

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
BENCH AT AURANGABAD.

**APPEAL FROM ORDER NO. 26 OF 2016**

KISAN NARAYAN LAWAND  
VERSUS  
GULAB DHONDIBA TIKORE AND OTHERS

...

Advocate for Petitioners : Mr. Shoyab Shaikh.

Advocate for Respondents : Mr. Sandeep Y. Mahajan.

...

CORAM : **V. K. JADHAV, J.**

DATE : 16<sup>th</sup> February, 2017.

ORDER:

. Heard finally with consent at admission state.

2 Being aggrieved by the judgment and order dated 22<sup>nd</sup> September, 2015 passed by the District Judge-1, Bhoom in Regular Civil Appeal No.168 of 2014, the original Defendant (Respondent in the aforesaid regular civil appeal) has preferred this appeal.

3 Brief facts giving rise to the present appeal are as follows:

- a) Respondents / Plaintiffs had instituted Regular Civil Suit No.225 of 2001 for recovery of the possession of the encroached portion. According to the Respondents / original Plaintiffs, they are the owner

in possession of land Gat No.218 situated at village Kokarwadi, Taluka Paranda, District Osmanabad to the extent of 3 Hectare 24 Ares. In the year 1998-99, the Appellant / original Defendant had committed encroachment upon the said suit property to the extent of land admeasuring 1 Hectare 34 Ares. The Appellant / original Defendant has strongly resisted the said suit by filing the written statement. It has specifically pleaded that the Respondents / Plaintiffs are not having the title to the land admeasuring 3 Hectare 24 Ares out of the land Gat No.218 and denied the averments made in the plaint. Both the parties led their oral and documentary evidence in support of their rival contentions. The learned Civil Judge Junior Division, Paranda by judgment and decree dated 22<sup>nd</sup> Deceased, 2010 dismissed Regular Civil Suit No.225 of 2001 with costs.

- b) Being aggrieved by the same, the Respondents / original Plaintiffs preferred Regular Civil Appeal

No.168 of 2014. After hearing both the parties, the learned District Judge-1, Bhoom vide its impugned judgment and order dated 22<sup>nd</sup> September, 2015, partly allowed the appeal and thereby set aside the aforesaid judgment and decree passed by the learned Civil Judge Junior Division, Paranda in Regular Civil Suit No.225 of 2001 and remanded the matter to the Trial Court with directions to appoint Taluka Inspector of Land Records as a Court Commissioner at the costs of both the parties and further directed the said Commissioner to carry out the joint measurement of the land of the parties and to ascertain as to whether any of the party has committed encroachment upon the land of other and submit a report. The learned District Judge further directed the Trial Court that after submission of the report by the Commissioner, opportunity should be given to the parties for adducing additional evidence if desire and decide the suit afresh. Being aggrieved by the same, this appeal is

preferred.

4           The learned counsel for Appellant / Defendant submits that in para 11 of the judgment and decree passed in Regular Civil Suit No.225 of 2001, the Trial Court after having discussed the documentary evidence elaborately, observed that Respondents / original Plaintiffs have failed to prove their title in respect of the suit land and accordingly recorded the finding to Issue No.1 in the negative. The learned counsel submits that without considering the said observations made by the Trial Court, the learned District Judge erroneously observed that the real dispute between the parties is regarding boundary marks of their share and so far as the encroachment is concerned, unless the property of both the parties are not jointly measured at one and the same time, it is very difficult to ascertain whether either of the party has committed encroachment of the property of another and accordingly remanded the matter to the Trial Court with directions as mentioned above. The learned counsel submits that the Appellant / Defendant succeeded in pointing out to the Trial Court on the basis of the documentary evidence produced on record that the Respondents / Plaintiffs have no title in respect of the suit land for which the relief

of recovery of possession is claimed and therefore, the order of remand passed by the lower Appellate Court by treating the dispute as a dispute mainly regarding the boundary marks, is liable to be quashed and set aside. The learned counsel submits that the lower Appellate Court has committed error by remanding the matter without considering the legal position that the lower Appellate Court is also a court of facts and law. The lower Appellate Court has exercised the power under Order XLI Rule 23-A of the Code of Civil Procedure in a very casual manner. The order under appeal cannot be justified on any count and the lower Appellate Court should have considered the appeal on merits by giving due regard to the observations made by the Trial Court in para 11 of the judgment.

5           The learned counsel for the Appellant / Defendant in order to substantiate his contentions placed reliance in the case of **Subhash s/o Narayanrao Moralwar Vs. Vilas s/o Pandurang Wankhede and others**, reported in **2013(4) Mh.L.J. 862**.

6           The learned counsel for the Respondents / original Plaintiffs submits that the lower Appellate Court has rightly remanded the matter to the Trial Court with certain directions. The

learned counsel submits that if the lower Appellate Court proposes to take any different view with regard to the observations made by the Trial Court in para 11 of the judgment, then the dispute between the parties would remain to the extent of boundary marks alone and in absence of joint measurement report of both the lands, the issue cannot be resolved. The learned counsel submits that considering the same, the lower Appellate Court has remanded the matter. No interference is required. There is no merit in the appeal and the appeal is liable to be dismissed.

7            On careful perusal of the judgment and decree passed by the Civil Judge Junior Division, Paranda dated 22<sup>nd</sup> December, 2010 in Regular Civil Suit No.225 of 2001, it appears that the learned Judge has given reference to the documents Exhibit – 73 and Exhibit – 81 respectively. Those are the old documents of 1348 Fasali and on perusal of the translated copy at Exhibit – 81, the learned Judge of the Trial Court has observed that the father of the Appellant / Defendant namely Narayan Lawand became the owner by purchased area 18 Acres 10 Gunthas i.e. 14 Aana Hissa and the said documents in the form of *Sikmi* register further shows that the father of Respondent / Plaintiff No.1 namely Dhondiba Tikore was

having 2 Aana share only i.e. 2 Acres 24 Ares in the suit land Gat No.218, which is originally having Survey No.52/1.

8           It appears from the impugned judgment and order passed by the lower Appellate Court that the lower Appellate Court has not at all considered the observations made by the Trial Judge particularly in para 11 of the judgment and erroneously observed that the real dispute between the parties is regarding boundary marks of their shares. The lower Appellate Court may altogether take a different view than the view taken by the Trial Court. However, the remand of the matter directing the joint measurement of both the lands by appointing the Court Commissioner is utterly unwarranted and uncalled for.

9           In the case of *Subhash s/o Narayanrao Moralwar Vs. Vilas s/o Pandurang Wankhede and others* (supra) relied upon by the learned counsel for the Appellant / Defendant, this Court by referring the judgment of the Supreme Court in the cases of **Jegannathan Vs. Raju Sigamani and another**, reported in, **2012(5) Mh.L.J. 1** and **Nendunuri “Kameswaramma” Vs. Sampati Subba Rao**, reported in, **AIR 1963 SC 884**, in para 9 of

the judgment, framed the 5 substantial questions of law for considering the remand order passed by the lower Appellate Court.

Para 9 of the judgment is reproduced hereinbelow:

“9. Upon hearing the Counsel appearing for the parties and upon careful perusal of the grounds taken in the appeal memo and annexures thereto, impugned judgment and order passed by the Courts below, judgments cited by the Counsel appearing for the parties across the bar and the provisions of Code of Civil Procedure and the judgment of the Supreme Court in the case of *Jegannathan* (supra) and in the case of *Nendunuri "kameswaramma" vs. Sampati Subba Rao* (supra), the following substantial questions of law will fall for consideration / determination in this Appeal from Order.

- (1) Whether the Appellate Court has committed patent error by remanding the matter back without considering the legal provision that the Appellate Court is also a Court of facts and law. If at all it had found any evidence lacking it had the jurisdiction to direct the parties to lead evidence on that aspect without remanding the matter back?
- (2) Whether the powers under Order 41, Rule 23-A of the Code of Civil Procedure can be exercised in a casual manner. Without the judgment and decree being liable to be set aside or perverse?

- (3) Whether the lower appellate Court justified in remanding the matter back when the parties led their evidence knowing their full case and trial Court has properly framed the issues?
- (4) Whether the lower Appellate Court has rightly remanded the matter considering the scope of Order 41 Rule 23 and 25 of the Code of Civil Procedure?
- (5) Whether the lower Appellate Court justified in remanding the matter which from the reading of the trial Court appears to be empty formality as such, trial Court has rightly framed issues while deciding the suit?

On the aforesaid substantial questions of law, 'Admit'. On admission, the learned Counsel for the respondents waives service. With the consent of the parties, the Appeal from Order is taken for final hearing forthwith."

This Court in para 12 of the judgment has made by the following observations in the aforesaid case.

**"12.** Upon careful perusal of Section 107 of the Code of Civil Procedure reproduced hereinabove, the Appellate Court has power to determine a case finally, to remand a case, to frame issues and refer them for trial and to take additional evidence or to require such evidence to be taken. Sub-section (2) of the said Section states that, the Appellate Court shall have the same powers and shall

perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. Therefore, in my considered opinion, in the facts of the present case, the lower Appellate Court should have decided Regular Civil Appeal filed by the respondents in the District Court itself instead of remanding the matter back to the trial Court. It was possible for the lower Appellate Court to frame specific issue on particular aspect and then refer it to the trial Court and ask the trial Court to send back the findings on the said issue and then decide the appeal. However, the lower Appellate Court instead of deciding the appeal in the District Court, remanded the matter back to the trial Court, which was not necessary in the facts of the present case.”

10            In the instant case, it appears that the lower Appellate Court has not considered the observations made by the Trial Court in para 11 of the judgment and without any justifying cause remanded the matter.

11            In view of the discussion above, the impugned judgment and order is thus, liable to be quashed and set aside with certain directions. Hence, the following order:

**ORDER**

- I. The appeal is partly allowed with costs.
- II. The judgment and order passed by the District Judge-1, Bhoom dated 22<sup>nd</sup> September, 2015 in Regular Civil Appeal No.168 of 2014, is hereby quashed and set aside with following directions.
- III. Re-admit Regular Civil Appeal No.168 of 2014 to its original number.
- IV. After giving opportunity of being heard to both the parties, District Judge, Bhoom shall dispose of the appeal on its own merits in accordance with law.
- V. All points kept open.
- VI. Appeal from order is accordingly disposed of.
- VII. Pending civil application stands disposed of.

**[ V. K. JADHAV, J. ]**