

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

**APPEAL FROM ORDER NO.12 OF 2016
WITH
CIVIL APPLICATION NO.3221 OF 2016**

- 1) Suryakant Tatya Damare
Age: 60 Yrs., occu. Serice,
- 2) Aabasaheb @ Pintya Suryakant Damare
Age: 40 Yrs., occu. Driver,

Both R/o Rashin, Tq. Karjat,
District Ahmednagar.

= **APPELLANTS**
(orig. Defendants)

VERSUS

Rajkumar Vishwanath Aandharlkar
Age: 35 Yrs., occu. Medical Practitioner,
R/o Rashin, Tq. Karjat,
District Ahmednagar.

= **RESPONDENT**

LEX AQUILA - MADHAVESHWARI D.THUBE-MHASE, Advocate
for Appellants;

Mr. VS Bedre, Adv. for sole Respondent

CORAM : P.R.BORA, J.

DATE : 9th August, 2016.

ORAL JUDGMENT:

- 1) Heard. **Admit.** With consent of the
learned Counsel appearing for the parties, taken
up for final disposal.

2) The order passed by the Principal District Judge, Ahmednagar in Regular Civil Appeal No.22/2010 on 4.1.2016, is challenged in the present appeal. Vide the impugned order, the learned Principal District Judge has remanded back the matter to the Trial Court with a direction to re-cast the issues as are framed by the appellate court in para 31 of the impugned judgment and to decide the matter afresh by giving due opportunity to the parties to the proceedings.

3) According to the appellants, no case of remand was made out even from the pleadings and as such, the matter could not have been remitted by the appellate court, but ought to have been decided on merits by the appellate court.

4) Mrs. Thube-Mhase, learned Counsel appearing for the appellants, submitted that while re-casting the issues, only the wordings have been changed by the Appellate Court, but the

spirit of the issues framed remained same, as were framed by the Trial Court.

. The learned Counsel further submitted that the entire material was before the Appellate Court, on the basis of which, the controversy, as was raised in the appeal, could have been decided by the Appellate Court and remand was not at all necessary.

. The learned Counsel relied upon the judgment of the Hon'ble Apex Court in the case of Ashwinkumar K.Patel Vs. Upendera J. Patel – 1999 (2) Supreme 436 and more particularly para 7 of the said judgment. The learned Counsel also invited my attention to the provisions of Order 41 Rule 23, 23-A, 24 and 25 of the Code of Civil Procedure.

. Referring to the aforesaid provisions in the Code, the learned Counsel submitted for allowing the present appeal thereby setting aside the order passed by the first Appellate Court and direct the first Appellate Court to decide the matter on its own merits.

5) Shri Bedre, learned Counsel appearing for the respondent, supported the impugned judgment. The learned Counsel submitted that the first Appellate Court has recorded a finding that the Trial Court mis-directed itself in framing the issue as regards to the ownership over the suit property of the plaintiff when the suit was for simplicitor injunction.

. The learned Counsel further submitted that the first Appellate Court has elaborately discussed the reasons for remand of the matter. The learned Counsel submitted that it is in the interest of the present appellants also that the matter is re-heard by the Trial Court by framing proper issues as are suggested by the first Appellate Court.

. The learned Counsel further submitted that since the very first issue was wrongly framed, the entire further discussion made by the Trial Court has proceeded in a wrong way. The learned Counsel further submitted that the Appellate Court has also observed that the

relevant Government Notification for exchange of lands has also not been properly considered by the trial Court. The learned Counsel, inviting my attention to the observations made by the first Appellate Court in that regard, submitted that the order of remand is correctly passed by the first Appellate court and no interference is required in the order so passed.

6) I have carefully considered the submissions advanced by the learned Counsel appearing for the respective parties. I have also perused the issues, as were framed by the Trial Court while deciding the Regular Civil Suit No.172/2001 and the issues re-cast by the first Appellate Court in para 31 of the impugned order.

7) It was the case of the present respondent, i.e. original plaintiff, that the suit property, allotted to present appellant No.1 by the State Government under the provisions of the Ceiling Act, was adjacent to his land. It

was his further contention that present appellant No.1 and he, by way of mutual agreement, decided to exchange their lands for convenient cultivation and accordingly for such exchange, the Sub Divisional Officer granted permission, vide order passed on 12th May, 1997 and he is in cultivating possession of the said property. It was the further contention of the plaintiff that the present appellants were obstructing his peaceful possession over the suit property. The original plaintiff had, therefore, sought perpetual injunction against the present appellants.

8) As against the aforesaid contention raised by the original plaintiff, it was the case of the present appellants that the original plaintiff with the help of the revenue officers intended to grab the suit property. It was their further contention that the original plaintiff was never in possession of the suit property.

9) In the light of the aforesaid pleadings,

the issues were framed by the Trial court. The material on record shows that the parties to the suit adduced oral as well as documentary evidence in support of their respective contentions and on the basis of the oral and documentary evidence placed on record, the trial court has recorded its finding and has ultimately dismissed the suit filed by the plaintiff.

. In the impugned judgment the learned Principal District Judge has observed that there was no reason for the trial court to frame an issue as regards to the ownership of the property and thereby to cast unnecessary burden on the shoulders of the plaintiff to prove his ownership when the plaintiff has not sought any declaration about his ownership over the suit property. It is further observed by the learned Principal District Judge that the observations made by the trial Judge as about the provisions of the Ceiling Act and more particularly that the Sub Divisional Officer has no legal authority to grant permission for exchange of land allotted

under the provisions of the Ceiling Act, are contrary to the Government Notification dated 11th March, 1966. The learned Principal District Judge has held that the observations made by the Trial court that Exchange-deed in question was bad in law, are incorrect in view of the aforesaid Government Notification. The learned Principal District Judge has further observed that the Trial Judge has framed the incorrect issue No.1 mixing the point of title of the plaintiff over the suit property and unnecessarily recorded a finding about title of the plaintiff in negative on erroneous legal position. The Principal District Judge has further observed that the said aspect needs to be revisited at the hands of the trial Judge and requires a fresh finding in the light of the citations of the Hon'ble Bombay High court and Hon'ble Supreme Court referred to by him in the judgment delivered by him.

10) In the impugned judgment, the learned

Principal District Judge has referred to the judgment of this Court in the case of Chandrashekhar Shankarrao Kulkarni Vs. Rahul Shikshan Prasarak Mandal, Sansar Nagar, Aurangabad – 2007(2) Mh.L.J. 296, wherein it is held that the decree for perpetual injunction can be granted if the person seeking perpetual injunction proves his possession over the suit property on the date of filing of the suit preferably to some lawful right and it is not necessary for the court to decide the title of the plaintiff.

. In the impugned judgment, the Principal District Judge has also referred to and relied upon the judgment of the Hon'ble Apex court in the case of M. Kallappa Setty Vs. M.V.Lashminarayana Rao – AIR 1972 SC 2299, wherein it is held that the plaintiff can, on the strength of his possession, resist interference from defendant, who has no better title than himself and get injunction, restraining the defendant from disturbing his possession.

11) It appears that in view of the law laid down in the aforesaid judgments, the Principal District Judge re-cast the issues and directed the trial court to decide the matter afresh in the light of the issues so framed.

12) After having considered the material on record, it appears to me that the entire material was available before the District court, and as such, it should have itself decided the appeal one way or the other. As has been observed by the Hon'ble Apex court in the case of Ashwinikumar K.Patel (cited supra), the Court should not ordinarily remand a case under Order 41 Rule 23 of the Code of Civil Procedure to the lower court merely because it considered that the reasoning of the lower court in some respect was wrong. As revealed from the arguments advanced by the leaned counsel appearing for the respective parties, both the parties had adduced the necessary evidence in order to substantiate their respective contentions. No such submission

was made either by the appellants or by the respondents that any of them was intending to adduce any more oral or documentary evidence. Thus, the entire evidence, which the parties were intending to adduce was already adduced by them and was existing on record. In the circumstances, if the learned Principal District Judge was of the view that some of the observations made by the learned Trial Judge were contrary to the Government Notification dated 11th March, 1966 and in the opinion of the Principal District Judge, the finding recorded by the trial judge as about the legality of the Exchange-deed was incorrect, it was well within the powers of the learned Principal District Judge to set aside the said finding and to lay down correct position of law. It was possible for the learned Principal District Judge to decide the controversy raised in the matter on the basis of material available on record. Even if it is presumed that the learned Trial Judge should not have entered into the controversy as regards to

the title of the plaintiff of the suit property, the fact remains that the trial Judge has also recorded an unambiguous finding that the plaintiff has failed to prove that he is in possession of the suit property. The correctness of the said finding could have been examined by learned Principal District Judge.

13) After having considered the material on record, it does not appear to me that it was necessary to remand the matter to the Trial Court for fresh decision. As has been observed by the Hon'ble Apex court in the case is Ashwinikumar K.Patel's Case (cited supra), such remand orders lead to unnecessary delays and cause prejudice to the parties to the litigation. As observed by me in the earlier paras, when necessary evidence is available, the learned Principal District Judge should have himself decided the appeal one way of the other. The learned Principal District Judge should have considered the various factual and legal aspects of the case, as are mentioned in

the order of the trial court and should have decided whether the order of the Trial court shall be confirmed or reversed or modified.

14) For the reasons stated above, the impugned order is set aside. The learned Principal District Judge shall decide the matter on its own merits on the material available on record. Pending Civil Application, if any, stands disposed of.

sd/-
(P.R.BORA)
JUDGE

bdv/