

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR
WRIT PETITION NO. 5010 OF 2021

Zahedabi w/o Abdul Razzaque Shete and others vs. Bilkis S/o. Mohd.
Ashif Sheikh and another

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. Masood Shareef, Advocate for petitioner.
Mr. R. L. Khapre, Senior Advocate assisted by Mr. D. R.
Khapre, Advocate for respondent No.2.

CORAM : MANISH PITALE J.

DATE : 14/03/2022

By this petition, the petitioners (original defendant Nos.1 to 5) have challenged the order passed by the Court of District Judge – 4, Nagpur (hereinafter referred to as the ‘Appellate Court’), whereby an application filed under Order 41 Rule 25 of the Civil Procedure Code (CPC) stood rejected and an application for Review of the said order also stood rejected.

2. The petitioners had moved the said application before the Appellate Court, contending that vital issues germane to the controversy between the parties were not framed by the Court of Civil Judge Junior Division (hereinafter referred to as ‘trial

Court') while deciding the suit for declaration, partition and separate possession filed by the respondent No.1. It was submitted that vital issue pertaining to the original defendant No.3 being a minor, was not framed when the suit was decreed by judgment and order dated 17/11/2015. It was contended that therefore, the proposed issues on behalf of the petitioners ought to have been directed to be framed and power should have been exercised by the Appellate Court under Order 41 Rule 25 of the CPC to call for finding on such issues.

3. This application was opposed on behalf of the contesting respondent by contending that the issues proposed on behalf of the petitioner were covered by the original issues framed by the trial Court and that, in any case, the parties were aware and alive to the question pertaining to the alleged status of defendant No.3 being a minor. On this aspect of the matter, there was discussion in the judgment and order of the trial Court and that therefore, the application deserved to be rejected.

4. By the impugned order dated 24/06/2021, the Appellate Court rejected the application for framing of additional issues and for decision afresh by the trial Court. Aggrieved by the

same, the petitioners filed application for review which also stood rejected by order dated 29/09/2021.

5. Mr. Masood Shareef, learned counsel appearing for the petitioners referred to Order 41 Rule 25 of the CPC and contended that the requirement of the aforesaid provision was clearly satisfied in the present case, because the trial Court had failed to frame a specific issue to determine the question of fact regarding the status of defendant No.3 being a minor. This, according to the learned counsel appearing for the petitioners, went to the very root of the matter and that the Appellate Court erred in refusing to exercise power under Order 41 Rule 25 of the CPC. Review application was also dismissed without reference to the facts and circumstances of the present case and application of law pertaining to the aforesaid provision.

6. Mr. Khapre, learned Senior Advocate appearing for the contesting respondent submits that a perusal of the judgment and order passed by the trial Court would show that not only was the aforesaid issue, upon which the petitioners are placing much reliance, discussed but, reference was also made to the material brought on record in that

context by the rival parties. On this basis, it was submitted that when the parties were fully alive to the aforesaid issue and findings were rendered by the trial Court after discussion, there was no scope for exercise of power under Order 41 Rule 25 of the CPC. It was submitted that the aforesaid application was filed on behalf of the petitioners only with a view to delay the proceedings before the Appellate Court. It was also submitted that when the petitioners failed to insist upon framing of specific issue in respect of the said aspect of the matter, it can be said that they had abandoned the said issue. Reliance was placed on judgment of this Court in the case of ***Sk.Ibrahim s/o Mohamood and others vs. Sk.Mehmood s/o Sk.Vazir AIR 2003 Bombay 357***, for the proposition that when the parties were fully aware and alive to the issue, there was no scope for exercising power for remanding the matter to the trial Court.

7. Heard learned counsel for the rival parties and perused the material on record. A perusal of the application filed under Order 41 Rule 25 of the CPC on behalf of the petitioners would show that much emphasis is placed on the claim of the petitioners that defendant No.3 was a minor and that this had a vital impact on the controversy between the parties. It was also claimed that the said aspect of the matter

required the trial Court to frame specific issue in that regard, which the trial Court had failed to do and in that context, specific issues were proposed on behalf of the petitioners.

8. As noted above, the said application was opposed on behalf of the contesting respondent.

9. A perusal of the material on record, particularly, the judgment and order dated 17/11/2015, passed by the trial Court whereby the suit was decreed shows that in paragraphs 46 to 50, the trial Court has specifically discussed the said aspect pertaining to the status of defendant No.3 being a minor at the time of execution of oral Wakf and its implication. While discussing the said aspect of the matter, the trial Court has referred to the aspect of burden of proof and the manner in which the parties had proceeded. It was specifically held in paragraph 50 of the judgment and order of the trial Court that objection raised on behalf of the Petitioner as to minority of defendant No.3 at the time of execution of oral Wakf was not proved on the basis of preponderance of probabilities. It is significant that while supporting the contentions raised in the present writ petition, the learned counsel appearing for the petitioners repeatedly stressed upon the alleged

admissions made on behalf of the contesting respondent as regards the status of the defendant No.3, being a minor at the relevant time.

10. It is worthwhile to see that while leading evidence, the parties were themselves alive to the aforesaid matter in controversy between them. The learned counsel for the contesting respondent is justified in relying upon the judgment of this Court in the case of *Sk. Ibrahim* (supra), wherein this Court has held that the when parties are fully aware of their respective cases for leading necessary evidence, the question of remanding the matter by the Appellate Court would not arise.

11. In the present case, there were certain specific issues framed by the trial Court. In that context, the parties led oral and documentary evidence. In the evidence itself, there is a reference to the aspect of the alleged status of defendant No.3 being a minor at the relevant time. Cross-examination was conducted in that regard and the trial Court had not only discussed the matter on the aforesaid point of controversy but, it had also rendered findings as noted above.

12. As to whether such findings rendered by the trial Court are correct or not, would be a matter to be determined by the Appellate Court on the basis of the contentions that would be raised by the rival parties and in the backdrop of the material available on record.

13. This Court is of the opinion that no case is made out for exercise of power under Order 41 Rule 25 of the CPC, because such power could be exercised for framing of an issue which the trial Court has omitted to frame for determining a question of fact in the present case.

14. As noted above, the parties were fully aware about their rival positions on the aforesaid point in controversy. Evidence was led in that regard and the trial Court discussed the same while rendering findings against the petitioners. Therefore, there was no occasion for the Appellate Court to have exercised power under Order 41 Rule 25 of the CPC. In view of the above, it is found that no case is made out for interference in the impugned order passed by the Appellate Court.

15. It is brought to the notice of this Court that by orders passed on more than one occasion, the

Appellate Court was directed to decide the appeal expeditiously and within a particular time frame. In that regard it is submitted that further extension may be granted to enable the Appellate Court to hear the rival parties and render judgment on the basis of the material available on record.

16. In view of the above, the writ petition is dismissed. The Appellate Court is directed to decide the appeal expeditiously and in any case within a period of four weeks from today.

17. Needless to say, when the contesting respondent has taken the position that the rival parties were alive to the controversy between the parties on the aforesaid specific issue sought to be highlighted on behalf of the petitioners, it will not lie in the mouth of the contesting respondent to contend before the Appellate Court that the petitioners would not be entitled to address the Appellate Court on the said issue, merely because specific issue in that regard was not framed before the trial Court.

JUDGE