

Iresh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 64 OF 2025  
WITH  
INTERIM APPLICATION NO. 1177 OF 2025  
IN  
APPEAL FROM ORDER NO. 64 OF 2025**

Mrs. Kunda Suresh Memane and ors

.....Appellants

Vs.

Chandrabhaga S. Kamble  
(Deceased) Thr. LRs and ors

.....Respondents

Mr. Nikhil Ghate a/w Mr. Mahesh Barve for the appellants  
Mr. Yogesh Patil for respondent nos. 1 to 5

**CORAM : GAURI GODSE, J.**

**DATE : 28<sup>th</sup> FEBRUARY 2025**

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MASHAL

**ORDER:**

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1. Heard learned counsel for the appellants. This appeal is preferred by the original defendant nos. 2 to 7 who claimed to be purchasers through defendant no. 1. The appeal challenges the order of remand directing the trial Court to decide the suit afresh.

2. Learned counsel for the appellants submits that the trial Court though did not frame issues on the point of limitation and estoppel, has exhaustively discussed the evidence on record which covers the issue

of limitation and estoppel. He submits that after examining the entire evidence on record, the trial Court has recorded the findings on the point of limitation and estoppel. He submits that both the parties were well aware about the issues and point of objections and the evidence was led on all the points including the issue of limitation, estoppel and non joinder of necessary parties. He submits that there was no reason for the first Appellate Court to remand the suit to the trial Court for deciding it afresh. He submits that the first Appellate Court failed to consider the evidence on record before arriving at conclusion that there was a necessity for remand.

3. He submits that unnecessary remand would only prolong the litigation. He submits that the defendants are in possession of the suit property and thus, pendency of the litigation would cause prejudice to the defendants. To support his submissions, learned counsel for the appellants relies upon the decisions of this Court in the case of *Saranghar Vithal Wadhe Vs. Shamrao Govinda Wadhe*<sup>1</sup> and *Balkrishna Padmakar Joshi Vs. Superintending Archeologist*<sup>2</sup>. He, therefore, submits that the appeal would require consideration and the first appeal deserves to be remanded back to the first Appellate Court

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<sup>1</sup> AIR ONLINE 2019 BOM 2939

<sup>2</sup> AIR ONLINE 2021 BOM 2410

for deciding it on merits based on the evidence already on record.

4. Learned counsel for the plaintiffs supports the impugned order. He submits that the suit was filed for challenging the Will based on which defendant no. 1 claims exclusive rights. He submits that the plaintiffs also prayed for partition and separate possession and the declaration that the sale deeds executed by defendant no. 1 would not bind the plaintiffs' share. He submits that without framing an issue of estoppel, the trial Court concluded that the plaintiffs are estopped from challenging the Will and thus, further concluded that the plaintiffs failed to disprove the Will in favour of defendant no. 1. Learned counsel for the plaintiffs, thus, submits that without framing proper issues, the burden was casted upon the plaintiffs to disprove the validity of the Will. He submits that in view of the rival pleadings, it was an obligation on the part of defendant no. 1 to prove the validity of the execution of the Will. He submits that in the absence of any issues framed regarding estoppel, the plaintiffs' substantive prayer for challenging the Will is decided without the evidence with regard to plaintiffs' entitlement to challenge the Will. He, thus, submits that the first Appellate Court is right in remanding the matter for deciding it afresh. He, further, submits that the point of limitation is decided in favour of

the plaintiffs. He, thus, submits that no prejudice would be caused to the appellants, in the event the suit is decided afresh by framing proper issues which also includes the issue of limitation which was decided by the trial Court in favour of the plaintiffs. He, thus, submits that the impugned order would not require any consideration by this Court.

5. I have perused papers of the appeal. The plaintiffs' substantive prayer is for challenging the Will in favour of defendant no. 1. The plaintiffs claim partition and separate possession of their one half share. Based on their claim for half undivided share, they challenged the sale deeds executed by heirs of defendant no. 1 on the ground that they would not bind the plaintiffs' shares. In defence, the defendants have supported the Will and claimed exclusive rights based on the Will executed by Yamunabai. Based on the exclusive rights, the defendants support the execution of the sale deeds executed by heirs of defendant no. 1. In defence, subsequent purchasers filed the written statement and disputed the suit claim. From amongst heirs of defendant no. 1, only two of the defendants i.e. defendant no. 1A and 1B filed the written statement. The suit proceeded ex-parte against defendant nos. 1C to 1F and defendant nos. 8 to 13. Considering the

rival pleadings, the issues were framed casting burden upon the plaintiffs to disprove the Will and to prove their one half share. The other issues were in respect of the sale deeds executed in favour of defendant nos. 2 to 5 by defendant no. 1 and sale deed executed by defendant no. 5 in favour of defendant nos. 6 and 7. The trial Court though did not frame the issue of limitation, has recorded findings that the suit is well within limitation. After the discussion about the evidence with reference to the Will and the subsequent sale deeds, the trial Court held that in view of the partition deed dated 31<sup>st</sup> May 2005, the plaintiffs were estopped from challenging the Will of Yamunabai. However, there was no issue framed with reference to execution of the partition deed and its effect on the Will in favour of defendant no. 1.

6. Considering the findings recorded on the plaintiffs being estopped from challenging the Will, the learned trial Judge further recorded that the plaintiffs failed to disprove the Will in favour of defendant no. 1. With these findings the trial Court held that defendant no. 1 had acquired the rights in respect of the suit property and thus, the sale deeds executed in favour of defendants cannot be declared as null and void. In view of these findings, the first Appellate Court held that the purpose of framing the issues is to enable the parties to lead

their respective evidence based on the burden that is casted upon the parties. The first Appellate Court referred to the rival pleadings and held that it was necessary for the trial Court to frame the issues on limitation, non-joinder of necessary parties and plea of estoppel. Thus, considering the rival pleadings and not framing the proper issues, the first Appellate Court was of the opinion that the impugned judgment was required to be set aside by remanding the suit to the trial Court for framing proper issues and permit the parties to adduce evidence based on the issues.

7. Thus, in view of non framing of proper issues, the first Appellate Court was of the opinion that the suit required a *de novo* trial. On perusal of the pleadings and rival contention of the parties, I do not see any fault in the opinion expressed by the first Appellate Court on the purpose of framing the issues. Framing of proper issues and *de novo* trial would in no manner prejudice the present appellants. The issue of limitation decided in favour of the plaintiffs is also kept open in view of the order of remand for fresh trial. The decisions relied upon by the learned counsel for the appellants are not on the point of incorrect framing of issues or non framing of issues. The decisions are with reference to the evidence led by the parties and non consideration of

the evidence on record by the first Appellate Court before passing an order of remand. In view of the different facts of this case, the legal principles settled by this Court in both the decisions would not be of any assistance to the appellants' arguments.

8. The first Appellate Court has rightly considered the object and purpose of framing the issues as contemplated under Order XIV of Code of Civil Procedure, 1908 (CPC). Considering the rival pleadings as discussed by the trial Court as well as the first Appellate Court, the parties are required to lead evidence based on the issues framed. Thus, the first Appellate Court is right in concluding that in the absence of proper issues being framed in the present case, the evidence that is led, cannot be said to be in accordance with the issues that arise in the rival pleadings of the parties. I do not see any illegality or perversity in the reasons recorded by the first Appellate Court for remanding the matter for deciding it afresh. Though the learned Judge has expressed the opinion on the issues that were necessary to be framed, the order of remand directs the trial Court to frame appropriate issues as indicated in the body of the judgment. Considering rival pleadings of the parties, in my opinion, it would be open for the trial Court to frame any other issue that arise in view of the rival pleadings of the parties.

9. Trial Court's judgment in the appearance column indicates that the suit was ex-parte against defendant nos. 1C to 1F and defendant nos. 8 to 13. However, in paragraph 6 of the trial Court's judgment, it is recorded that defendant no. 7 filed a pursis and adopted say of defendant no. 6. Thus, it is necessary that after considering the written statement filed by respective defendants, the trial Court frames the issues based on the rival pleadings as per the respective written statements. Hence, it is clarified that apart from the issues as indicated in the body of the judgment, it will be open for the trial Court to frame appropriate issues as contemplated under Order XIV of CPC by considering the rival pleadings of the parties. I, therefore, do not see any reason to interfere in the impugned order, except for the aforesaid clarification regarding framing of issues.

10. For the reasons recorded above, the appeal is dismissed.

11. In view of dismissal of appeal, Interim Application No. 1177 of 2025 is disposed of as infructuous.

**[GAURI GODSE, J.]**