

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 33 of 2014

1. Abdul Ajim S/o late Jan Mohammad, aged about 55 years,
2. Abdul Karim S/o late Jan Mohammad, aged about 45 years,

Both R/o Near Masjid, Mowa, Police Station Mowa, Tahsil, Civil and Revenue District, Raipur, CG

---- Appellants/defendants

Versus

- 1 Mohd. Istayak S/o late Mohd. Ismail, aged about 62 years,
 2. Mohd. Ayub S/o late Mohd. Ismail, aged about 60 years,
- Both R/o Indira Gandhi Ward, Station Road, Kelkarpara, Police Station Kotwali, Civil and Revenue District, Raipur, CG
3. Smt. Shamim Begam D/o late Mohd. Ismail W/o Abdul Sattar, aged about 43 years, R/o Rikhiyapara, Police Station Purani Basti, Civil and Revenue District Raipur, CG
 4. Smt. Nafisa Begam, D/o late Mohd. Ismail, W/o Sher Khan, aged about 34 years, R/o Khadamuda, Police Station Komna, Civil and Revenue District Bhawanipatnam (Kalahandi) Orissa.

---- Respondents/Plaintiffs

For Appellants	-	Shri Malay Bhaduri, Advocate
For Respondents	-	Shri Yogesh Pandey, Advocate

Hon'ble Shri Justice Pritinker Diwaker

Order on Board

31/08/2016

With the consent of the parties the matter is heard finally.

The respondents/plaintiffs filed a suit for ejectment and possession *inter alia* pleading that they are the owner of the land in dispute i.e. Khasra No. 345, PH No. 109, plot No. 17, area ad-measuring 1800 sq.ft situate at village Mowa, Tahsil and District Raipur boundary of which has been described in the map,

and the said land is in their possession. According to the respondents/plaintiffs, in their absence the defendants have encroached upon their land and therefore the judgment and decree be passed in their favour and the appellants/defendants be evicted accordingly. Vide judgment dated 30.4.2011 the trial Court dismissed the suit of the plaintiffs. While deciding the suit the trial Court has framed six issues out of which the second issue was "whether the defendants have encroached upon the land belonging to the plaintiffs?"

2. Aggrieved by the said judgment the plaintiffs preferred first appeal under Section 96 of the Code of Civil Procedure and vide judgment dated 22.1.2014, the appellate Court remitted the matter to the trial Court with a direction to decide the suit afresh. The lower appellate Court while deciding the appeal has held that demarcation of the land is not proper and unless the demarcation is done properly, dispute cannot be resolved finally. Lower appellate Court thus directed the trial Court to get the land demarcated and then to decide the suit afresh after giving opportunity to the parties. It is this judgment which is under challenge in this appeal by the appellants/defendants.

3. Counsel for the appellants/defendants submits that by a well-reasoned judgment the suit filed by the plaintiffs was dismissed by the trial Court answering all the issues framed by it in an effective manner. He submits that once a categorical finding has been recorded by the trial Court on all the issues, without meeting out and upsetting those issues the matter could not have been remanded and therefore such wholesale remand is illegal. According to the counsel for the appellants/defendants, the first Appellate Court has committed an error law in setting aside the order of the trial Court and remitting the matter to it with a direction to decide the suit afresh. The first Appellate Court is also contended to have erred in law in directing the trial Court to get the demarcation in respect of the land bearing khasra No. 345 and

346 belonging to the plaintiffs and defendants respectively. It is submitted that once the plaintiffs have given description of the land in question in paragraph No.2 of the plaint and also in the map annexed therewith, question of demarcation of the land as directed by the lower appellate Court does not arise. According to the counsel for the appellants/defendants, plaintiffs are required to prove their case by leading evidence and once the boundaries of the land are not disputed, question of demarcation does not arise. According to him, when demarcation is not in dispute and the plaintiffs have given full description of the land including disclosure of boundary in the map, lower appellate Court has committed an error of law in making wholesale remand of the case to the trial Court. In support of his contention, reliance is placed on the decision of the Apex Court in the matter of **Zarif Ahmad (D) Thr. LRs. & another v. Mohd. Farooq** reported in **2015 AIR SCW 1190**.

4. On the other hand counsel for the plaintiffs/respondents supports the judgment impugned and submits that as the entire picture of the case was not clear before the trial Court, first Appellate Court was justified in remanding the matter with a direction to the trial Court to decide the suit afresh. He submits that no harm would be caused to the defendants if the material on record is re-appreciated by the trial Court.

5. Heard counsel for the parties and perused the material available on record.

6. Appeal is not yet admitted for hearing. However, the substantial question of law involved in the case is as under:

“Whether the First Appellate Court is justified in making wholesale and open remand in exercise of power under Order 41 Rule 23 of the Code of Civil Procedure, without reversing the decree in appeal and without holding that the re-trial is necessary”?

7. From the judgment passed by the trial Court it is apparent that as many as six issues were framed by it and all have been answered in favour of the defendants. The first Appellate Court however, without meeting out and upsetting the finding recorded by the trial Court on any of the issues, has disturbed the same by remitting the matter with a direction to the trial Court to decide the suit afresh. Making such wholesale and open remand without taking pains to meet the finding of the trial Court, is not permissible under the law.

8. It is a settled legal position that in the cases like the present one, the Court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate Court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial Court, it has to come with a proper finding of its own and it should not shirk its duties. Further settled legal position with respect to remand cases is that the Court should not ordinarily remand a case under Order XLI Rule 23 CPC merely because the reasoning of the lower Court on some point was wrong as such remand order leads to un-necessary delay and cause prejudice to the parties to the case. Furthermore, it has been categorically held by the Apex Court in the matter of *Zarif Ahmad (D) v. Mohd. Farooq (supra)* that if the suit property has been described by the plaintiff in the plaint not only by the boundaries but the map enclosed with the plaint also demonstrates the same, there is no need to remit the matter to the trial Court to allow the parties to adduce additional evidence.

9. In view of above factual and legal position, this Court is of the considered opinion that the lower Appellate Court has committed an error of law in making wholesale and open remand of the case to the trial Court without upsetting the finding recorded by the trial Court on any of the issues and being so the judgment impugned dated 22.1.2014 cannot be made to stand and it is

hereby set aside. Substantial question of law framed by this Court is answered in negative.

10. Lower appellate Court to decide the appeal afresh on its own merits in accordance with law. Parties to appear before the First appellate Court on 3.10.2016.

11. Appeal allowed.

Sd/-

(Pritinker Diwaker)

Judge

Jyotishi