

Servai,⁽¹⁾ it would appear that it would have been open to Bhupatrai to repudiate the transaction, and consequently it is equally open to his heirs, plaintiffs Nos. 2 to 4, to do so. I agree, therefore, that they should be allowed to redeem along with plaintiff No. 1, and I am also of opinion that when plaintiff No. 1, Bai Devmani, who was not a party to those transactions, has a right of residence founded on a decree, it is inequitable that she should be compelled alone to redeem the mortgage, which she, a widow, is probably not in a position to do. I, therefore, agree that the decree of the lower appellate Court should be reversed, and the appeal allowed with costs throughout.

1928
 BAI DEVMANI
 v.
 RAJESANKAR
 OGHADBHAI
 Baker, J.

Decree reversed.

J. G. R.

⁽¹⁾ (1908) 35 Cal. 551 at p. 558.

APPELLATE CIVIL.

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Murphy.

ANNAJI RAMCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2),
 APPELLANTS v. THAKUBAI BHRATAR DATTATRAYA DESHPANDE
 AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1928
 September 28

Civil Procedure Code (Act V of 1908). Order XLI, rules 25, 23—Appellate Court—Further finding necessary—Remand by appellate Court.

Under the provisions of Order XLI of the Civil Procedure Code when the Court is of opinion 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 of that Order, 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. It is not competent to the appellate Court in such a case to reverse the decree and remand the case to the trial Court for disposal under rule 23, which only applies to the case where a suit has been decided on a preliminary point.

SUIT for declaration.

*Appeal from Order No. 10 of 1926 against the Order of R. S. Broomfield, District Judge of Sholapur, in Appeal No. 56 of 1924.

1928

ANNAJI
RAMCHANDRA
v.
THAKURBAI
DATTATRAYA

The property in suit belonged to one Jivaji and was inherited by his daughters, plaintiff and defendant No. 4.

On May 12, 1921, they sold the property to Annaji, defendant No. 1. They brought a suit to recover the property on the ground that they were minors at the time of the sale, that they were married women and the consent of their husbands was not obtained, and that the sale deed was obtained from them by fraud and undue influence.

The trial Court found that the plaintiff and defendant No. 4 were estopped from contending that they were minors at the date of the sale-deed and that the consent of the husbands was not necessary for the disposal of their *stridhan*. The Court subsequently dismissed the suit as the parties were not ready to adduce evidence on the remaining issues.

On appeal the District Court held that the plaintiff and defendant No. 4 were not estopped from showing that they had been minors at the date of execution of the deed and that the consent of their husbands was necessary to validate the sale. The District Judge reversed the decree and remanded the suit to the trial Court for finding on issues whether the plaintiff and defendant No. 4 were minors at the date of the sale, and whether their husbands had consented to the sale and also on issues which were decided in the absence of evidence.

The defendants appealed to the High Court against the order of remand.

P. V. Kane, for the appellants.

G. B. Chitale, for respondent No. 1.

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.

Under the provisions of Order XLI of the Civil Procedure Code 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

1928

ANNAM
RANCHANDRA
2.THAKURAI
DATTATRAYA

Murphy, J.

1928

ANNAJI
RAMCHANDRA
P.
THAKI BAI
DATTATRAYA
Murphy, J.

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.

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.

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.

MARTEN, C. J. :—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.

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

Decree varied.

B. G. R.