



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 170 OF 2012

Jaikranti d/o Sahebrao Jadhav,
Age 26 years, Occ. Household,
R/o. Renkapur, Tq. Basmat,
Dist. Hingole.

... Appellant
(Orig. Deft. No. 3)

VERSUS

- 1) Babarao s/o Vishwanath Bhise,
Age 24 years, Occ. Education,
R/o. Renkapur, Tq. Basmat,
Dist. Hingoli.
- 2) Sunil s/o Vishwanath Bhise,
Age 16 years, Occ. Education,
Under Guardianship of natural
mother- Sheshabai w/o Vishwanath
Bhise, R/o. Renkapur, Tq. Basmat,
Dist. Hingoli.
- 3) Sangeeta w/o Gautam Thorat,
Age 34 years, Occ. Household,
R/o. Renkapur, Tq. Basmat,
Dist. Hingoli.
- 4) Shalubai w/o Sanjay Bagate,
Age 30 years, Occ. Household,
R/o. Limbgaon, Tq. & Dist. Nanded.
- 5) Mangal d/o Vishwanath Bhise,
Age 19 years, Occ. Education,
R/o. Renkapur, Tq. Basmat,
Dist. Hingoli.
- 6) Anita d/o Vishwanath Bhise,
Age 17 years, Occ. Education,
Under Guardianship of natural
mother- Sheshabai w/o Vishwanath
Bhise, R/o. Renkapur, Tq. Basmat,
Dist. Hingoli.

- 7) Sheshabai w/o Vishwanath Bhise,
Age 49 years, Occ. Household,
R/o. Renkapur, Tq. Basmat,
Dist. Hingoli. ... Orig. Plff. No. 1 to 7
- 8) Vishwanath s/o Tolaji @ Tolba Bhise,
Age 54 years, Occ. Agriculture,
R/o. Renkapur, Tq. Basmat,
Dist. Hingoli.
- 9) Marotrao s/o Shankarrao Pawade,
Age 64 years, Occ. Agriculture,
R/o. Puvni (Pawade) Tq. & Dist.
Nanded. ... Orig. Deft. Nos. 1& 2
... Respondents.

...
Advocate for Appellant : Mr. A.S. Jadhav
Advocate for Respondent nos. 1 to 7 : Mr. G.K. Naik-Thigle
...

CORAM : SHAILESH P BRAHME, J.

RESERVED ON : 29.09.2025
PRONOUNCED ON : 04.10.2025

JUDGMENT :

Heard both the sides.

2. The appeal is heard finally on substantial questions of law framed vide order dated 15.04.2013. The appellant/original defendant no. 3 is questioning judgment and order dated 27.09.2012 remanding the matter to deal with following issues :

“Issue no. 1 – Do defendant nos.2 and 3 prove that defendant no. 1 sold the suit properties to them for legal necessities ?

Issue no. 2 – Do defendant nos. 2 and 3 prove that suit for partition is not maintainable as the plaintiffs have not brought into common hotchpot all joint family properties in suit for partition and therefore, suit is not maintainable ?”

3. The respondent nos.1 to 7 are the plaintiffs, who had filed Regular Civil Suit No. 5/2008 for partition, possession and declaration. They are children of respondent no. 1 Vishwanath Tolaji Bhise, who were denied partition and allotment of their share in the undivided joint family properties. The alienations of the joint family property made by him on 22.04.1992 in favour of defendant no. 2 and further alienation in favour of present appellant on 11.04.2001 are said to be without there being any legal necessity. It is contended that the purchasers are not *bona fide* purchasers.

4. The appellant and the respondent no.9 (defendant no. 2) contested the suit by filing written statement. They justified the alienations on the ground of legal necessity and they are said to be *bona fide* purchasers. The suit was dismissed vide judgment and decree dated 10.03.2010. Being aggrieved, present appellant preferred Regular Civil Appeal No. 17/2010, which resulted in order of remand under Order XLI Rule 23A of the Code of Civil Procedure.

5. The learned counsel for the appellant submits that the Lower Appellate Court has committed error of jurisdiction in remanding the matter when already the findings were recorded by the Trial Court on the issues which are sought to be decided. There was sufficient material before the Lower Appellate Court to decide the matter on merits invoking powers under Order XLI Rule 33. It is submitted that it is perversity to remand the matter for deciding it fresh instead of referring only those issues. It is submitted that it is not permissible to relegate the matter on the ground of inadequacy of the evidence when the parties had opportunity to lead the evidence.

6. Per contra, the learned counsel for the respondents supports the impugned judgment and order. He would vehemently submit that the appellant being purchaser ought to have adduced evidence by stepping into witness box to buttress the legal necessity and therefore the need of remand

was felt. It is further submitted that the specific issues were not settled by the Trial Court and the existing material was found to be insufficient. Hence, the Appellate Court has rightly remanded the matter. It is further submitted that very purport of framing specific issues would be to channelize the enquiry for deciding the controversy involved in the matter, which is sought to be achieved by the impugned order. It is further submitted that an equitable order is passed by extending opportunity to both the parties to lead evidence, which cannot be faulted.

7. I have considered the rival submissions of the parties. I have gone through relevant record and proceedings which is before me. The appellant and the respondent no. 9 contested the suit by filing written statement. The appellant examined four witnesses and respondent no. 9 examined three witnesses. Respondent no. 8 who is defendant no. 1 neither filed any written statement nor adduced any evidence.

8. The written statement filed by the appellant as well as respondent no. 9 show that a specific defence was raised that partial suit for eviction was not maintainable and three distinct joint family properties were not brought in common hotchpot namely house at Renukapur, gat No. 92 and Gat No. 46. Both of them specifically contended that they are *bona fide* purchasers and the alienations were valid. In view of those pleadings, following issues were framed:

	मुद्दे
1.	वादीने पुराव्याने सिध्द केले आहे का की वादमिळकत ही त्यांची वडिलोपार्जित आहे ?
2.	प्रतिवादी नं. 2 व 3 ने पुराव्याने सिध्द केले का की ते वादमिळकतीचे नेकनियम खरेदीदार आहेत ?
3.	वादी वाटणी मिळविण्यास पात्र आहे का ?
4.	वादी कायमस्वरुपी मनाई हुकूम मिळविण्यास पात्र आहे ?

9. The appellant and respondent no. 9 also examined witnesses to

justify the alienation and to contest the suit on its maintainability. The Trial Court recorded findings in para No. 24, that all properties are not brought in common hotchpot. Further reasons are assigned in paragraph no. 25 to 27 that alienations were for the legal necessity, the recitals of which are incorporated in the sale-deeds. Thereafter, it was further held that the alienations are valid and the issue of limitation was partly held in favour of the few of the plaintiffs and partly against the remaining plaintiff. Though specific issue regarding the alienation was for legal necessity and non joinder of all the properties in common hotchpot were not framed, reasons for issue nos. 2 and 3 were covering the aspect of the matter. The evidence brought on record in that regard has been appreciated and the findings are recorded. The learned counsel for the appellant Ms. Jadhav is right in contending that it is not that the Trial Court did not deal with the aspect of the matter.

10. It is not the case that the parties have any grievance regarding opportunity of hearing. It is further not a case that the evidence or part of evidence which is vital is discovered after decision of the Trial Court. There is nothing on record to show that the respondents-plaintiffs were taken by surprise of any plea or circumstance pressed into service by the appellant. Having understood each others case when the parties would participate in a proceedings, it is immaterial as to whether a specific issue is framed or not. No steps were taken by either of the parties for recasting of the issues. A purport of framing of issue is to channelize an enquiry. The Lower Appellate Court committed perversity in observing in paragraph no. 13 that neither plaintiffs nor the defendants gave any evidence on those points. In such a situation, it cannot be countenanced that the entire suit is required to be relegated to the Trial Court.

11. Before the Lower Appellate Court adequate material was available. There were necessary pleadings and the evidence on record. It should have invoked power under Order XLI Rule 33 of CPC for examining the issues

pertaining to legal necessity and bringing on record other joint family properties. It failed to exercise the jurisdiction vested in it. There is nothing on record to suggest that it was not possible to decide the controversy. The impugned order does not reflect that the pleadings of the parties, the evidence on record especially sale-deeds and the oral evidence are considered by the Lower Appellate Court. The findings recorded by the Trial Court have not been revisited by the Lower Appellate Court. I find substance in the submissions of the learned counsel for the appellant that the Appellate Court committed error of jurisdiction.

12. The Lower Appellate Court framed and referred two issues. It has power under Order XLI Rule 25 of CPC to refer only those specific issues to the Trial Court and after return of the evidence with findings it would have dealt with the appeal. It is incomprehensible as to why such course is not adopted. There is no propriety to send the case for retrial. I find substance in the submission of the learned counsel for the appellant that the impugned order is unsustainable.

13. Reliance is placed by the learned counsel for the appellant in judgment of **H. Siddiqui (Dead) by L.Rs. Vs. A. Ramalingam; (2011) 4 Supreme Court Cases 240**. I have gone through para No. 21 of the judgment. It is about obligation of the appellate Court, which is extracted herein below:

“Order 41 Rule 31 of CPC

21. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's

judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide Sukhpal Singh v. Kalyan Singh, Girijanandini Devi v. Bijendra Narain Choudhary, G. Amalorpavam v. R.C. Diocese of Madurai, Shiv Kumar Sharma v. Santosh Kumari¹⁰ and Gannmani Anasuya v. Parvatini Amarendra Chowdhary.)”

14. It is rightly contended that the Appellate Court should have decided the appeal on merits instead of remanding the matter to the Trial Court. Insufficiency of the evidence cannot be a ground to relegate the parties when none of the parties have grievance of not extending opportunity of hearing or adducing evidence.

15. The learned counsel for the respondents has placed reliance on **Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited and another; (2009) 17 Supreme Court Cases 796**. I have gone through paragraph NO. 10 to 14. There is no quarrel for the proposition laid down by the Hon’ble Apex Court. The facts are distinguishable. I have already observed in a case at hand that there was adequate material before the Trial Court in the form of pleadings and the evidence on the issues in question and remand is unwarranted. This judgment will not enure to the benefit of the respondents.

16. It appears from record that the impugned order was passed on 27.09.2012. In pursuance of the impugned order, the parties did not appear before the Trial Court and suit was dismissed for default vide order dated 04.12.2012. It was sought to be restored by filing application, which was barred by 562 days. A separate Civil M.A. No. 66/2014 was preferred for condonation of delay. It was rejected on 19.01.2018. Being aggrieved Civil Misc. Appeal No. 15/2024 is preferred before the Adhoc District Judge, which is pending and posted on 16.10.2025. The orders passed after the impugned order are inconsequential. They are vitiated as order of remand is held to be unsustainable.

17. I am inclined to answer the substantial questions of law in favour of the appellant. I, therefore, pass following order :

ORDER

(I) Appeal from order is allowed.

(II) Impugned judgment and order dated 27.09.2012 is quashed and set aside. Regular Civil Appeal No. 17/2010 is restored to the lower Appellate Court for deciding it on its own merits on the basis of material available on record.

(III) Needless to mention that the proceedings and the orders of Civil M.A. No. 66/2014, order dated 19.01.2018 and Civil M.A. No. 15/2024 stand vitiated.

(SHAILESH P. BRAHME, J.)

mkd/-