
(2009) 10 BOM CK 0108
In the Bombay High Court
Case No : Writ Petition No. 7207 of 2005

Mirabai Trimbak Patil and Another	Vs	APPELLANT
Anusayabai Trimbak Patil		RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 24, Order 41 Rule 25, Order 6 Rule 17
Constitution of India, 1950 — Article 227
Hindu Marriage Act, 1955 — Section 16(3), 5(1)

Citation : (2010) 1 ALLMR 213 : (2010) 2 BomCR 173

Hon'ble Judges : Shinde S.S., J

Bench : Single Bench

Advocate : Rashmi P. Hardas, holding for . C.R. Deshpande, for the Appellant;
M.H. Patil, for the Respondent

Final Decision : Dismissed

Judgement

Shinde S.S., J.—This writ petition takes exception to the order dated 15/4/2005 passed by the Additional District Judge at Shahada below Exh. 32 in RCA. No. 27 of 2001.

2. The back-ground facts of the case are as under:

The petitioners herein are the original defendants in R.C.S. No. 14 of 2000 filed by the plaintiff Anusayabai in the Court of the Civil Judge (S.D.) at Shahada for partition and separate possession of the agricultural lands and the house property.

The petitioners herein filed written statement and resisted the suit claim. According to the petitioners, who are the original defendants, plaintiff Anusayabai has got no concern with the husband of defendant No. 1 namely Trimbak Shamala Patil. It is specifically averred that, the plaintiff was not the wife of said Trimbak and as such there is no question of consideration of the joint family.

The plaintiff Anusayabai herself stepped into witness box and deposed at Exh. 31. In her deposition, she stated that, one Sayankalabai was the first wife of Trimbak Shamala Patil. Thereafter, said Trimbak married with Anusayabai and thereafter he married with Meerabai. Thus, according to the plaintiff Anusayabai, she is second wife, whereas Meerabai is the third wife of Trimbak Shamala Patil. She has also stated that she does not know as to who was the owner of the suit lands prior to Trimbak Shamala Patil.

3. On 8/11/2002, the learned Civil Judge (S.D.), Shahada has been pleased to decree the Suit of the plaintiff in respect of 1/4th share of plaintiff in the agricultural lands, agricultural implements, bullocks and the suit house.

Feeling aggrieved by the judgment and Decree in Spl.Civil Suit No. 14 of 2000, the original defendant No. 1 Meerabai has preferred Civil Appeal No. 27 of 2001 in the Court of the Additional District Judge at Shahada, which is pending. In the said appeal, present petitioners had jointly filed an application Exh. 30 under Order VI, Rule 17 of the CPC and prayed for inserting paragraph 2-A in the written statement.

On 7/4/2005, the Additional District Judge, Shahada allowed application Exh. 30 for amendment in the written statement. It is the case of the petitioners that, they had filed application Exh. 32 in Civil Appeal No. 27 of 2001 under Order XLI, Rule 25 of the CPC and prayed for framing the issues. On 15/4/2005, the Additional District Judge, Shahada has been pleased to reject the application Exh. 32. Hence, this writ petition is filed challenging the Order dated 15/4/2005 passed by the Additional District Judge, Shahada below Exh. 32 in R.C.A. No. 27 of 2001.

This Court, by Order dated 7/12/2005 granted Rule and Rule on interim relief.

The matter is taken up for final hearing. The learned Counsel appearing on behalf of petitioner invited my attention to the admissions by the respondent in her Suit for partition bearing R.C.S. No. 14 of 2000, which are as under:

[A] That the present respondent Anusayabai is the second wife of Trimbak Shamalal Patil.

[B] That the said Trimbak Shamalal Patil is absconding and not known to be alive for past 27-30 years.

[C] That the said Trimbak Shamalal Patil was married to one Sayankalabai before the alleged marriage of Anusayabai.

[D] That Sayankalabai was alive and married to Trimbak Shamlal Patil at the time of the alleged marriage of Anusayabai to Trimbak Patil.

[E] That the present petitioner No. 1 Mirabai is the third wife of Trimbak Shamlal Patil and present petitioner No. 2 Dagdu is the son of Mirabai

[F] That Anusayabai has no witnesses to show her marriage is solemnized with

Trimbak Patil.

The learned Counsel further invited my attention to the depositions of P.W. 1, who is the uterine brother of Trimbak Shamala Patil and P.W. 2, the nephew of plaintiff Anusayabai. Both witnesses have admitted that the plaintiff Anusayabai is the second wife of Trimbak Shamala Patil and Sayankalabai to be the first wife of Trimbak Shamala Patil, who was alive at the time of alleged marriage Anusayabai with Trimbak Shamala Patil. It is further submitted that said Sayankalabai, who is the first wife of Trimbak Shamala Patil, died on 26/10/1999. The plaintiff Anusayabai failed to adduce any evidence as to whether Sayankalabai died issueless. It is further submitted that the issues framed by the Civil Judge (S.D.), Shahada in Spl. Civil Suit No. 14 of 2000 are inadequate to prove, whether the plaintiff Anusayabai is the legally wedded wife of Trimbak Shamala Patil. It is further submitted that, the petitioner sought an amendment to the written statement under Order VI, Rule 17 of the CPC in R.C.S. No. 27 of 2001. The petitioners prayed for introducing paragraph 2-A in the written statement in the civil appeal. It is submitted by the learned Counsel for the petitioner that, in the case of Chanchalben Shah and Others Vs. Municipal Corporation of Greater Mumbai and Another, the settled position of law is recorded i.e. "application for amendment of plaint filed at the appellate stage, is maintainable since appeal is a continuation of the suit".

It is further submitted that the lower Appellate Court allowed the application at Exh. 30 by Order dated 7/4/2005. The learned Counsel submitted that the application at Exh. 32 was filed by the petitioner in Civil Appeal No. 27 of 2001 under Order XLI, Rule 25 of the CPC and it was prayed that following issue should be framed,

Does the plaintiff prove that she is the wife or legally wedded wife of Trimbak Shamlal Patil?

The learned Counsel submitted that, in the case of Smt. Nagarathnamma Vs. Smt. Venkatalakshamma and Others, , similar situation arose where the husband having two wives, filed Suit for partition and separate possession. The trial Court after initially framing the issues, subsequently framed an additional issue i.e.

Whether the plaintiff has proved that she is the legally wedded wife of the deceased?

The learned Counsel for the petitioner submitted that, in the back-ground of this case also, it is necessary to frame specific issue and matter is required to be send back to the trial Court for adducing evidence on the said issue. It is submitted that, to reach to the correct conclusion, it is vitally important to frame the issue i.e. Whether the plaintiff has proved that she is legally wedded wife of the deceased?.

The learned Counsel submitted that the Judge of the lower Appellate Court failed

to appreciate the scope of Order XLI, Rule 25 of the Code of Civil Procedure. The learned Counsel invited my attention to the reported judgment of this Court in case of Satpuda Tapi Parisar Sahakari Sakhar Karkhana Ltd. Vs. Jagruti Industries and Another, , wherein the Division Bench of this Court has observed that,

Under Order XLI, Rule 25, power is conferred on the Appellate Court to frame additional issues. The legislative intent and purpose behind this is that the party can raise an objection at any stage of the proceedings. The expression "Court" obviously includes Appellate and Revisional Court. Under the provisions of Rules 23 and 25 of Order XLI of the Code, the Appellate Court has the power to frame additional issues or where it reverses the finding recorded in a decree on a preliminary issue to remand the matter for determination of all issues in accordance with law. In other words, the Appellate Court has similar powers like the trial Court.

The learned Counsel further submitted that instead the learned Judge has preferred to decide the application under Order XLI, Rule 24. Thus, the order dated 15/4/2005 rejecting the application Exh. 32, is legally unsustainable.

It is further argued that the learned Judge while deciding the application Exh. 32, has disregarded the substantial laws, which ought to have been given due consideration while rejecting the said application. The learned Judge failed to appreciate the fact that the plaintiff Anusayabai herself has admitted that she is the second wife of Trimbak Shamalal Patil and only treating herself as his wife, she is claiming partition and separate possession of the properties of Trimbak Shamalal Patil. The provisions of Section 5(1) of the Hindu Marriage Act, 1955 lays down a mandatory pre-condition that at the time of the marriage, no party to the marriage should have a spouse living. Thus, the legal position in such situation would be that, if one of the parties to the marriage has a spouse living and the second marriage is performed, such marriage will not have any validity in the eyes of law. Such marriage can be said to be null and void marriage having contravened a mandatory pre-condition of a substantive law. Further more, it can be said that the right to a share in property in the instant case is derived by Anusayabai from the alleged marriage between her and Trimbak Shamalal Patil and in the absence of a valid marriage, her claim to a share in the property of Trimbak Shamalal Patil being his wife, also stands nullified. Thus, in the absence of any evidence in respect of her valid marriage with Trimbak Shamalal Patil, she has no right to a share in the properties. Hence, the issue sought to be framed goes to the very root of the matter and is vitally important to be proved for the final determination of the case.

It is further submitted that the issue sought to be framed is not a mere technical issue, but a question which strikes the crux of the case to be determined. The plaintiff has failed to adduce any evidence in respect of the date of her alleged marriage with Trimbak Shamalal Patil. The evidence on record is insufficient to come to a reasonable conclusion whether the alleged marriage between plaintiff

Anusayabai and Trimbak Shamalal Patil took place prior to codification of Hindu Laws. Mere presumptions accrued from the age of the plaintiff Anusayabai can not lead to a definite conclusion in respect of the date of her alleged marriage. It is further submitted that when a marriage is null and void at the inception itself, it can not gain subsequent validity by a fact arising at a later stage. At the time of the alleged marriage between plaintiff Anusayabai and Trimbak Shamalal Patil, the first wife Sayankalabai was alive and thus the alleged marriage is in contravention of the provisions of Hindu Marriage Act, 1955 and thus null and void. The alleged marriage can not gain validity after the death of the first wife Sayankalabai.

It is further submitted that the petitioner No. 2 Dagdu Trimbak Patil is the son of petitioner No. 1 and Trimbak Shamalal Patil. In the absence of any legitimate heirs, the petitioner No. 2 becomes the sole heir to the property of Trimbak Shamalal Patil by virtue of law laid down in Section 16(3) of Hindu Marriage Act, 1955. The learned Counsel invited my attention to the settled position of law reiterated in the case of Smt. Nagarathnamma Vs. Smt. Venkatalakshamma and Others, , where the Court held that,

There can be no dispute, as regards the proposition of law is concerned, that children, born of a marriage which is valid or voidable, in view of Section 16(3) of the Hindu Marriage Act, are entitled and are capable of possessing rights of succession as regards the self acquired property of the deceased parents so far as are concerned and section provides that children born out of such marriage, shall be deemed to be legitimate children notwithstanding the nullity of marriage.

The learned Counsel submitted that, whereas no such right can be accrued by a second wife of a Hindu male under the codified provisions of Hindu Laws. The evidence on record is insufficient to prove the plaintiff's marriage with Trimbak Shamalal Patil to be legal and valid and in accordance with the provisions of law. Thus, the specific issue sought to be framed relates to this vital fact and hence, the issue needs to be remanded back to the trial Court for adducing evidence on such issue. If the issue is not remanded back to the trial Court and the lower Appellate Court proceeds with the evidence adduced and records a finding thereon, would seriously prejudice the right of the parties to adduce evidence before the trial Court and agitate the same before the first Appellate Court.

4. The learned Counsel for the petitioners invited my attention to the reported judgment of the Supreme Court in case of Surya Dev Rai Vs. Ram Chander Rai and Others, and submitted that in case there is failure of justice, this Court can exercise powers under Article 227 of the Constitution of India. It is further submitted that if the parties are denied the opportunity to adduce oral and documentary evidence on the specific issue, it would result in failure of justice. Thus, for meeting the ends of justice, it would be just and proper for the Hon'ble Court to issue a writ of certiorari or any other writ in the like nature and any other relief as the Court may deem fit in the eyes of law. Therefore, the learned Counsel submitted that writ petition deserves to be allowed.

5. The learned Counsel for petitioners further invited my attention to the grounds in the petition and submitted that in the interest of justice, the petition deserves to be allowed.

6. The learned Counsel appearing on behalf of respondent supported the reasons given in the impugned order. The learned Counsel for the respondent submitted that the provisions of Order XLI, Rule 25 of the CPC are not mandatory. The learned Counsel further submitted that the Appellate Court specifically observed that the proposed issue is not required to be framed at this stage in this appeal as both parties adduced evidence on the said point and the evidence on record is sufficient to enable the Appellate Court to pronounce the judgment by framing points for determination on the said disputed point, even without framing such issue at this stage in the appeal. The learned Counsel further submitted that, the petitioner No. 1, who is third wife of Trimbak Shamala Patil, has no right to file appeal or application. The present petitioner No. 2 is the respondent No. 2 in civil appeal and now the respondent No. 2 in the civil appeal is made petitioner in this petition. It is further submitted that the plaintiff/respondent is of 75 years age at present. It is submitted that the plaintiff has proved that she is legally wedded wife of Trimbak Shamala Patil. The plaintiff, who is 75 years age, if again directed to adduce the evidence about her marriage, which in fact, she has already adduced long back in the year 2000 itself, would be great prejudice to her at this old age. It is further submitted that in case of Krishna Laxman Bhatkar (since deceased by LRs) and etc. Vs. Vithal Ganesh Athavale, , it is held that,

First Appellate Court applying its mind to all submissions made by the parties and documents relied upon-giving cogent reasons for accepting or rejecting them - Remand on the ground that points for determination like framing of issues were not framed, will not be ordered.

7. The learned Counsel, therefore, would submit that, the petitioners have not raised any objection at the time of trial and they have not filed any application for framing the necessary issues, even they did not enter the witness box and, therefore, at belated stage, it was not open for them to contend that, the specific issue should be framed about the marriage of the plaintiff with Trimbak Shamala Patil. The learned Counsel for the respondent in support of his contention submitted that the plaintiff has proved her marriage, placed reliance in case of Badri Prasad Vs. Dy. Director of Consolidation and Others, and also in case of Ningu Vithu Bamane and Others Vs. Sadashiv Ningu Bamane and Others, .

The learned Counsel further submitted that, in fact petitioners herein filed pursis below Exh. 66 that they do want to adduce any evidence. It is submitted that on the ground of non examination of defendants as witnesses, an adverse inference has to be drawn against the defendants. In support of this contention, learned Counsel placed reliance in case of Adivekka and Others Vs. Hanamavva Kom Venkatesh "D" by LRs. and Another, .

The learned Counsel further submitted that revenue record is also in favour of

the plaintiff. Her name is shown as legal heir of Trimbak in other rights column and not only that, revenue entry is taken on an application filed by the original defendant No. 2, who is petitioner No. 2 herein for mutation. The Tahsildar after due enquiry, has sanctioned the mutation entry. The learned Counsel invited my attention to the fact that, the plaintiff has no issue and she is dispossessed from the suit property by the present petitioners since last 12 years and she is unable to maintain herself due to old age and she has no means for her livelihood. The petitioners only with an intention that she would not get any share in the suit property, are prolonging the matter. It is submitted that this Court has no power to interfere with the findings of facts like the Court of appeal. The learned Counsel placed reliance in support of his contention in case of AIR 1975 1297 (SC) . Therefore, learned Counsel relying on the reasons in the impugned order as well as written submissions filed by him and the written submissions filed before the lower Appellate Court and submitted that writ petition is devoid of any merits and deserves to be dismissed.

8. I have heard learned Counsel appearing for respective parties at great length. I have also perused the petition, annexures thereto, reply filed by the respondent, written submissions filed by the respective parties, all judgments cited by the respective Counsel and I proceed to decide the writ petition finally.

The trial Court in Special Civil Suit No. 14 of 2000 framed as many as 8 issues for its determination. The Issue No. 2 was as follows:

Does plaintiff prove that she is having undivided ? share in the suit property being a wife of Trimbak Shamala Patil?

The trial Court in paragraph 6 has referred to the deposition of P.W. Anusayabai, who deposed that, her marriage was solemnized with Trimbak Shamla Patil at village Bhongara. P.W. 2 Natthu deposed same fact and further deposed that, she was present in the aforesaid marriage. It is further deposed by the said witness that, after marriage of plaintiff with Trimbak, she started residing with them at village Bhongara and resided together till 1968. According to P.W. 2 Nathhu, he is related with Trimbak by uterine blood, so also he has deposed about the relations with Trimbak. P.W. 3 Bhila deposed that, Trimbak was his cousin uncle. He further deposed that, he knew about the marriage of plaintiff with Trimbak as he used to come to his village Khamblon along with plaintiff. He further deposed that he saw the plaintiff and Trimbak at village Bhongara. Therefore, the trial Court held that, the version of P.W. 2 Nathhu and P.W. 3 Bhila supports to the plaintiff to show her relationship with Trimbak. The trial Court in paragraph 7 has further recorded that, Anusayabai in her deposition, deposed that, she is second wife of Trimbak and the petitioner No. 1 herein i.e. Meerabai is concubine and third wife of Trimbak. In the same paragraph, the trial Court recorded the arguments of the Counsel for the plaintiff that, P.W. 2 and P.W. 3 are the close relatives of the plaintiff and her family and so their version is sufficient to prove that, the plaintiff is the wife of Trimbak.

In paragraph 8, the trial Court had referred to 7/12 extract of the suit lands at Exhs. 49 and 50, in which the name of plaintiff has been shown as legal heir in other rights column, while the name of defendants are shown in ownership and cultivation column by virtue of mutation entry No. 217. The mutation extract bearing No. 217 (Exh. 51) shows that Trimbak is absconding since 22 years and so Dagadu i.e. defendant No. 2 has applied for mutation and accordingly an enquiry was held by the Tahsildar and as per the order of Tahsildar, the name of plaintiff and defendant were mutated in the revenue record of the suit lands as legal heirs of Trimbak. The trial Court has further referred to the certified copy of the Order of the Tahsildar dated 27/3/2000 (Exh. 52) shows the same fact and further shows that, the another wife of Trimbak namely Sakharabai died on 26/12/1999. Therefore, the trial Court held that, these revenue record supports to the plaintiff regarding her relationship with Trimbak as well as the relationship of Sakharabai and defendant No. 1 Meerabai with Trimbak. In the same paragraph, the trial Court has specifically observed that, defendants have not adduced any evidence rebutting the presumption of legitimacy in favour of the marriage of plaintiff with Trimbak, so also, the defendants have not stepped themselves into witness box.

9. In paragraph 11, the trial Court referred to the arguments of the learned Counsel for the defendants that, the plaintiff is not legally wedded wife of Trimbak and after hearing the learned Counsel for the defendants, the trial Court held, "In my opinion, this submission is not acceptable in the light of version of P. W. 1 to 3 as well as the revenue record of the suit lands. According to plaintiff, she is 70 years old, while her witness P. W. 2 Nathhu is 75 years old and so there is no reason for P. W. 1 and 2 to depose false. So, the version of P.W. 1 and 2 is acceptable to hold the status of plaintiff as wife of Trimbak. It is pertinent to note that, there is no dispute that, Trimbak is absconding since 22 to 23 years, so also from the evidence on record, it transpires that, the suit property except gold is self-acquired property of Trimbak.

In paragraph 13, the trial Court has recorded the finding of fact after appreciation of evidence that, the plaintiff is the wife of Trimbak.

10. On careful perusal of Issue No. 2 framed by the trial Court for its determination and discussion thereon, it clearly appears that, the trial Court had given full opportunity to the parties to adduce evidence and to advance arguments on the point of validity of marriage of plaintiff Anusayabai with Trimbak. On careful perusal of the findings recorded by the trial Court, it is clear that, sufficient opportunity was given to the plaintiff as well as defendants to lead evidence about the validity of marriage between the plaintiff Anusayabai and Trimbak. It appears from the careful reading of the judgment of the trial Court that, the petitioners herein did not press or file any application for framing specific issue questioning the legality of the marriage between the plaintiff and Trimbak. As already observed, the petitioners herein did not adduce any evidence in support of their contention that the plaintiff Anusayabai is not legally wedded

wife of Trimbak. Not only this, but even the petitioners did not enter into the witness box to prove their contentions. Therefore, it is not open for the petitioners at belated stage to agitate the said issue before the Appellate Court when the trial Court after taking into consideration entire evidence brought on record by the plaintiff as well as defendants, reached to the convincing finding that Anusayabai i.e. plaintiff is wife of Trimbak.

11. At this juncture, it would not be out of place to refer to some of the judgments of the Hon Tale Apex Court as well as this Court on the point of validity of marriage. In case of *Badri Prasad v. Dy. Director of Consolidation* (cited supra), the Hon"ble Apex Court observed thus,

For around 50 years, a man and a woman, as the facts in this case unfold, lived as husband and wife. An adventurist challenge to the factum of marriage between the two, by the petitioner in this special leave petition, has been negated by the High Court. A strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although, the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view, the contention of Shri Garg, for the petitioner, that long after the alleged marriage, evidence has not been produced to sustain its ceremonial process by examining the priest or other witnesses, deserves no consideration. If man and woman who live as husband and wife in society are compelled to prove, half a century later, by eyewitness evidence that they were validly married, few will succeed. The contention deserves to be negated and we do so without hesitation.

12. This Court in case of (*Subhash Popatlal Shah v. Lata Subhash Shah*) reported in 1993 Mh.L.J. 923 held that, When some sort of marriage ceremony is undergone by the parties, there is always a presumption of a valid marriage.

In case of *Ningu Vithu Bamane and Ors. v. Sadashiv Ningu Bamane and Ors.* (cited supra), this Court held,

There is a legal presumption in favour of marriage and legitimacy and the burden of proving a fact existing otherwise is on the party, who challenges the marriage between two persons and the legitimacy of the children born of such marriage.

13. In the instant case, the present petitioners, who are original defendants, though full opportunity was given by the trial Court, utterly failed to adduce any convincing evidence and thereby failed to discharge burden on them to prove that the marriage between Anusayabai and Trimbak was not legal.

The Hon"ble Apex Court in case of *Adivekka v. Hanamavva Kom Venkatesh* (deceased by L.Rs.) (cited supra) held that,

On the ground of non examination of party to Suit, adverse inference can be drawn against that party.

14. Therefore, in the instant case also, the petitioners have failed to adduce sufficient evidence when opportunity was given to them by the trial Court and not only that, they even did not entered in the witness box to discharge their burden.

The learned Counsel for the petitioners is absolutely right in contending that the appeal is a continuation of Suit and, therefore, application which was filed by the petitioners for framing necessary issue, was perfectly maintainable. There is no dispute that appeal is continuation of Suit and the petitioners were entitled to file application under Order XLI, Rule 25 of the Code of Civil Procedure. The learned Counsel, therefore, is absolutely right in placing reliance on the judgments cited at the time of arguments in support of her contention that the application under Order XLI, Rule 25 of the CPC was maintainable.

Though, the learned Counsel for the petitioner submitted that the findings recorded by the trial Court are inadequate to prove whether the plaintiff is legally wedded/wife of Trimbak or not, in my considered view, the trial Court has given elaborate findings about giving full opportunity to the parties to put forth their case. Therefore, the contention that findings of the trial Court are inadequate to prove whether the plaintiff is legally wedded wife of Trimbak or not, is required to be rejected.

It is true that the application filed by the petitioner for amendment was allowed and paragraph 2-A was allowed to be inserted and on the basis of the said paragraph, it is open for the petitioners to advance arguments at the time of final hearing of the appeal. Though, the learned Counsel has placed reliance on the judgment of the Karnataka High Court in case of Smt. Nagarathnamma v. Smt Venkatlakshamma and Ors. (cited supra), it clearly appears that the facts of that case were different than the facts of the case in hand. Here, the petitioners have utterly failed to adduce sufficient evidence in spite of opportunity given by the trial Court and not only that, they did not enter in witness box in support of their contention. They have not insisted to frame the issue before the trial Court, which now they want that Appellate Court should frame the issue about the legality of the marriage of the plaintiff with Trimbak. Therefore, the ratio laid down in that case is not applicable in the instant case. At the time of recording the evidence of the plaintiff, she was aged about 70 years age and sending the matter back by framing the issue to the trial Court, would be mockery of the judicial process and will add to the mental agony of the litigant, who is aged more than 75 years and waiting for justice since long. It is relevant to mention at this juncture that, the learned Counsel for the respondent is right in submitting that, the petitioners have dispossessed the plaintiff from the property 12 years back and there is nobody to take her care. Importantly, when the trial Court had given sufficient opportunity to lead the evidence, the petitioners have utterly failed to discharge the burden and, therefore, in the facts and circumstances of this case, the Appellate Court has rightly rejected the application of the petitioners.

On plain reading of the provisions of Order XLI, Rule 25 of the Code of Civil Procedure, it clearly appears that, in the given set of facts, it is for the concern Court to decide by using discretion whether to frame any issue as prayed by the party and to send it to the trial Court for recording the evidence and send it back to the Appellate Court again. In the instant case, the Appellate Court has recorded finding that the trial Court had given sufficient opportunity to the parties to lead evidence on the point, whether Anusayabai is legally wedded wife of Trimbak or not. Therefore, on plain reading of the provisions of Order XLI, Rule 25 of the Code of Civil Procedure, it appears to me that those are not mandatory in nature. Though, the learned Counsel tried to contend that, the Appellate Court has not appreciated the provisions of Order XLI, Rule 25 of the Code of Civil Procedure, on careful reading of the reasons given by the Appellate Court, it clearly appears that though technically the Court has not referred to the said provisions, the same are appreciated by the Appellate Court.

15. It would be relevant to mention that the Civil Application which was filed and copy of which is placed on record at EXH. "C" by the petitioners at page 36, it appears that the Civil Application was filed only by Meerabai. However, the present writ petition is filed by Meerabai and even by Dagadu. It is relevant to mention at this juncture that, Dagadu was applicant before the Tahsildar, filed application praying therein for mutating mutation entries in his name as well in the name of plaintiff, and on his application, the Tahsildar has entered the name of the plaintiff and the petitioners in the revenue record. Therefore, what follows from it is that, there was relationship between Anusayabai and Trimbak as husband and wife and, therefore, after proper enquiry, the Tahsildar has taken entries in the revenue record.

16. On careful perusal of paragraph 11 of the trial Court judgment, it clearly appears that all possible arguments have been advanced by the defendants in support of their case. The trial Court has recorded a clear finding that the plaintiff is wife of Trimbak. Therefore, under Article 227 of the Constitution of India, it is not permissible for this Court to up set the finding of fact recorded by the Appellate Court, which is the last Court on facts.

The learned Counsel appearing for the petitioner has placed reliance on the reported judgment of this Court in case of Satpuda Tapi Parisar Sahakari Sakhar Karkhana v. Jagruti Industries and Anr. (cited supra) and tried to contend that, under Order XLI, Rule 25 of the Code of Civil Procedure, power is conferred on the Appellate Court to frame additional issues and the Appellate Court under Rules 23 and 25 of Order XLI of the CPC has power to frame additional issues or whether it reverses the finding recorded in a Decree on a preliminary issue to remand the matter for determination of all issues in accordance with law. There is no doubt about the powers of the Appellate Court, however, in the facts of this case, the Appellate Court has rightly held that it is not necessary to frame issue as prayed by the petitioners since the trial Court has already elaborately dealt with the said issue and given full opportunity to the parties to lead evidence and

advance arguments.

Though the learned Counsel for the petitioner vehemently submitted that, the provisions of Section 5(1) of the Hindu Marriage Act, 1955 lays down a mandatory precondition that at the time of the marriage, no party to the marriage should have a spouse living. To that effect, no supporting evidence has been laid before the trial Court by the petitioners and even not entered into witness box. Therefore, the said contention at belated stage, is required to be rejected.

Though the learned Counsel appearing on behalf of petitioners submitted that, this Court can exercise its extra ordinary jurisdiction in case there is failure of justice, it appears to me that complete justice has been done by the trial Court as well as Appellate Court and, therefore, there is no substance in the contention of the learned Counsel for the petitioners that there is failure of justice in the instant case.

17. So far framing of the issues is concerned, as prayed by the petitioners on this issue, the Hon''ble Apex Court in case of Nedunuri Kameswaramma Vs. Sampati Subba Rao, , held that,

Where the parties went to trial, fully knowing the rival case and led all the evidence not only in support of their contentions, but in refutation of those of the other side, it can not be said that the absence of an issue was fatal to the case, or that there was that mis-trial, which vitiates proceedings. The Suit could not be dismissed on this narrow ground and also there is no need for a remit, as the evidence which has been led in the case, is sufficient to reach the right conclusion and neither claimed that it had any further evidence to offer.

This Court in case of Krishna Laxman Bhatkar (since deceased by LRs) and etc. Vs. Vithal Ganesh Athavale, , held that

The Appellate Court while deciding the appeal, has considered each and every submission made by the appellant and given his findings. The judgment of the Appellate Court shows that the Appellate Court has applied its mind to all the submissions made, the documents relied upon and the evidence adduced and has given cogent and convincing reasons for accepting or rejecting each of the submissions made by the respective parties and, therefore, merely because the point for determination were not framed, like framing of the issue that would not itself vitiate the judgment nor that could a case for remand to the Appellate Court.

The Hon Tale Apex Court in case Babhutmal Richand Oswal v. Laxibai R. Tarte and Anr. (cited supra), held that,

Held on the facts of the case that the High Court overstepped the limits of its power under Article 227 when it interfered with the findings of fact arrived at by the District Court as a final Court of fact acting under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The High Court could not claim to

interfere with the findings of the fact reached by the District Court even on the ground that the District Court had misread apart of the evidence and ignored another part of it. S.C.A. No. 2794 of 1967, D/8/11/1973 (Born) Reversed.

18. Therefore, in view of the discussion and reasons given herein above, the writ petition is devoid of any merits and deserves no consideration. Rule is discharged. Interim relief, if any, stands vacated. Civil application, if any, disposed of in view of disposal of main writ petition. The writ petition stands dismissed.