

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 16 OF 2022

Shivling s/o Manmath Patange Appellant

Versus

Pushpa w/o Mallikarjun Hiremath & others Respondents

WITH
APPEAL FROM ORDER NO. 17 OF 2022

Sachin s/o Haribhau Ghongade Appellant

Versus

Pushpa w/o Mallikarjun Hiremath & others Respondents

WITH
APPEAL FROM ORDER NO. 18 OF 2022

Ranjeet s/o Haribhau Ghongade Appellant

Versus

Pushpa w/o Mallikarjun Hiremath & others Respondents

WITH
APPEAL FROM ORDER NO. 19 OF 2022

Sachin s/o Haribhau Ghongade Appellant

Versus

Pushpa w/o Mallikarjun Hiremath & others Respondents

WITH
APPEAL FROM ORDER NO. 32 OF 2022

Jalindar Baburao Bugade & others

Appellants

Versus

Pushpa w/o Mallikarjun Hiremath & others

Respondents

Mr. D. A. Mane, Advocate for the appellants.

Mr. N. S. Tekale, Advocate for respondents No. 1 to 3.

CORAM : R. M. JOSHI, J.

DATE : 20th APRIL, 2023.

PER COURT :

1. These appeals from order take exception to the order dated 21st February, 2022 passed by the Learned Adhoc District Judge 1, Bhoom remanding the suits back to the Trial Court for re-trial.

2. Plaintiffs filed suits for declaration and ownership and recovery of possession in respect of suit lands and cancellation of sale deeds. Learned Trial Court decided the suits after recording evidence of both the sides and dismissed the same by judgment and decree dated 17th July, 2019.

3. Plaintiffs being aggrieved by the said judgment, preferred appeal before the First Appellate Court under Section 96 of the Code of Civil Procedure. The First Appellate Court, by passing impugned

order, relegated the suit back to the Trial Court for framing of issues as discussed in the judgment and for decision of the suit afresh.

4. Learned counsel for the appellants/original defendants contends that the First Appellate Court has committed error in not deciding all the points for determination involved in the appeals and has taken recourse of Order 41 Rule 25 of the Code of Civil Procedure for relegating back the suits for retrial. According to him, even if the said recourse was to be adopted by the First Appellate Court, it was only open for the First Appellate Court to frame the issue which ought to have been framed by the Trial Court and to call upon the Trial Court to record finding against the same and to refer back the said finding to the First Appellate Court for final decision of the appeal. He also drew attention of this Court to the impugned order wherein certain issues are claimed to have not been framed by the Trial Court and hence called upon to be framed and decided. These issues, according to him, are already framed and determined by the Trial Court. Hence, there was no propriety in calling upon the Trial Court to decide those issues again. As far as issue as to whether partition took place between deceased Ambadas and Suraj on 29th January, 1977 is concerned, it is informed to this Court that infact

defendant No. 1 filed an application for framing of this issue which is objected by the plaintiffs and hence, considering said objection, the issue of partition was not framed.

5. Learned counsel for the plaintiffs does not dispute the fact that the issues about plaintiffs being legal heirs of deceased Ambadas and whether the sale deed in question is binding on plaintiffs or not were framed by the Trial Court and also answered. Insofar as the issue about partition is concerned, it is contended that predominantly it is the responsibility of the Court to frame the issue and therefore, the objection raised by plaintiffs for framing the said issue is inconsequential.

6. The First Appellate Court while deciding the appeal is required to answer all points raised before it for determination. It is only after determination of those points if the Court finds that any issue was relevant for decision of the case was not framed by the Trial Court, it is open for the First Appellate Court to refer the same by invoking provisions of Order 41 Rule 25 of the Code of Civil Procedure. In the instant case, as rightly pointed out by learned counsel for the appellants/defendants that the issues about who is

legal heir of deceased Ambadas as well as binding nature of the sale deed are already framed and decided by the Trial Court. Thus, there was no reason for the Appellate Court to call upon the Trial Court to decide those issues afresh. As regards non-framing of issue of partition is concerned, it is to be considered that the plaintiffs themselves had opposed framing of the said issue. It was for the First Appellate Court to decide the effect of such opposition and non framing of the issue. However, for that purpose, certainly Order 41 Rule 25 of the Code of Civil Procedure could not have been invoked by the First Appellate Court.

7. In view of the aforesaid discussion, the impugned order of relegating back the suits for trial before the Trial Court cannot sustain. Hence, the order stands set aside. Appeals from order stand allowed. The First Appellate Court is directed to decide the same on merit. Parties to bear their cost.

8. Parties to appear before the First Appellate Court on 12th June, 2023. The First Appellate Court shall not issue fresh notice to the parties for their appearance.

9. Pending civil application if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb