contention and held that since the properties were joint, the Plaintiffs are liable to pay the arrears in respect of their share. Nevertheless, the Court declared that the Plaintiffs have 4/9th share in the suit property and allowed the prayer for partition and separate possession of the suit property. The Plaintiffs thereafter filed execution proceedings (Execution Petition No.52 of 81). The Plaintiffs claim that the property was partitioned and possession of the suit property was handed over to them under the Kabjepatti (possession receipt dated 13/6/1985).

26. The Defendants had not challenged the judgment in Special Civil Suit No.30 of 1972 or the Kabjepatti / possession receipt issued in

favour of the Plaintiffs in execution proceedings, despite being served in the said suit and the execution proceedings. In such circumstances it was necessary for the Appellate Court to ascertain whether the evidence sought to be adduced in respect of sales tax receipt was relevant and has bearing on the issues involved in the suit. While allowing the application at Exhibit-20, the Appellate Court has observed that though the pleadings make a reference to the sales tax receipts, the Plaintiffs had not produced the same. The learned Judge has merely observed that the said receipts are relevant, without assigning any reasons for arriving at such findings. The Appellate Court has not returned a finding that the additional evidence relating to the payment of sales tax was essential to enable it to pronounce the judgment.

27. The records reveal that the Defendants had sought to examine Sunil Kharade, the witness to the possession receipt. The affidavit of Sunil Kharade was filed along with application at Exhibit-246. On the subsequent date the Defendant had sought an adjournment on the ground that the witness was on duty and was unable to appear before the Court. The learned Judge dismissed the application and closed the evidence of the Defendants. The learned

Judge had not recorded the finding that the reasons stated in the adjournment application were not genuine. Hence, the closure of evidence was not justified and learned District Judge was within his rights to allow the Defendants to examine the witness-Sunil Kharade.

28. By application at Exhibit-26 the Defendants had sought leave to examine Ramchandra Barge, the adjoining owner, to prove their possession in respect of the suit property. The witness - Ramchandra Barge was not cited as a witness before the Trial Court. Apart from stating that the appeal is continuation of suit, no reasons were assigned for not examining this witness before the Trial Court. In such circumstances, the Appellate Court was not justified in mechanically allowing the application at Exhibit- 26. Needless to state the powers of the Appellate Court to receive additional evidence are circumscribed by the limitations specified in Order 41 Rule 27 of the CPC and the parties are not entitled to adduce additional evidence at appellate stage as of right.

29. It is also to be noted that the Appellate Court is vested with wide powers including power to frame additional issues and receive additional evidence itself or to direct the Court from whose decree the

appeal is preferred, or any other subordinate Court, to take such evidence. The object is to bring finality to the litigation without shuttling the litigant from one Court to another. In ***Shivkumar Vs. Sharanbasappa AIR 2020 SC 3102*** the Hon'ble Supreme Court has reiterated that " *A conjoint reading of Rule 23, 23A and 24 of Order XLI 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 XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and 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 life of the litigation without serving the cause of justice. An order of remand only 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 eventuality which may justify an order of remand or where remand would be rather necessary depending on the facts and given set of circumstances* *of a case.*"

30. In the instant case, the learned Judge in total disregard to the provisions of Section 107 (1)(b) r/w. Order 41 Rule 28 and 29 of the CPC, set aside the entire decree and ordered retrial. Hence, the order of remand cannot be sustained.

31. Under the circumstances, the appeals are allowed, the impugned judgment and order is set aside. The matter is remitted with directions to the Appellate Court to receive additional evidence of Sunil Kharade. The Appellate Court shall decide the application at Exhibits-20 and 26 in accordance with law and receive additional evidence relating to payment of sales tax arrears and record evidence of Ramchandra Barge, provided the conditions as stipulated in Rule 27 are found to exist and such evidence is essential to pronounce the judgment.

32. Pending applications, if any, stand disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)

MEGHA S PARAB Digitally signed by MEGHA S PARAB Date: 2022.10.20 17:19:08 +0530