

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

APPEAL FROM ORDER NO.:29 OF 2017

Bashirkhan Samsherkhan Pathan (deceased) Through L.rs. And Others

VERSUS

Ibrahimkhan Aliyarkhan Pathan And Others

Mr. Natu Sharad V., Advocate for Petitioner

WITH

APPEAL FROM ORDER NO.:25 OF 2017

Ibrahimkhan Aliyarkhan Pathan And Others

VERSUS

Bashirkhan Samsherkhan Pathan (deceased) Through His L.rs. Ikhlas Khan

Bashirkhan Pathan And Others

Mr. Patil Milind , Advocate for Petitioner

Mr. Natu Sharad V., Advocate for Respondent Nos. 2 to 5.

Mr. Bolkar Yogesh B., Advocate for respondent No. 6.

WITH

CIVIL APPLICATION NO.:4710 OF 2017

IN

APPEAL FROM ORDER NO.:25 OF 2017

Ibrahimkhan Aliyarkhan Pathan And Others

VERSUS

Bashirkhan Samsherkhan Pathan (deceased) Through His L.rs. Ikhlas Khan

Bashirkhan Pathan And Others

Mr. Patil Milind , Advocate for Petitioner

Mr. Natu Sharad V., Advocate for Respondent Nos. 2 to 5.

Mr. Bolkar Yogesh B., Advocate for respondent No. 6.

CORAM

: ARUN R. PEDNEKER, J.

CDATED

: 14/07/2023.

ORDER :

1. The Appellants in the Appeal From Order (AO) No. 29/2017 are original plaintiffs and the appellants in AO No. 25/2017 are original defendants. By the present AOs, the appellants are challenging the common

order dated 7.3.2017 passed by the learned District Judge-1, Shahada in R.C.A. Nos. 25/2014 and 27/2014, setting aside the judgment and decree dated 30.7.2014 passed in Special Civil Suit No. 23/2011, and remanding the matter back to the Trial Court for deciding it afresh. The Trial Court has partly decreed the suit of the plaintiff for declaration that that plaintiffs are the legal heirs of deceased Majidkhan and dismissed the suit filed for possession of the suit lands described in para No. 4A, of the plaint.

2. Brief facts, giving rise to the present Appeal from Orders can be summarized as under :-

The plaintiffs and defendants belonged to Sunni sect of Islam religion. The plaintiffs have filed the suit for declaration that they are the legal heirs of deceased Majidkhan Sujatkhan Pathan and they are owners of suit fields, suit house and suit amount and defendant Nos. 1 to 3 are not the legal heirs of deceased Majidkhan and they have no right, title and interest in the suit properties and for directing to the defendant Nos. 4 and 5 for depositing amount in the Court which was laying in the bank in the accounts of deceased Majidkhan. The plaintiffs also sought declaration that mutation entries in respect of the suit lands are unlawful and they sought relief of distributing the suit lands between the plaintiffs.

3. The defendants denied the claim of the plaintiffs. They admitted the relationship of Majidkhan with the plaintiffs. They denied that plaintiffs had any right or interest over the suit properties. The learned Civil Judge, Senior Division, after framing issues and considering the material on record has delivered the judgment on 30.7.2014. The Trial Court held that plaintiffs are legal heirs of deceased Majidkhan. The Trial Court also held that deceased Majidkhan in the year 2001 gifted the suit land to the defendants by oral

gift as per the Mohmedian Law. It further held that defendant Nos. 1 to 3 are in the lawful possession of suit land as per oral gift in their favour by deceased Majidkhan. The Trial Court further held that the plaintiffs being the legal heirs of deceased Majidkhan, are entitled for the amounts laying with defendant Nos. 4 and 5 in the name of deceased Majidkhan subject to succession certificate. The Trial Court further held that mutation in respect of the suit lands is not proved as illegal and accordingly held that the plaintiffs are entitled for declaration in respect of the suit house and the amounts, but are not entitled for the possession of the suit lands. Thus, the suit was partly decreed by the Trial Court.

4. The original plaintiffs challenged the judgment and decree of the Trial Court by filing Civil Appeal No. 25/2014 and the original defendant Nos. 1 to 3 challenged the judgment and decree of the Trial Court by filing Civil Appeal No. 27/2014. Both the civil appeals were heard together by the Appellate Court. The Appellate Court framed following points for determination, which are as under :-

(1) Whether issues framed in the suit shall be taken for decision by this Court on basis of objections raised by the appellants in both appeals ?

(2) Whether the suit is required to be remanded to the Trial Court for recording finding and giving decision on all issues with certain directions in respect of the necessary parties to the suit ?

5. The Appellate Court held that the Trial Court was required to frame issue on the point of possession of the suit house and so, it is necessary for the Trial Court to frame that issue and consider the evidence on it and record findings on it. There is no specific order in respect of the ownership over the suit property though plaintiffs claimed that they are the legal heirs

of Majidkhan in respect of the suit house. The Appellate Court further held that Trial Court was required to decide entitlement of the parties of properties and secondly, it was required to decide the entitlement of the amount which is laying in the bank, but instead of doing so the matter was left for succession certificate which was not necessary.

6. The Appellate Court held that once parties have filed the suit for determination of their right and entitlement of their property, that cannot be subject matter of the succession certificate and the Civil Court is competent to give judgment. Thus, the Appellate Court proceeded to pass common judgment and order in both the appeals, by setting aside the judgment and decree passed by the Trial Court and remanded the matter back to the Trial Court for deciding it afresh. The Trial Court was further directed by the Appellate Court to give opportunity to the plaintiffs to add necessary persons as either plaintiffs or defendants as necessary parties and for that purpose Trial Court was directed to give time limit. The Trial Court was further directed to frame necessary issues. The Trial Court was directed to give findings on the entitlement of the parties in respect of the amount lying in the bank and the Trial Court, in view of the above directions, was directed to decide the suit afresh.

7. Both the parties have challenged the order passed by the Appellate Court before this Court. It is the contention of the parties that it was not the prayer of the parties before the Appellate Court to remand the matter back to the Trial Court for deciding it afresh. The Trial Court, after considering the contentions of the parties and going through the evidence on record of both the parties, has rendered the finding on the issues and passed the judgment in the matter. Parties had opportunity to lead their evidence and they had

done it to their extent possible and no prayer was made to remand the matter back to the Trial Court. The learned counsel for the parties submit that the Appellate Court ought not to have remanded matter back to the Trial Court for fresh adjudication and directing the parties to lead evidence. The order passed by the Appellate Court does not render findings as to why the Trial Court's findings on the issues are erroneous. The learned counsel submit that sufficient evidence is available on the record and the Appellate Court can enter into the findings of facts recorded by the Trial Court based on the evidence on record. The learned counsel submit that the parties do not wish to go before the Trial Court to lead further evidence and the Appellate Court was fully competent to decide the appeals within its jurisdiction based on the material on record.

8. The law on this subject is discussed by this Court in **Barku Pundlik Patil (Since deceased, Through LR's) Chandrakalabai Barku Patil and others Vs. Subhash Govindrao Pagare and others, Appeal From Order No.35 of 2022, dated 09.11.2022**. The relevant portion i.e. para nos. 9 and 10 in the above case is as under :-

"9. Order 41 Rule 23 deals with the remand of case by Appellate Court. Rule 23 deals with a situation where the Court from whose decree an Appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in Appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded. Order 41 Rule 23-A provides that, whether the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in Appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

10. The Hon'ble Supreme Court has considered the scope of power of Remand by Appellate Court under Order 41 Rule 23-A in various Judgments as under:-

10(a).

10(c). In the case of P. Purushottam Reddy and another Vs. Pratap Steels Ltd., 2002 (2) SCC 686, the Hon'ble Supreme Court has held that only in exceptional cases, where the conditions stipulated by provisions of Order 41 Rule 23-A of the Code of Civil Procedure, 1908 are satisfied that such an order of remand can be passed.

10(d). The Hon'ble Supreme Court in the case of Shivakumar and others Vs. Sharanabasappa and others, (2021) 11 SCC 277, at Paragraph Nos.26.4 and 26.4.1, has observed as under:

"26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

26.4.1. ...Such cases where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill- up the lacuna in its case."

9. In view of the settled legal position as discussed above by the Hon'ble Supreme Court, the order of remand is not to be lightly passed by Appellate

Court and moreso, in the instant case, when none of the parties have prayed for remand and the Appellate Court unless it had reached a findings that the evidence on record is not sufficient to render the judgment should have not remanded the matter for fresh adjudication. The Trial Court had rendered the judgment based on the material on record and the Appellate Court being the fact finding Court is entitled to examine the evidence and record it's findings on the issues.

10. In view of the discussion made above, I hold that the Appellate Court erred while remanding the matter back to the trial Court for deciding it afresh. In the result, the order passed by the Appellate Court is set aside and the matter is remanded back to the Appellate Court to decide the same on merits. The Appellate Court is entitled to exercise all the powers envisaged to the Appellate Court. The Appellate Court shall not be influenced by the observations made by this Court in this order. Both the appeals are disposed of accordingly. Civil Application, if any, is disposed of accordingly. Record and proceedings be sent back to the Appellate Court.

[ARUN R. PEDNEKER J.]

SSC/