

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3813 OF 2017

1. Smt. Shantabai w/o Ananda Thorat
Age- 80 years, Occ- Household,
R/o. Jawali, Tq. Ausa, District Latur.
2. Ashok Shivram Thorat,
Age- 75 years, Occ- Agri.,
R/o. Mugaliwadi, Tq. Ausa,
District Latur.
3. Annarao Shivram Thorat,
Age- 70 years, Occ- Agri.
R/o. Mugaliwadi, Tq. Ausa,
District- Latur.
4. Mudrikabai Sadashivram More
Age- 77 years, Occ- Household,
R/o. Mugaliwadi, Tq. Ausa
District Latur.
5. Smt. Uttambai w/o Shankar Hambade
Age- 81 years, Occ- Household,
R/o. Jawali, Tq. Ausa, District- Latur. ...**Petitioners**

[Orig. Defe. No 2, 3/A to 3/C & 4]

VERSUS

1. Sow. Rajiyabee w/o Khalil Sayyed,
Age- 44 years, Occ- Household,
R/o. Jawali, Tq. Ausa, District- Latur.
2. Smt. Shabarabee w/o Makbul Shaikh
Age- 90 years, Occ- Household,
R/o. Jawali, Tq. Ausa now at Savangira
Tq. Nilanga, Dist. Latur.
3. Ashok Dadarao Suryawanshi
Age- 43 years, Occ- Agri,

R/o. Mugaliwadi, Tq. Ausa
District Latur.

Respondents
[Orig. Plaintiff & Defe. Nos. 2 and 6]

Mr. Sachin S. Deshmukh, Advocate for petitioners.
Mr. R.P. Adgaonkar, Advocate for respondent No. 1.

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 27th SEPTEMBER, 2023

JUDGMENT:

1. Leave to correct prayer clause.
2. Rule. Rule made returnable forthwith. Heard finally with the consent of parties.
3. This petition impugns the order passed by learned District Judge-4, Latur, below Exhibit-35, in Regular Civil Appeal No. 88/2013.
4. Respondent No. 1 filed Regular Civil Suit No. 249/2001, for partition and separate possession and other consequential reliefs, in which petitioners and respondents No. 2 and 3 are defendants. By judgment and decree dated 26.02.2023 the suit was decreed thereby granting $\frac{1}{2}$ share to plaintiff and $\frac{1}{8}^{\text{th}}$ share to defendant No. 1. Petitioners challenged the said decree by filing Regular Civil Appeal No.

88/2013. In the said appeal, petitioners filed application Exhibit-35, under Order 41 Rule 25 of CPC for framing of additional issue and if necessary permission to lead additional evidence. Appellate Court has partly allowed the application and directed to frame issue No. 5 suggested in the application i.e. “प्रतिवादी वादग्रस्त जमिनीचे विरुद्ध बाजुचे (अॅडव्हर्स पजेशन) या तत्वानुसार मालक झाले काय?” (Is it proved that the defendants have become owner of the suit property by way of adverse possession?). After framing of this issue, Appellate Court directed the parties to lead evidence before it in respect of this issue. Petitioners are aggrieved by this order.

5. Heard the learned advocate for petitioners and learned advocate for respondent No. 1.

6. By relying on Rule 25 of Order 41 of CPC, learned advocate for petitioners submits that the Appellate Court ought to have sent the matter for recording of additional evidence to the Trial Court, whose decree is challenged in the appeal. The Appellate Court has committed an error in directing the parties to lead evidence before it. In support of his submission he relies on **Bachahan Devi and Another vs. Nagar Nigam, Gorakhpur and**

Another, (2008) 12 SCC 372.

7. Learned advocate for respondent No. 1 on the other hand supported the impugned order. According to him, Appellate Court has rightly relied on Rule 27 and 28 of Order 41 of CPC and therefore, no case is made out by petitioners to interfere in the impugned order.

8. Perused the writ petition memo, its annexures, impugned order and the citation relied upon by learned advocate for petitioners.

9. Rule 25 of Order 41 of CPC provides thus;

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor[within such time as may be fixed by the Appellate Court or extended by it from time to time].

10. Rule 25 of Order 41 of CPC is interpreted by the Apex Court in *Bachahan Devi* (supra), in following terms;

11. *A bare reading of the provision makes it clear that the same comes into operation when court, from whose decree the appeal is preferred, has omitted to frame or try an issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order 41 Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate court to do so. This is clear from the use of expression "may". But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with the findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the*

additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor."

11. Aforesaid ratio is squarely applicable to the facts of the present case. Since, in the present Appellate Court has allowed application Exhibit-35 and framed additional issue and permitted to lead additional evidence, the order is passed under Rule 25 Order 41 of CPC and Appellate Court ought to have directed the Appellate Court to record additional evidence. The impugned order is passed by misinterpreting Rule 25 Order 41 CPC, same is therefore unsustainable and is liable to be quashed and set aside. In the result, following order:

ORDER

- (I) Writ petition is allowed.
- (II) Impugned order dated 03.02.2017 passed by learned District Judge-4, Latur, below Exhibit-35, in Regular Civil Appeal No. 88/201, is hereby quashed and set aside.
- (III) Appellate Court shall send the matter to the Trial Court, whose judgment and decree is under challenge in the appeal for recording additional evidence in terms of Rule 25 of Order 41 of CPC.

- (IV) This exercise shall be conducted within three months from the date of receipt of writ of this order
Rule is made absolute in the above terms.

[NITIN B. SURYAWANSHI, J.]