

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

APPEAL FROM ORDER No. 1000 OF 2015

Mr. Chandrakant Vithal Rawool	... Appellant.
VS	
Jayashree Babasaheb Hankare & ors.	... Respondents.

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Mr. Ajay Joshi, Adv. for Appellant.
Mr. Pradeep D. Dalvi, Adv. for Respondent No.1.

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CORAM : MRS.MRIDULA BHATKAR, J.

DATED : SEPTEMBER 08, 2015

P.C. :

This Appeal from Order is directed against the order dated 11/09/2014 passed by the Principal District and Sessions Judge, Sindhudurg-Oros, thereby setting aside the Judgment and Order dated 21/12/2011 passed by the Joint Civil Judge, Junior Division, Kudal dismissing the suit. The plaintiff i.e. Respondent No.1 has filed a suit for declaration in respect of her easementary rights by necessity for use of way and also for perpetual injunction restraining the defendants i.e. the appellant from obstructing her right of way.

2. Learned counsel for the appellant has submitted that the order passed by the learned Principal District and Sessions Judge, Sindhudurg is erroneous. The learned Judge after remanding the

matter, directed the learned Civil Judge, Junior Division, Kudal to record evidence afresh. He submitted that he has no objection even if the additional issue is framed by the Appellate Court i.e. District Judge and evidence can be recorded by the Trial Court under Order 41 Rule 27 of the Code of Civil Procedure. However, the Appellate Court should give finding on the basis of the said additional evidence. The order of remand has serious consequences as the Judgment and Decree of the Trial court is set aside. He further submits that the plaintiff in his plaint did not aver right of easement by grant, but her pleadings are limited to right of way by easement of necessity. He further submits that the learned District Judge should not have framed issue, which is not pleaded by the plaintiff and the order of remand passed by the District Judge is to be set aside.

3. Learned counsel for the respondent No.1 submits that the plaintiff in Para No.2 of his plaint has sounded about his right of way granted by the original land-owner i.e. Defendant No.4. He relies on Exh.41 i.e. a Consent Letter given by the defendant No.4 - the original landlady in favour of the plaintiff in respect of right of way. He further argued that after the order of remand, in fact, steps are taken by both the parties before the Trial Court as Court Commissioner was appointed and he had submitted a report. The expenditure of appointment of the Commissioner was also paid by the plaintiff. Now, the parties are

before the Trial Court.

4. After perusal of the order, the plaint and submissions of the learned counsel for both the parties, I am of the view that though expressly right of easement by grant is not pleaded in the plaint, the Appellate Court has taken a correct view that the issue in respect of easement by grant is required to be framed and it is to be answered by the Trial Court. Parties have already taken steps pursuant to order passed by the Appellate Court and Commissioner's report is also before the Trial Court.

5. Under the circumstances, order of Appellate Court of remanding the matter cannot be faulted with. Hence, the appeal is dismissed. However, it is made clear that the evidence, which is recorded earlier is to be read in the evidence. Earlier Commissioner's report is to be read and additionally, the parties are allowed to lead further evidence-oral as well as documentary. The Trial Court to record additional evidence and parties to co-operate and after hearing the submissions, it is to be decided, preferably on or before 23rd December, 2015.

6. All the contentions and objections are kept open.

(MRS.MRIDULA BHATKAR, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Order.