

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

**APPEAL FROM ORDER NO.340 OF 2016
WITH
CIVIL APPLICATION NO.441 OF 2016
IN
APPEAL FROM ORDER NO.340 OF 2016**

Ganesh Balu Patil

...Appellant

Versus

The Ward Officer, E Ward office,
N.M.M.C., Koparkhairane Navi
Mumbai & Ors.

...Respondents

.....

Mr. Sachin P. Shetye for the Appellant/Applicant.

Mr. Sandeep V. Marne for the Respondent Nos.1 to 4.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 15th JUNE, 2017.**

P.C.:-

Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2. By this appeal the Appellant herein, who is the original plaintiff has challenged the judgment dated 6th January, 2016 in Civil Appeal No.72 of 2014 passed by the learned District Judge-10, Thane. The Appellant herein filed Regular Civil Suit No.504 of 2012 for declaration that the notice dated 24th November, 2010 which was issued by the Respondent No.1 was null and void and that the Navi

Mumbai Municipal Corporation i.e. Respondent No.4 had no right to issue notice under section 53(1) of the Maharashtra Regional And Town Planning Act, 1966 (for short 'the M.R.T.P. Act'). The Appellant had sought relief for permanent injunction seeking to restrain the Respondents herein from demolishing House No.254 of 2003 situated at Survey No.122 at Mahape Village, Taluka and District-Thane, Navi Mumbai, without following due process of law.

3. The suit was contested by the Respondents on several grounds including the ground of maintainability of suit in view of powers under Section 149 of the M.R.T.P. Act. The learned Trial Judge had framed only one issue and after according opportunity to the respective parties and assessing the evidence adduced by them, the learned Trial Judge by judgment dated 21st December, 2013 decreed the suit and declared that the impugned notice dated 24th November, 2010 issued under Section 53(1) of the M.R.T.P. Act was illegal, null and void and not binding on the Appellant. Aggrieved by the judgment and order dated 21st December, 2013, the Respondents preferred an appeal i.e. Civil Appeal No.72 of 2014.

4. A perusal of the impugned judgment and order dated 6th January, 2016 reveals that during the pendency of the said Civil

Appeal, the Appellant/ Plaintiff had filed two applications at Exhibit Nos.11 and 13 for additional evidence. The learned Trial Judge had held that the Appellant/Plaintiff has come up with a specific case that suit property was situated within the jurisdiction of Town Planning Authority of MIDC and not within the jurisdiction of NMMC and the Town Planning Authority of NMMC had no right and jurisdiction over the suit property to issue notice dated 24th November, 2010 under section 53 (1) of the M.R.T.P. Act. The learned Judge held that the Trial Court had not framed the jurisdictional issue. The learned Judge therefore, held that the following issue was required to be framed :-

“Whether the suit property is situated only within the jurisdiction of MIDC Town Planning Authority as contended by Plaintiff?”

5. The learned Judge further held that it is also necessary to prove the documents enlisted in Applications at Exhibit Nos.11 and 13 and to record the evidence of the parties and to give opportunity to cross examine the witnesses. The learned Judge therefore allowed the Appeal and set aside the judgment and decree dated 24th November, 2010 in Regular Civil Suit No.504 of 2010 with directions to the learned Trial Court to re-admit the suit to its original number and to

proceed to decide the suit after framing the issue and by giving opportunity to both the parties to lead evidence on the said issue as well as on the additional documents enlisted by the Appellant /Plaintiff in the Applications at Exhibit Nos.11 and 13.

6. Being aggrieved by the said judgment and order the Appellant/Plaintiff has preferred this Appeal. The learned counsel for the Appellant /Plaintiff at this stage has submitted that the challenge in this Appeal is restricted to the order of remand and not to the order of framing of additional issue.

7. It may be mentioned that Rule 25 of Order XLI of CPC reads as under :

“Rule 25 Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.-

Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor, [within such time as may be fixed by the Appellate Court or extended by it from time to time].”

8. A plain reading of the said provision reveals that whenever a Court from whose decree an appeal is preferred has omitted to frame any issue, which according to the Appellate Court is essential to the right decision of suit, the Appellate Court is empowered to frame such issue and refer the same for trial to the Court from whose decree the appeal is preferred and direct such Court to take additional evidence. Rule 25 of Order XLI of CPC further stipulates that upon recording such evidence the Court from whose decree, the Appeal is preferred has to try such issue and return the evidence to the Appellate Court together with its finding thereon and the reasons within the time stipulated by the Appellate Court. The Appellate Court therefore continues to be in seisin of the matter and has to decide the appeal on the additional evidence and additional findings recorded by the Trial Court.

9. In the instant case, the Appellate Court has not followed the provisions under Order 25 of Rule XLI of the CPC and on the contrary, has set aside the judgment and remanded the file with directions to the Trial Court to frame the issue. The procedure followed by the learned District Judge is not in accordance with the provisions of Order 25, Rule XLI of the CPC. Hence, the following order :

ORDER

- (i) The impugned order dated 6th January, 2016 is set aside;
- (ii) The learned District Judge is directed to frame the additional issue and to refer the same to the Court from whose decree the appeal is preferred.
- (iii) The Trial Court shall take additional evidence required for determining the said issue and shall return the evidence together with its findings thereon to the Appellate Court within the time stipulated by the Appellate Court;
- (iv) The Appellate Court shall thereafter, decide the appeal taking into consideration the additional evidence and additional findings recorded by the Trial Court.
- (v) Both the parties to appear before the District Court on **3.7.2017.**

9. Rule is made absolute in above terms.

10. The Civil Application No.441 of 2016 stands disposed of in view of the disposal of the Appeal.

(ANUJA PRABHUDESSAI, J.)