

(1928) 09 BOM CK 0021

In the Bombay High Court

Case No : Appeal from Order No. 10 of 1926

Annaji Ramchandra

APPELLANT

Vs

Thakubai Dattatraya Deshpande

RESPONDENT

Date of Decision : 28-09-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25

Citation : (1929) 31 BOMLR 208 : (1929) ILR (Bom) 335 : 118 Ind. Cas. 790

Hon'ble Judges : Murphy, J; Amberson Marten, J

Bench : Division Bench

Judgement

Murphy, J.—In this matter the learned District Judge of Sholapur when dealing with an appeal from the decree of the Joint Subordinate Judge's Court of that place has passed an order which, we think, cannot be sustained under the provisions of Order XLI of the Civil Procedure Code. His findings on issues Nos. 1 and 2 were, that plaintiff and defendant No. 4 were not estopped from showing that they had been minors at the date of execution of Exhibit 44. He then went on to say that an issue must next be raised on the question of fact whether they were actually minors or not and that evidence must be taken on this point because though the trial Court had recorded a finding that these ladies had then been majors, no issue had so far been raised on this point and the parties had not had a proper opportunity of adducing all their evidence. He next found on issue No. 4 that the consent of the husbands of plaintiff and defendant No. 4 was in law necessary to give validity to the sale which the plaintiff was impugning; and also found on the latter part of this issue that there should have been a definite finding whether the husbands' consent had been given or not. He therefore thought that the parties must be given an opportunity of adducing evidence on this point as well as on issues Nos. 3, 5 and 8. As a result of these conclusions he remanded the suit to the lower Court for disposal in accordance with these directions and at the same time set aside the original Court's decree dismissing the suit.

2. Under the provisions of Order XLI of the CPC when the Court is of opinion, as in this case, that certain findings of fact are necessary for the proper disposal of an appeal, and that evidence should be led on these points the proper procedure is under Rule 25, by which the appellate Court may frame issues and refer them for trial to the Court whose decree is appealed from. Findings should then be returned to the appellate Court. which must rehear the appeal so far as is necessary, and so dispose of it. In this case the learned Judge seems to have acted partly under Rule 23, which only applies to the case of a suit which has been decided on a preliminary point, and so reversed the decree given on the strength of that point, and also, partly under Rule 25, by calling for further findings. I think that this cannot be done. In substance, what the order amounts to is, in my opinion, that he found on the preliminary points which were points of law and then discovered that further evidence was necessary on issues of fact and, therefore, remanded the case for findings after reversing the original decree. This order is technically wrong, and must be amended in this Court.

3. We must, therefore, vary the appellate Court's decree by directing that the findings which it asked the original Court to give on the issues specified in the order should be tried and decided in the Subordinate Judge's Court, and the findings on those issues should then be returned to the District Court which will rehear the appeal and pass an order in accordance with law.

4. Both sides may adduce evidence on the issues which have been remanded by the District Judge, and findings should be returned to the District Court within a reasonable time, to be fixed by that Court.

Amberson Marten, Kt., C.J.

5. I agree, We vary the order of December 10, 1925, by discharging the direction to set aside the decree of the first Court and for a remand of the suit to the lower Court, and by ordering instead, under Order XLI, Rule 25, Civil Procedure Code, that the issues in question referred to in the judgment of the lower appellate Court be tried by the first Court and that the findings and the evidence be returned to the lower appellate Court.

6. Each party to bear his own costs of the appeal to us.