



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.36 OF 2023
WITH
CIVIL APPLICATION NO.7396 OF 2023
IN AO/36/2023

GOTU TUKARAM PARDESHI DIED THR LEGAL HEIRS
NIRMALA GOTU PARDESHI AND ORS

Versus

PANDIT TUKARAM PARDESHI AND ORS

Mr. P. V. Mandlik, Sr. Counsel i/b. Mr. P. P. Mandlik, Advocate for appellant.
Mr. A. D. Sonkawade, h/f Mr. A. V. Hon, Advocate for Respondent No.1.
Respondent Nos. 2 and 3 served.

CORAM : S. G. CHAPALGAONKAR, J.

DATED : 17th FEBRUARY, 2025

ORDER :

1. Appellants/original plaintiffs impugns the judgment and order dated 13.03.2023 passed by District Judge, Dhule in Regular Civil Appeal No.24 of 2021.

2. Appellants/original plaintiffs instituted suit for partition and separate possession of house property situated at Kusumbe. Defendant No.1 refuted plaintiff's claim contending that he is absolute owner of the suit plot, which has been purchased by him under registered sale deed dated 10.08.1987 and made construction out of his self earnings. Plaintiffs have

no right title or interest in the suit property. The Trial Court framed issues, recorded evidence of the parties and decreed the suit of the plaintiffs declaring that the plaintiffs and defendant No.1 have 1/2 share in the suit plot and plaintiffs are owners of Western side house portion (Plot No.26-B).

3. Defendant No.1 assailed decree passed by Trial Court in Regular Civil Appeal No.24 of 2021 before District Judge at Dhule. Learned District Judge after referring to the provisions of Order XIV and paragraph 89 of Civil Manual, observed that the Trial Court was under obligation to frame issue as to maintainability of the suit, limitation and valuation of suit.

4. Appellate Court observed that non framing of aforesaid issues rendered Trial Court's judgment unsustainable and finally remanded matter back to Trial Court with direction to frame proper and material issues as indicated above and decide the suit afresh by giving opportunities to both the parties.

5. Mr. Mandlik, learned senior Advocate appearing for appellant submits that Appellate Court erroneously set aside judgment and decree of the Trial Court. According to him, there was absolutely no reason to remand matter since re-trial is not

required. The issues as indicated in para no.15 of judgment of Appellate Court could have been answered by Appellate Court on the basis of evidence and material already on record. By inviting attention of this Court to provisions of Order 41 Rule 23 to 25, he submits that remand of matter was absolutely unwarranted. It causes unnecessary harassment to plaintiffs who are litigating for their right since 2017.

6. Per contra, Mr. Sonkawade, learned Advocate appearing for respondent No.1 supports impugned judgment and order passed by Appellate Court. According to him, issues as highlighted by Appellate Court were necessary for adjudication of dispute and non framing of such issues has caused prejudice to the defendants, remand of matter was necessary.

7. Having considered submissions advanced, it is apposite to refer certain observations of the Supreme Court in case of **Shivakumar and others Vs. Sharanabasappa and others reported in (2021) 11 SCC 277**, as regards to the scheme under Order 41 Rule 23 to 25, which reads thus :-

“26.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without reference to the provision contained in Rule 24 of Order 41 that enables the

Appellate Court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the Appellate Court proceeds on a ground entirely different from that on which the Trial Court had proceeded.

26.4. A conjoint reading of Rules 23, 23A and 24 of Order XLI 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 XLI CPC](#) and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial 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.”

8. Similarly, in case of **Ashwinkumar K. Patel Vs. Upendra J. Patel**, 1999 (3) Supreme Court cases 161. The Supreme Court observed as under :-

Insofar as Order 41 Rule 25 of the Code is concerned, the appellate court continues to be in seisin of the matter; it calls upon the trial court to record the finding on some issue or issues and sent that finding to the appellate court. The power under Order 41 Rule 25 is invoked by the appellate court where it holds that the trial court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate court while remitting some issue or issues, may direct the trial court to take additional evidence on such issue(s).

9. In light of aforesaid exposition of law, if the reasoning adopted by the Appellate Court is considered, it nowhere spells out that parties wish to record any more evidence in support of their contentions. Appellate Court observed that issue as to maintainability of suit, limitation and suit valuation are germane to the proceeding in light of specific objections in written statement, but Trial Court omitted to frame such issues. It is true that in such circumstances, procedure contemplated under Order 41 Rule 25 can be adhere to. However, when issues omitted by Trial Court does not require leading of additional evidence by parties or re-trial is not warranted, then Appellate Court can frame such issues and render its finding on the basis of evidence already led by parties.

10. In present case, there is nothing on record to hold that re-trial is essential. Appellate Court could have easily rendered its finding against all issues, including those omitted by Trial Court on the basis of available material and decide the appeal one way or other on its own merit. Therefore, order passed by Appellate Court to the extent of directing remand of the matter cannot be countenanced. In result, the appeal is

partly allowed. Judgment and decree dated 13.03.2023 passed by Appellate Court in Regular Civil Appeal No.24 of 2021 is quashed and set aside. Regular Civil Appeal no.24 of 2021 is restored to its original number. Appellate Court shall re-admit appeal and decide same on merit considering on all issues as framed by Trial Court and additional points as to maintainability of suit, its valuation and limitation.

11. Parties shall remain present before Appellate Court on 19.03.2025. On appearance of parties, Appellate Court shall proceed to decide Appeal on its own merit by rendering findings on all points on the basis of evidence and material already tendered by parties in the suit.

12. Appeal from Order stands **disposed of**. Pending Civil Application also stands **disposed of**.

(S. G. CHAPALGAONKAR, J.)

Rushikesh/2025

...