

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APEAL FROM ORDER NO.16 OF 2016
WITH CA/3754/2016 IN AO/16/2016**

1. Govind Kundlik Chavan,
Age : 47 years, Occ. : Agriculture & Teacher,
R/o. Karanjkheda, Tq. & Dist. Osmanabad.
At present R/o. Chaitrali Coaching Classes,
Near Bhosle High School, Osmanabad.
2. Surekha w/o. Nandkishor Deshpande,
Age : 54 years, Occ. : Household,
R/o. Devlali, Tq. & Dist. Osmanabad. ...Appellants

Versus

1. Dattatray Venkatrao Kulkarni,
Age : 41 years, Occ. Labour,
R/o. Karanjkheda, Tq. & Dist. Osmanabad.
At present residing at Kangara,
Tq. & Dist. Osmanabad.
2. Digambar s/o Venkatrao Kulkarni,
Age : 39 years, Occ. : Labour,
R/o. Karanjkheda, Tq. & Dist. Osmanabad.
At present residing at Kangara,
Tq. & Dist. Osmanabad.
3. Laxmibai wd/o Venkatrao Kulkarni (Died)
through Lrs.,
 1. Dattatraya Venkatrao Kulkarni
 2. Digambar Venkat Kulkarni
Age : Major, Occu. Labour,
R/o. Kangara, Tq. & Dist. Osmanabad.
4. Vandana w/o Hanmant Kulkarni,
Age : Major, Occ : Household,
R/o. Karanjkheda, Tq. & Dist. Osmanabad.
At present residing at Kangara,
Tq. & Dist. Osmanabad.
5. Venkat s/o. Kashinath Kulkarni (died)
His Lrs are already on record.

6. Shrikant s/o. Pralhad Kulkarni
Age : 50 years, Occ : Agriculture,
R/o. Karanjkheda, Tq. & Dist. Osmanabad.
7. Ramesh s/o. Pralhad Kulkarni
Age : 46 years, Occ :
R/o. Karanjkheda, Tq. & Dist. Osmanabad.
8. Padmavati Venkat Kulkarni
Died through her legal representative,
the Appellant No.2,
Surekha w/o. Nandkishor Deshpande,
Age : 54 years, Occ : Household,
R/o. Devlali, Tq. & Dist. Osmanabad. ...Respondents.

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Advocate for Petitioners : Mr. Avinash M. Lavharde h/f Mr. Milind M. Patil

Advocate for Respondent Nos.1, 2 & 4 : Mr. S.A. Deshmukh

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CORAM : S.G. MEHARE, J.

DATED : OCTOBER 12, 2023

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard finally with the consent of parties at the admission stage.
2. The present appellants are the original defendants nos.5 and 6. Respondents nos.1 to 4 had filed the suit for enforcing 1/4th share to each plaintiff in the joint family property. The suit of the plaintiffs was dismissed. Against the said Judgment and decree, the plaintiffs preferred the Regular Civil Appeal No.372 of 2012. The learned District Judge-3, Osmanabad, remitted the matter back to the trial Court by Judgment and decree dated 28.11.2015, observing that

the issues as regards the nuptial relations between plaintiff no.3, namely Laxmibai and defendant no.2 Venkat and the paternity of plaintiffs nos.1, 2 and 4 were raised, and such issue was formulated to the stance of the plaintiffs. Defendant no.5, who is the daughter of Padmavati (alleged second wife) and the subsequent purchaser / defendant no.6 – Govind, have impugned the order of the learned District Judge-3 Osmanabad.

3. Learned counsel for the appellants would submit that the impugned order of the learned District Judge remitting the matter to the Court under Order 41 Rule 23-A of the Civil Procedure Code is illegal. The Court had exceeded in observing that ex-facie, the plaintiffs remained away from bringing on record the relevant documents on which the entire claim is based. The learned trial Court failed to frame the proper issues which misled defendant no.6 to establish his so-called right as a bona fide purchaser of block no.12. He has vehemently argued that the impugned Judgment and decree of the learned District Judge-3 is perverse. The trial Court had correctly framed the issues involved in the case. The marital relationship of defendant no.1 with defendant no.2 was also questioned, and a specific issue was framed. That issue covers who was the first wife of defendant no.2. The legality and validity of Civil Suit No.20 of 1973 were also considered by way of framing the

specific issue. The trial Court had also framed the issue of the status of the property.

4. Learned counsel for respondents nos.1, 2 and 4 supported the impugned Judgment and order. He would submit that the plaintiffs did not lead the evidence before the Court. Therefore, the learned District Judge has correctly granted them an opportunity to lead the evidence. He would submit that no harm would be caused to the appellants if the trial Court hears the matter as per the order of District Judge 3.

5. Hearing the respective counsels, the question for determination is whether the District Judge has exercised the powers under Order 41 Rule 23-A of C.P.C. correctly while passing the impugned Judgment and Order.

6. Perused the impugned Judgment and order. It was not the case of the appellants/plaintiffs before the learned District Judge-3 that the Court denied them to lead the evidence. There were no circumstances on record that restrained the plaintiffs from producing the evidence. The suit was for partition. The entire facts, how the relationship between defendant nos.1 and 2 was created, how that civil suit was compromised, and everything was assailed. The learned trial Court decided the suit after granting an opportunity to lead the evidence. The learned trial Court has correctly framed the issues which cover the dispute among the parties.

7. The learned District Judge has illegally held that ex-facie, the plaintiffs, remained away from bringing on record the relevant documents upon which the entire claim was based. Such findings could not be sustained unless there is material to satisfy the Court that either the Court denied the parties to lead the evidence or the plaintiffs could not produce the evidence as it was not in his knowledge or could not produce it after his due diligence. Order 41 Rule 27 has taken the care that if anything has been proved before the Court and by way of additional evidence, the party to the suit may seek leave to lead the evidence. Nothing was there before the learned District Judge. The learned trial Court had framed all the relevant issues. The parties had led the evidence, and the trial Court decided the suit on merit. Nothing was on the record to exercise the power under Order 41 Rule 23-A of the Civil Procedure Code. It appears a casual approach of the appellate Court in remitting the matter back to the trial Court. Order 41 Rule 24 of the C.P.C. provides that where the evidence on record is sufficient, the appellate Court may determine the case finally. If sufficient evidence exists, the appellate Court should avoid remitting or remanding the matter. The purpose is that the matter should be adjudicated on merit, and the litigant should not wait for adjudication of his dispute for years together.

8. The Court, going through the Judgment and Decree passed by the learned trial Court, is of the opinion that the impugned

Judgment and Order of the learned District Judge-3 remitting the matter back to the trial Court is illegal and against the provision of Order 41 Rule 23-A of the C.P.C. Hence, the following order:

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned Judgment and Order of the learned District Judge-3, Osmanabad, passed in Regular Civil Appeal No.372 of 2012 dated 28.11.2015, is quashed and set aside.
- (iii) The learned District Judge-3 is directed to decide the appeal on merit on the basis of the material available on record within three months from the date of appearance of the parties.
- (iv) The parties shall appear before the learned District Judge-3, Osmanabad on 01.11.2023.
- (v) All civil applications stand disposed of.
- (vi) Rule is made absolute.

(S.G. MEHARE, J.)