

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

**APPEAL FROM ORDER NO. 690 OF 2018
WITH
CIVIL APPLICATION NO. 902 OF 2018
WITH
CIVIL APPLICATION NO. 754 OF 2019
IN
APPEAL FROM ORDER NO. 690 OF 2018**

Ganpati Tayappa Vadar (Chavan) Appellant

v/s.

Ramchandra Tayappa Vadar (Chavan)

(since deceased through legal heirs) :

Smt. Ratnabai Ramchandra Chavan and ors. Respondents

Mr. Rakesh Agrawal for the Appellant.

Mr. Pratap Patil for Respondent No.1(a) and 1(c) to 1(f).

Mr. Munna Mansur Nadaf for Respondent Nos.2(a) to 9.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 19th JULY, 2022.

P. C. :-

. With consent, heard finally at the stage of admission.

2. The Appellant has assailed the judgment and order dated 23/04/2018 passed by the learned District Judge-4, Sangli in Regular Civil Appeal No.78/2009. By the impugned judgment, the learned District Judge allowed the Appeal, set-aside the judgment dated 15/01/2009 passed by the IInd Joint Civil Judge, Junior Division,

Tasgaon in Regular Civil Suit No.200/1990 and remanded the matter under Order 41 Rule 23 with directions to give opportunity to the parties to lead evidence relating to the partition deed dated 03/03/1959 and to decide the issue no.2 afresh.

3. The brief facts necessary to decide this Appeal are as under :-

4. The Appellant herein were the plaintiffs and Respondents were the defendants in RCS No.200/1990 and shall be hereinafter referred to as 'the plaintiffs' and 'the defendants'. The plaintiffs had instituted a suit for partition in respect of the property under Survey No.798/3A+3B, 798/3A/3B/1, 798/3A + 3B/2 and 798/2A+3B/3 admeasuring 6 acre situated at village Tasgaon, District – Sangli. The said property shall be hereinafter referred to as 'the suit property'. The Trial Court held that the plaintiff and the defendant nos.2 and 3 have 1/5th share each whereas defendant nos.1(a) to 1(e) and defendant nos.4 to 9 together have 1/5th share in the suit property. Being aggrieved by the said judgment and order, the legal heirs of defendant no.1 and defendant no.11 filed an Appeal before the District Court, Sangli.

5. The Respondent No.11 filed an Application under Order 41 Rule 27 of CPC seeking leave to produce deed of partition. Learned District Judge allowed the Respondents to produce additional evidence under Order 41 Rule 27 of CPC on the ground that the document is relevant to determine the controversy between the parties. Hence, by the impugned judgment, learned District Judge set-aside the judgment and remanded the matter with directions to give opportunity to the parties to adduce evidence on the deed of partition and decide the issue no.2 afresh.

6. The short question which falls for consideration is whether the learned Judge was justified in setting aside the judgment and remanding the matter under Order 41 Rule 23. Similar question had arisen before this Court in ***Bharat Kisan Mekale v/s. Ravikumar Jethappa Kurne in Appeal from Order No.213/2020***. After considering the relevant provisions relating to production of additional evidence and remand, this Court has observed that :-

“ 16. A plain reading of these provisions 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.

17. In ***Union of India vs. Ibrahim Uddin and Anr. (2012) 8 SCC 148***, the Apex Court has held that an application under Order 41 Rule 27 is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and or the evidence sought to be adduced have any relevance /bearing on the issue involved. The Apex Court has held that the true test is whether the Appellate Court is able to pronounce the judgment on the material before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands, some inherent lacuna or defect become apparent to the Court. These principles are reiterated in ***A. Andisamy Chettiar vs. A. Subburaj Chettiar (2015) 17 SCC 713***.

18. 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. 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...

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19. The power to remand the matter under Rule 23 is limited. It can be exercised 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. ”

7. In the instant case, the learned Judge has not considered whether the deed of partition dated 03/03/1959 which relates to house property was relevant to decide the issue relating to agricultural property. Even if the document is held to be relevant in terms of Rule 28 of Order 41 of CPC, the learned Judge had two options i.e., either to record such evidence or to direct the trial Court to record such

evidence and transmit the same and upon considering the evidence to decide the Appeal on merits. Instead of following the procedure contemplated under Order 41 Rule 28 and 29, learned Judge has set-aside the judgment and remanded the case by taking recourse to Order 41 and Rule 23 of CPC. The course followed by the learned Judge is contrary to the statutory provisions and tantamounts to abdication of duty to decide the case on merits.

8. Under the circumstances, the Appeal is allowed. The impugned judgment is set-aside. Learned District Judge is directed to decide the Appeal and the Application under Order 41 Rule 27 afresh. In the event, the Application under Order 41 Rule 27 is allowed, the First Appellate Court shall take additional evidence in accordance with Order 41 Rule 28 and 29 of CPC. Considering the fact that the Appellant is a senior citizen who is over 90 years of age, the First Appellate Court shall endeavour to decide the Appeal finally within six months from the date of receipt of the order.

9. Pending Applications, if any, stand disposed of in view of disposal of the Appeal.

PREETI
H JAYANI

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(SMT. ANUJA PRABHUDESSAI, J.)