

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

APPEAL FROM ORDER NO.717 OF 2022
WITH
INTERIM APPLICATION NO. 16548 OF 2022

Mangal Hanumant Shirodkar & Ors. ..Appellant/s

v/s.

Umesh Hanumant Shirodkar ..Respondent

APPEAL FROM ORDER NO.719 OF 2022
WITH
INTERIM APPLICATION NO. 16550 OF 2022

Shri Hanumant Hari Shirodkar
(Since deceased through legal heirs)
Mangal Hanumant Shirodkar & Anrs. ..Appellant/s

v/s.

Umesh Hanumant Shirodkar ..Respondent

Mr. Venkatesh A. Shastry for the Appellant/s.
Mr. N.V.Walavalkar, Sr. Counsel i/b. Mr. Sushil Inamdar for the
Respondent.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 13th DECEMBER, 2022.**

JUDGMENT.

1. With consent, heard finally at the stage of Admission.
2. The Appellant herein has taken exception to the common judgment dated 16.12.2015, passed by the Principal District Judge,

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Sindhudurg, Oros, in Regular Civil Appeal Nos. 24 of 2016 and 25 of 2016.

3. By the impugned judgment, the learned Judge set aside the common judgment and decree dated 16.12.2015, passed by the Civil Judge, Junior Division, Malvan, in Regular Civil Suit No. 91 of 2007 and 78 of 2007, and remanded the matter under Order 41 Rule 23A of the Code of Civil Procedure with directions to frame additional issue in RCS No. 91 of 2007, relating to the encroachment by Respondent Umesh in the suit house and to decide the matter afresh by giving opportunity to the parties to adduce additional evidence.

4. Brief facts necessary to decide these appeals are as under:

The Original Plaintiff, Hanumanth Shirodkar, is the late father of the Respondent Umesh Shirodkar. Said Hanumanth Shirodkar was the owner in possession of the property under Survey No. 283832 (22568 and 783/A-3/2), property No.2256B and House No.1738 with a shed (padavi), hereinafter referred to as the suit properties. The suit properties were purchased by Hanumanth Shirodkar by Deed of Sale dated 09.07.1956. He was running a grocery shop in House No. 1738. He claimed that his daughter Mangal and sons Madhusudan and Umesh used to help him in running the said shop, and that he used to pay them

Rs.2000/- per month. On 29.05.2005, Respondent Umesh, who was living separately broke open lock of the shed (padavi) and threw away his belongings. Said Hanumanth therefore filed Suit No.91 of 2005 for perpetual injunction seeking to restrain the Respondent Umesh from interfering with his possession in respect of the suit property. It was alleged that during pendency of the suit, Respondent Umesh took forcible possession of the shed. Hence the plaint came to be amended incorporating prayer for recovery of possession. Said Hanumanth died during the pendency of the suit. The Appellants, herein, who are his legal representatives came to be impleaded in his place.

5. Respondent Umesh filed Civil Suit No.78 of 2007 against his siblings and nephew alleging that the suit property was a joint family property and that he was running the shop in the shed with the consent of his father Hanumanth. Respondent Umesh contended that his father Hanumant was under the control of his sister, Mangal-Appellant No.1 herein. The Appellant No.1 did not accept his inter caste marriage and hence pressurized their father Hanumanth to lodge a police complaint and file a suit against him. It is further alleged that the Appellant No.1 also pressurized Hanumanth to execute a Will in her favour. He therefore, filed a suit for declaration that the Will is illegal , bogus and void ab-initio and sought partition of the properties.

6. The Appellants in Appeal No. 719 of 2002 denied that their father Hanumanth had permitted Respondent Umesh to conduct business in the said shed. They also denied that the Will was fake and fabricated. They filed a counter claim and sought declaration that they are the owners of the suit properties as per the Will dated 20.05.2004.

7. Upon considering the evidence adduced by the respective parties, the learned Judge decreed Suit No. 91 of 2005 and directed the Respondent-Umesh to hand over possession of the suit property (shed) to the Appellants Mangal and Rupesh. The trial Court dismissed RCS No.78 of 2007 and allowed the counterclaim and thereby declared that the Appellant in Appeal No. 719 of 2022 are the owners of the suit property (1A and 1B) as described in the Counter Claim dated 20.05.2004.

8. The said common judgment came to be challenged in Regular Civil Appeal Nos. 24 of 2016 and 25 of 2016 before the District Court at Sindhudurg. The learned District Judge observed that the Plaint was amended by incorporating pleadings that the Respondent Umesh had taken forcible possession of the suit shed and had sought recovery of possession. The issue relating to the amended pleading was not framed, no evidence in this regard was adduced, and no findings on the issue of encroachment have been rendered. The learned Judge, therefore,

allowed the appeal, set aside the judgment and remanded the matter under Order 41 Rule 23A of CPC with direction to frame additional issues and to take additional evidence and to decide the matter afresh. Being aggrieved by the judgment, the Appellants, original plaintiffs have filed these appeals.

9. Heard Mr. Shastry learned Counsel for the Appellant and Mr. N.V. Walavalkar, Senior Counsel for the Respondent. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

10. It is to be noted that Civil Suit No.91 of 2005 was for injunction simplicitor. During the pendency of the Suit, the Original Plaintiff Hanumanth had amended the plaint and incorporated prayer for recovery of possession of the shed on the premise that the Respondent Umesh had taken forcible possession of the shed, whereas Respondent Umesh had raised a defence that Hanumanth had permitted him to occupy the shed. The trial Court instead of framing a specific issue emanating from the amended pleadings as regards trespass and forcible possession of the suit shop, framed a general issue, as to whether the Plaintiffs are entitled for recovery of possession. The records reveal that the parties did not adduce evidence on the issue of forcible dispossession. Moreover, the trial Court did not record any finding even on the issue as framed. In

such circumstances, the Appellate Court was required to take recourse to Rule 25 of Order 41 of CPC, which can be invoked when the trial Court omits to frame or try any material issue, or to determine any question of fact, which is essential for decision on merits. In exercise of power under Rule 25 the Appellate Court was empowered to frame the additional issue and to remand the matter to the trial Court to record additional evidence, to record the findings on such issue and return the evidence to the Appellate Court with its findings and reasons thereof. Till such time, the Appellate Court continues to be in seisin of the matter and has to decide the appeal on merits on receipt of the additional evidence and findings recorded by the trial Court on the additional issue. The Appellate Court, in total disregard to this provision has exercised power under Order 41 Rule 23A of CPC and has set aside the judgment in toto, without recording a finding that retrial is necessary for proper adjudication of the case. The impugned order, to this extent, suffers from jurisdictional error and cannot be sustained.

14. Under the circumstances, the Appeals are allowed. The impugned judgment and decree dated 23.03.2022 in Regular Civil Appeal Nos.24 of 2016 and 26 of 2016 are set aside. The appeals are restored to the file.

. The matter is remanded to the trial Court to decide the following issue:

“ whether the Plaintiff proves that during the pendency of the suit, Defendant Umesh had taken forcible possession of House No.1783 in property No2256A?”

. The trial court shall record additional evidence on the issue and return the evidence to the Appellate Court with its findings and reasons thereon. The Appellate Court shall thereafter decide the appeal after affording opportunity of hearing to both the parties.

. Interim applications stand disposed of in view of disposal of the Appeal from Orders.

(ANUJA PRABHUDESSAI, J.)