

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1101 OF 2015
with
CAA/1367/2015

Shri Appa Sahadeo Joshi ... Appellant

Vs.

Shri Prabhakar Shantaram Sawant & Ors. ... Respondents

Mr.Sudhir Prabhu for the Appellant
Mr.A.S. Khandeparkar a/w Amogh Karandikar i/b Khandeparkar & Asso.
for Respondent Nos.1, 2 & 3

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **15th FEBRUARY, 2016**

P.C.:

1. The appellant, who is the original defendant No.1, has filed this appeal challenging the order dated 3.8.2015 passed by the learned Principal District Judge, Sindhudurg at Oros in Regular Civil Appeal No.67 of 2010 remanding the suit and directing the trial Court to lead evidence on the point of Court Commissioner's map and to prove the contents of the sale deed and also fresh trial.

2. The suit was filed by the present respondents for perpetual and mandatory injunction in respect of suit premises. As per the case of the plaintiffs, the defendants had started constructing a house with the permission of the Gram Panchayat. However, while initiating the

construction, he dugged a well on the adjacent land of the plaintiffs and also encroached upon the land of the plaintiffs and, therefore, he filed a suit for perpetual and mandatory injunction. The said suit was dismissed on merit against which the appeal is filed.

3. The learned Counsel for the Appellant has pointed out the issues of determination and the findings given by the appellate court in paragraph 6 of the appeal. He submitted without deciding those points and by just holding that the said points do not survive, the appellate Court should not have remanded the suit under Order 41 Rule 23A of the Code of Civil Procedure. In support of his submissions, he relied on the judgment of **Purshottamdas Reddy vs. Pratap Steels Ltd.**¹. He further submitted that the appellate Court ought to have decided those points. He further submitted that in fact, the trial Court has rightly considered the evidence and has dismissed the suit.

4. The learned Counsel for the respondents i.e., the original plaintiffs, submits to the orders of this Court.

5. Perused the impugned judgment and order of the appellate Court. Considering the facts of the case and the merits and also the nature of the evidence, it appears that the Court Commissioner was appointed at the

1 (2002) 2 SCC 686

instance of the plaintiffs and the TILR has measured the suit land. The report is placed on record at exhibit 22. However, it was objected by the defendants i.e., the present appellants by filing say, which is marked at exhibit 37. The objection was on the point of its accuracy and it appears that the concerned TILR was not examined and, therefore, the appellate Court directed the trial Court to give an opportunity to the plaintiffs to examine the Court Commissioner or the TILR. Secondly, it is observed by the appellate Court that the sale deed is marked exhibit 145. A certified copy of the sale deed i.e., 16.10.1952 which is marked as exhibit 89 is produced. However, the appellate Court had raised a question about the contents in the sale deed and remanded the matter. It appears that certified copy of the sale deed was produced and thus, there is no further requirement to prove the contents of the sale deed, which is registered.

6. In view of the ratio laid down in the judgment in the case of **Purshottamdas Reddy (supra)**, the unwarranted orders of remand resulting in keeping litigations pending unnecessarily are not to be placed. The points of determination framed by the appellate Court are as follows:

	Points	Findings
1)	Do the plaintiffs prove that they are owners and possessors of the suit land?	Does not survive
2)	Do the plaintiffs prove that the defendants have constructed farm house and well in the suit land?	Does not survive

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|----|---|---|
| 3) | Whether the plaintiffs are entitled to prohibitory, mandatory injunction? | Does not survive |
| 4) | Whether the decree passed by the trial Court is correct and proper? | No |
| 5) | What order? | Appeal is partly allowed. Reg. Civil Suit No.33 of 2003 is remanded for retrial |

7. Considering the evidence tendered before the trial Court, there is sufficient material before the trial Court to decide point Nos.1, 2 and 3 and moreover, if the appellate Court is of the view that when there is a challenge given by the defendant to the report of the Court Commissioner, specific evidence of the Court Commissioner is required, then the appellate Court may frame additional issue under Order 41 Rule 25 and may remand the matter for the limited purpose directing the trial court to record the additional evidence to that extent; give its finding to that effect and send back the matter again to the trial Court for its decision.

8. Under such circumstances and in view of the ratio laid down in the case of **Purshottamdas Reddy & anr. (supra)**, the impugned judgment and order of the appellate Court dated 3.8.2015 is hereby set aside. The matter is remanded to the appellate Court.

9. Appeal from order is disposed of accordingly. Civil Application also stands disposed of.

(MRIDULA BHATKAR, J.)