



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

**APPEAL FROM ORDER NO.4 OF 2025
WITH
CIVIL APPLICATION NO.475 OF 2025**

1. Prakash s/o Kisanlal Lodha,
Age- 75 years,
Occupation-Agriculture and Business.
2. Subhashchandra s/o Kisanlal Lodha,
Age- 77 years,
Occupation – Agriculture and Business
Through his power of attorney holder,
The petitioner No.1.

Both r/o. Kallam, at Present
Prabhat road, Galli No.07, Erandwane,
Pune, Dist. Pune.

..Appellants
(Original Plaintiffs)

Versus

1. Dagadu Sopan Kore,
Age – 65 years,
Occupation – Agriculture,
2. Jyotiram Dagadu Kore,
Age – 41 years,
Occupation – Agriculture

Both r/o
Shelka Dhanora, Tq. Kallam,
District – Dharashiv.

..Respondents
(Original defendants and counter claimants)

...

Mr. D. A. Mane h/f Mr. M. M. Patil, Advocate for Appellants.
Mr. A. N. Nagargoje, Advocate for Respondent No.1-Caveator.

...
**CORAM : S. G. CHAPALGAONKAR, J.
DATED : 04th FEBRUARY, 2025.**

JUDGMENT:-

1. The appellants take exception to common judgment and order dated 08.05.2024 passed by District Judge-1, Kallam in Regular Civil Appeal Nos.03/2024 and 04/2024, thereby quashing

and setting aside judgment and decree dated 03.02.2024 passed by Civil Judge, Senior Division, Kallam in Regular Civil Suit No.1145/2019 and remanding proceeding to the Trial Court for framing issue of tenancy with further direction to refer the same to Tenancy Authority for final disposal. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The appellants are original plaintiffs in Regular Civil Suit No.1145/2019. They filed suit seeking relief of perpetual injunction against respondents in respect of land bearing Gut No.72 admeasuring 7H 80R situated at Shelka Dhanora, Tal. Kallam, Dist. Osmanabad.

3. It is the case of plaintiffs that they are sons of Kisanlal and Madanbai Lodha. They inherited the suit property. The defendant no.1 has been declared as protected tenant to the extent of 3H 40R out of Gut No.72. On 01.06.2019, the defendants caused obstruction to plaintiffs cultivation over the suit property. The defendants filed written statement as well as counter claim contending that Gut No.72 is formed out of Survey Nos.34, 35, 39 and 43 during the consolidation. Kisanlal Lodha was original owner of all four survey numbers. Late Sopan Maruti Kore (Mali) (father of defendant no.1) was cultivating Survey Nos.35 and 43 as protected tenant. After his death, defendant no.1 acquired

possession. Late Sopan Kore was already declared as restricted owner of Survey No.43. Although there is no declaration as regards to the Survey No.35, he never surrendered tenancy rights in respect of said land and continued in the possession. Accordingly, defendants sought dismissal of suit of the plaintiffs and decree of perpetual injunction against plaintiffs from causing obstruction over part of land from Survey No.35.

4. In written statement to the counter claim, plaintiffs contended that on 04.07.1980, Sopan Kore declared as protected tenant to Survey No.43 admeasuring 3H 30R and made oral surrender of his tenancy right in respect of Survey No.35. Thereafter, late Sopan Kore never raised his claim as to the tenancy right or possession over Survey No.35. The plaintiffs are owners and possessors of land Survey No.35.

5. The Trial Court framed issues based on the pleadings of the parties and finally observed that the questions as to whether Sopan Kore was a tenant of Survey No.35 and whether his tenancy was validly terminated fall under the jurisdiction of the Competent Authority under the Hyderabad Tenancy and Agricultural Lands Act, 1950 (for short, "HT & AL Act"). However, considering nature of claim and counter claim in this suit, decision has to be based on evidence of actual possession of the parties. Consequently, the suit of the plaintiffs was decreed, and the counterclaim was dismissed.

6. Aggrieved defendants filed Regular Civil Appeal Nos.03/2024 and 04/2024 against decree in the suit as well as counter claim. The Appellate Court observed that although plaintiffs as well as defendants are claiming decree of perpetual injunction against each other, the issue as to the tenancy of Sopan Kore over disputed Survey No.35 needs reference to the Competent Authority under Section 99 of the HT & AL Act. Consequently, partly allowed the Appeals and remanded the proceedings to the Trial Court with following directions:

“1. The judgment and decree passed by Ld. Trial Court in RCS No.1145/2019 is quashed and set aside and the matter is remanded to the Ld. Trial Court with following directions-

i) Readmit the RCS No.1145/2019 under it's original number along with counter claim.

ii) The evidence recorded during the original trial shall be the evidence during the trial after remand. The parties are not at liberty to adduce any oral or documentary evidence after remand.

lii) The parties shall appear before the Trial Court on 12.06.2024.

iv) The Ld. Trial Court in terms of pleading of the parties shall frame necessary tenancy issue/s and refer it to the Tenancy Court in terms of provisions of Sec.99(A) of Hyderabad Tenancy and Agricultural Land Act, 1950.

v) After such reference is made the Trial Court shall direct the parties to the suit to appear before the tenancy authority on particular date.

vi) The tenancy authority shall decided the said reference within period of 6 months after appearance of the parties before it.

Vii) On receipt of the decision of Tenancy Court on such reference, the Trial Court shall dispose of suit in accordance with law as expediently as possible, preferably within period of 3 months thereafter.

2) Decree be drawn up accordingly.

3) R & P send to Ld. Trial Court”

7. Mr. Mane, learned Advocate appearing for the appellants submits that appellants/plaintiffs filed simplicitor suit for perpetual injunction. Even counter claim filed by the respondents sought simple relief of perpetual injunction. The issue can be decided ascertaining actual possession of parties. The issue of tenancy would not be germane to such proceedings. The decree for perpetual injunction can be passed without calling decision of Competent Authority. Mr. Mane would further point out that Late Sopan Kore never raised any claim of his tenancy in respect of land Survey No.35 during his lifetime. In the year 1976-77, Survey Nos.34, 35, 39 and 43 consolidated together to form Gut No.72. Late Sopan Kore got declaration of his tenancy right on 04.07.1980 in respect of Survey No.43 admeasuring 3H 30R by order of Competent Authority. His name never appeared as possessor of land Survey No.35, either before or after consolidation. The plaintiffs are absolute owners and possessors. The Trial Court appreciated aforesaid evidence and decreed the suit of the plaintiffs. However, Appellate Court without framing necessary points for consideration and dealing with findings recorded by the

Trial Court, mechanically remanded matter back with direction to frame and refer issue as to the tenancy to the Competent Authority under Section 99(A) of the HT & AL Act.

8. Per contra, Mr. Nagargoje, learned Advocate appearing for the respondents submits that in written statement to the counter claim, plaintiffs have admitted that Sopan Kore was tenant over Survey Nos.43 as well as 35, however, they contend that Sopan surrendered his tenancy right in respect of Survey No.35 and retained the tenancy right in respect of Survey No.43 only. According to Mr. Nagargoje, there is no provision for oral surrender of the tenancy right. Whether tenancy of Sopan exists or it has been extinguished are the issues to be dealt with by the Competent Authority under HT & AL Act. As such, reference under Section 99(A) was necessary. The Appellate Court has rightly remanded the matter with direction to refer the issue to the Competent Authority. He would, therefore, urge to maintain the judgment and decree passed by the Appellate Court.

9. Having considered submissions advanced, certain admitted facts can be referred before delving into the controversy in this Appeal:

- (i) Admittedly, lands were owned by plaintiffs' father. Now they inherited the same.

(ii) The land Survey Nos.34, 35, 39 and 43 has been merged in Gut No.72 during consolidation scheme implemented in the year 1976-77. The father of the defendants i.e. Sopan Kore was tenant over Survey Nos.35 and 43. However, he has been declared as protected tenant over land Survey No.43 admeasuring 3H 30R by order of Competent Authority/Tahsildar.

(iii) The revenue record before and after consolidation depicts ownership and possession of the plaintiffs over Gut No.72, except portion of land Survey No.43. There is no record as to the surrender of tenancy right by Sopan Kore in respect of Survey No.35, but his possession is not discernible after 1955-56.

(iv) Now, plaintiffs are claiming their exclusive possession over Gut No.72. Admittedly, land Survey No.35 is part of Gut No.72 and defendants are claiming their tenancy rights derived from Sopan and also assert their possession on the basis of such right. The plaintiffs and defendants both are claiming for decree of perpetual injunction against each other.

10. It is true that, in a suit seeking decree of simplicitor injunction the issue of possession would germane for consideration. However, cursorily, right of enjoyment of property and legality of possession also requires consideration. There may be cases where

merely on the basis of evidence as to the possession, the dispute between the parties can be resolved by passing decree of simplicitor perpetual injunction. However, when possession is asserted based on a certain right, an inquiry into the title or such right becomes essential and indispensable. In present case, Trial Court found plaintiffs to be in possession of the suit property without entering into the claim as to the tenancy rights asserted by defendants. It is trite that, if defendant establish his tenancy right over suit property, he cannot be clamped with decree of perpetual injunction. The person who holds tenancy right cannot be evicted without following due process of law. In absence of valid surrender of such tenancy, the tenant would continue to enjoy right to be in possession even against true owner. Section 99 of the HT & AL Act makes further provision for protection of possession of tenant against illegal dispossession. Section 98 provides for summary eviction of any person unauthorisedly occupying or wrongfully in possession of the land by the Collector. Section 99 prescribes bar of jurisdiction of Civil Court to settle, decide or deal with any question, particularly as to the tenancy right. Section 99(A) provides that if any issue that required to be decided under Section 99 arises in the suit, Civil Court is under obligation to stay the suit and refer such issue to the Competent Authority for determination and on receipt of such reference to proceed to decide the suit in accordance with law.

11. The aforesaid scheme of the HT & AL Act clearly bars the jurisdiction of the Civil Court from deciding issues related to the extent, conditions, or termination of a person's tenancy rights if they are, or shall be, considered a tenant, protected tenant, or deemed full owner of the land at the relevant time. In present case, defendants asserted their possession on the basis of tenancy rights of Sopan. The admission of plaintiffs in written statement to the counter claim as to the tenancy of Sopan over Survey No.35 with caveat that such tenancy does not exist, prima facie, shows that tenancy right of the Sopan as regards to the Survey No.35 requires to be adjudicated by Competent Authority through reference under Section 99(A). Hence, decision of the Appellate Court regarding need of framing issue of tenancy cannot be faulted.

12. Eventually, issue that falls for consideration is whether case is made out for remand of the matter under the scheme of the Order XLI Rules 23, 24 and 25 of the Code of Civil Procedure. Rule 23 of the Order XLI empowers Appellate Court to remand the case and direct what issue or issues shall be tried in the case, so remanded with direction to re-admit the suit under its original number. Rule 23(A) further prescribes that where 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 retrial is considered necessary, the appellate court

shall have the same powers as it has under Rule 23. However, Rules 24 and 25 are in the nature of explanation or in the nature of proviso to the powers of remand. Rule 24 prescribes that where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds. Rule 25 further prescribes that here 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.

13. The Supreme Court of India in case of ***Shivkumar & Ors. Vs. Sharanabasappa and Ors.***¹ intangibly discussed scheme of Order XLI Rules 23 to 26 and summarized legal position in paragraph no.26, which reads as under:

“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 XLI that enables the Appellate Court to dispose of a case finally without a remand if the evidence on

¹ 2021 (11) SCC 277.

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.”

14. In yet another judgment the Supreme Court of India in case of ***Syeda Rahimunnisa vs Malan Bi (Dead) By Lrs. & Anr.*** *Etc*² observed in paragraph no.36 as under:

“It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for

and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court. The High Court instead should have decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals.”

15. In a wake of aforesaid exposition of law, when Appellate Court recorded that no further evidence is required to be recorded by the parties and issue as to the tenancy is required to be framed and referred to the Competent authority under HT & AL Act, the Appellate Court itself could have framed the issue and referred the same to the Tenancy Authority. There is absolutely no justification for remanding matter for that purpose to the Trial Court only for the purpose of framing the issue of tenancy. When right of the parties to record further evidence was foreclosed, even otherwise parties have not claimed that they wish to bring on record any additional material than what has been already on record and relied by them, order of remand cannot be justified.

16. In result, Appeal partly succeeds. Hence, following order:

ORDER

- a. Appeal from Order is partly allowed.
- b. The impugned common judgment and order dated 08.05.2024 passed by District Judge-1, Kallam in Regular Civil Appeal Nos.03/2024 and 04/2024, is hereby quashed and set aside.

c. The Regular Civil Appeal Nos.3/2024 and 4/2024 be restored/re-admitted before the District Judge, Kallam, Dist. Osmanabad.

d. Parties shall appear before the District Judge, Kallam on 28.02.2025.

e. The learned District Judge, in terms of pleadings of the parties shall frame necessary tenancy issue/s and refer it to the Competent Authority in terms of Section 99(A) of the HT & AL Act, 1950.

f. In case such an issue is already framed and referred by Trial Court in pursuance of the impugned judgment and order dated 08.05.2024, the Competent Authority shall decide it expeditiously as directed in Clause No.(vi) of the impugned order and communicate its decision to the learned District Judge at Kallam, who shall dispose of Appeals as expeditiously as possible and preferably within a period of six months from the date of receipt of decision on tenancy issue from the Competent Authority.

17. In view of the above, nothing survives in the Civil Application and the same is accordingly disposed of.

(S. G. CHAPALGAONKAR)
JUDGE