IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 41 OF 2024

Smt. Manoramabai Rayaba Chavan
Since deceased through L.Rs.
Mrs. Vaishali Vijaykumar Deshmukh .. Appellant

Versus

Gopaldas Narayandas Barshikar
Since deceased through his L.Rs.
Pradeep @ Sandip Gopaldas Barshikar
and others .. Respondents

Shri Devidas R. Shelke, Advocate for the Appellant.
Mrs. Charuta S. Deshmukh, Advocate for the Respondent Nos. 1A to 1D.

AND
APPEAL FROM ORDER NO. 61 OF 2023

Sandeep Gopaldas Barshikar .. Appellant

Versus

Subhash Rayba Chavan and others .. Respondents

Mrs. Charuta S. Deshmukh, Advocate for the Appellant.
Shri Devidas R. Shelke, Advocate for the Respondent Nos. 1, 6, 9, 10 and 2-A.

CORAM : SHAILESH P. BRAHME, J.

CLOSED FOR ORDER ON : 05.03.2026

ORDER PRONOUNCED ON : 11.03.2026.

FINAL ORDER :

. Heard both sides.

2. In both appeals judgment and order of remand passed on 06.04.2023 in R. C. A. No. 626 of 2012 is questioned. Appeal from Order No. 41 of 2024 is preferred by the original plaintiff No. 4. Appeal from Order No. 61 of 2023 is preferred by the defendant No. 1-A.

3. For the sake of convenience the parties in Appeal from Order No. 41 of 2024 are referred as per their original status in the Trial Court. Appellant and original respondent Nos. 9 to 11 are original plaintiffs in R.C.S. No. 725 of 2000, which was for partition, separate possession and mesne profit. The respondents are the defendants.

4. The controversy pertains to undivided joint family of Laxman Mehekarikar and his family members. On 21.05.1980 sons of Laxman transferred 59/80th share by registered sale deed to the defendant No. 1 and 2. His daughters transferred 3/48th share by distinct sale deed on the same day to the defendant No. 1 and 2. Plaintiffs claimed to have purchased 21/80th share from Manik Laxman Mehekarikar on 06.11.1987. The contesting parties are the purchasers of the undivided share and they have rival claims for their ownership and possession over the shares alienated to them.

5. Plaintiffs contention is that the defendants unauthorizedly occupied the undivided joint family property, hence suit was filed. It is contested by the defendants on the ground that after the alienations on 21.05.1980 no salable interest was left for Manik to alienate 21/80th share to the plaintiffs.

6. The Trial Court dismissed the suit vide judgment dated 26.09.2012. Being aggrieved R.C.A. No. 626 of 2012 was filed by the plaintiffs. The Appellate Court found that the suit property was not properly described and the shares claimed by the parties were unable to be identified. It is further recorded that appointment of Court Commissioner for measuring and identifying the shares would resolve the controversy and the matter was remanded to the Trial Court.

7. Learned counsel Mr. Devidas Shelke appearing for the plaintiffs submits that order of remand is unwarranted and has been passed in routine manner. It is submitted that the Appellate Court should have decided the matter on merits and should have appointed Commissioner instead of remanding it to the Trial Court. It is submitted that the sale deed executed on 21.05.1980 is bad in law and the decree of the Trial Court should have been reversed.

8. Both sides have canvassed the submissions in pursuance of substantial questions of law framed by this Court vide order

dated 08.10.2025 in both the appeals.

9. Per contra, learned advocate Mrs. Charuta Deshmukh appearing for the defendants submits that remand order was not required and Appellate Court had ample power to decide the matter on merits. It is submitted that Manik had no salable interest and alienation of 21/80th share is void. It is further submitted that already exercise of appointing Commissioner was undertaken in the Trial Court and the map was produced on record. The decree should have been confirmed by the lower Appellate Court.

10. Both sides are claiming that lower Appellate Court should have exercised the powers conferred by Order XLI Rule 24 and 33 of the Code of Civil Procedure (for the sake of brevity and convenience hereinafter referred as to the "C.P.C.") in deciding the appeal on merits, instead of remanding the matter to the Trial Court. In the Trial Court, Commissioner was appointed for measurement of the suit property, who was D. W. No. 2. The measurement map was produced at Exhibit 211. The Execution of the sale deeds which are referred in the earlier paragraphs are not disputed. The facts in issue are as to whether defendants are owners of 59/80th share and 3/48th share and as to whether plaintiffs are owners of 21/80th share. Their entitlement and claim can be examined on the basis of material placed on record.

11. Just because there is interese dispute regarding

entitlement to the extent of respective shares, remanding the matter for resorting to Order XXVI Rule 10 of the C. P. C. is not the solution. Appellate Court has ample power U/O XLI Rule 24 and 33 of the C. P. C. to deal with factual aspect of the matter. Taking recourse to Order XXVI Rule 9 of the C. P. C. at the appellate stage is also permissible, if so required. I find substance in the submissions of both learned counsels that order of remand is unwarranted.

12. Its nobody's case that opportunity of hearing was not extended to either of the sides. Neither is it a case that additional material is available which could not be placed on record in the Trial Court. In this backdrop order of remand is likely to consume more time.

13. Learned advocate Mr. Shelke has relied on the judgments of the Supreme Court and Gauhati High Court in the matters of Jagannathan Vs. Raju Sigmani and another reported in *2012(5) SCC 540*, Akshay Automobiles Vs. Union of India and others reported in *(2004) 2 Gauhati L.R. 187* and Municipal Corporation, Hyderabad Vs. Sunder Singh reported in *2008(8) SCC 485* to buttress that order of remand is unwarranted and it was passed routinely. Reliance is also placed on the judgment of this Court in the matter of Yasin Gula Shkalkar Vs. Maruti Nagnath Anware reported in *LAWS (BOM)-2023-1-210* to support that Appellate Court has power to appoint the Court Commissioner. The propositions are not disputed. Those can be made applicable to the present case.

14. I am inclined to answer substantial questions of law in favour of both the appellants in holding that impugned judgment and order is unsustainable and Appellate Court can very well deal with the matter on merits. I, therefore, pass following order.

O R D E R

A. Appeal from Order No. 41 of 2024 and Appeal from Order No. 61 of 2023 are allowed.

B. Impugned judgment and order dated 06.04.2026 passed by District Judge – 6, Ahmednagar in R.C.A. No. 626 of 2012 is quashed and set aside.

C. Parties shall appear before the Appellate Court on 30.03.2026.

D. The Appellate Court shall decide the appeal on its own merits as expeditiously as possible and in any case not more than 10 (ten) months from the date of appearance of the parties.

[SHAILESH P. BRAHME J.]

bsb/March 26