

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

**APPEAL FROM ORDER NO. 750 OF 2016
with
CIVIL APPLICATION NO. 942 OF 2016**

Shubhangi Ramesh Bhatkar

..Appellant

v/s.

Dipmala Dattaram Bhatkar

..Respondents

Mr. Rajesh Patil for the Appellant
Mr. Sudhir Prabhu for the Respondent.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 30th JUNE, 2017.**

ORAL JUDGMENT.

1. The Respondent waives service. With the consent of the parties the appeal is taken up for final hearing at the stage of admission.
2. The appellant herein who was the plaintiff in Regular Civil Suit No. 15 of 2006, on the file of the Civil Judge, Senior Division, Ratnagiri, has challenged the judgment and decree dated 14th June, 2016 passed by the District Judge I, Ratnagiri in Regular Civil Appeal No.21 of 2010.

3. Heard Mr. Rajesh Patil, the learned Counsel for the appellant/plaintiff and Mr. Sudhir Prabhu, the learned Counsel for the respondent/defendant in the suit. I have perused the records and considered the submissions advanced by the learned Counsels for the respective parties.

4. The appellant was the plaintiff and the respondent was the defendant in the suit and shall be hereinafter referred to as the plaintiff and the defendant respectively.

5. The subject matter of the suit is the property under Survey No. 35 Sub Division 3/17/4 admeasuring 25 Ares situated at Mauje Padave Wadi, District Ratnagiri. The said property shall be hereinafter referred to as the suit property. The suit property is a part of the larger property belonging to Ramchandra Athale. The case of the plaintiff is that Rajaram Athale had executed a Power of Attorney in favour of her husband Ramesh Bhatkar, and based on the said Power of Attorney, by deed of Sale dated 31st May, 2005, Ramesh Bhatkar sold the suit property to the plaintiff.

6. The plaintiff claims that the defendant had purchased a portion of the larger property by Deed of Sale dated 29th February, 1992. The property purchased by the defendant is surveyed under Survey No. 35 sub division 3/17A/1/4 and it admeasures 1 Hectare 5 Ares. The grievance of the plaintiff is that Ramchandra Athale and the defendant executed a Deed of Rectification dated 18th October, 2005 whereby they rectified the sale deed dated 29th February, 1992. Under the garb of the said deed of rectification, they changed the description of the property, which was sold to the defendant by Sale Deed dated 29th February, 1992 in such a manner as to include the suit property within the boundaries of the property purchased by the defendant.

7. The plaintiff claims that subsequent to the execution of the Deed of Rectification, the defendant objected to the mutation entry in favour of the plaintiff. The defendant got her name recorded in the 7 x 12 extract and started disturbing and interfering with her possession in respect of the suit property. Based on these pleadings, the plaintiff filed a suit seeking relief of permanent injunction to restrain the defendant from disturbing or interfering with her possession in respect of the suit property.

8. The defendant contested the claim of the plaintiff mainly on the ground that she had purchased the entire property admeasuring 1 Hectare 1 Ares from Ramchandra Athale by Deed of Sale dated 29th February, 1992. The defendant denied that Ramchandra Athale had executed any Power of Attorney in favour of Ramesh Bhatkar, the husband of the plaintiff or that said Ramchandra Athale had authorized Ramesh Bhatkar to execute any sale deed in favour of the plaintiff. The defendant further claimed that Ramchandra Athale or his Power of Attorney could not have executed any sale deed in favour of the plaintiff since the title in respect of the entire property was already transferred in her favour by Deed of Sale dated 29th February, 1992. The defendant claimed that she is the owner in possession of the suit property and contended that the plaintiff has no right to the suit property.

9. Based on these pleadings, the learned trial Judge framed the following issues:-

- (i) Whether the plaintiff proves that she is the owner in possession of the suit property?
- (ii) Whether the plaintiff has proved that the defendant has interfered with her possession in respect of the suit property.

(iii) Whether the plaintiff is entitled for the relief of permanent injunction?

10. Both the parties adduced evidence in support of their respective claims. After appreciating the evidence on record, the learned trial Judge held that the plaintiff had proved that she was the owner in possession of the suit property and that the defendant was interfering with her possession. The learned trial Judge therefore answered the issues in the affirmative and decreed the suit as prayed.

11. The defendant challenged the said judgment and decree in Regular Civil Appeal No.21 of 2010. The learned District Judge held that the defendant had disputed the title of the plaintiff in respect of the suit property, despite which the plaintiff had not sought a declaratory relief. Relying upon the decision of the Apex Court in *Anathulla Sudhakar vs. P. Buchi Reddy*¹ the learned Judge held that the suit for injunction simplicitor was not maintainable.

12. The learned Judge further held that there was also dispute regarding identification of the suit property and hence it was not possible to ascertain

¹ AIR 2008 SC 2033

as to which of the party was in possession of the suit property. The learned Judge further held that the defendant had also disputed that the owner Shri Ramchandra Athale had executed a Power of Attorney in favour of the husband of the plaintiff and despite such pleading issue in that regard was not framed. Based on these findings, the learned District Judge I, Ratnagiri set aside and quashed the impugned judgment and remanded the suit for re-trial, with liberty to the plaintiff to amend the plaint so as to seek declaration of his title, if so desired. The learned District Judge directed the trial Court to frame issue regarding the validity of the Power of Attorney and also to appoint the Taluka Inspector of Land Record (T.I.L.R.) as Court Commissioner. The learned Judge further directed the T.I.L.R. to take measurement of survey no. 35 and to identify the suit property and delineate the same on a plan.

13. Aggrieved by the order of remand, the plaintiff has filed this appeal. Since the plaintiff has questioned the legality of the order of remand, it is necessary to consider the scope of jurisdiction of the Appellate Court in the matter of remand. Rules 23, 23A, 24 and 25 of Order 41 of Civil Procedure Code (for short CPC), which govern the powers of the appellate Court in

the matter of remand rules read thus:

23. Remand of case by Appellate Court - Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases - Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. Where evidence on record sufficient, Appellate Court may determine case finally- Where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, the Appellate court, may after re-settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

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 there for within such time as may be fixed by the Appellate Court or extended by it from time to time.

14. A plain reading of the aforesaid provisions make it abundantly clear that the scope of remand in terms of Order 41 Rule 23 CPC is very limited. The Appellate court can invoke the powers under Rule 23 of Order 41 only when the trial Court has disposed of the suit on a preliminary point and when the Appellate Court reverses such decree and considers it fit to remand the case for fresh disposal.

Order 41 Rule 23A, which has been inserted in the Code by Act No. 104 of 1976, empowers the Appellate Court to remand the suit to the trial Court, when the suit is disposed of otherwise than on a preliminary point and the decree is reversed in appeal and retrial is considered necessary.

Order 41 Rule 24 enables the Appellate Court to resettle the issues if necessary and determine the suit finally on the basis of the evidence available on record, if such evidence is sufficient to pronounce judgment. The object of this provision is to obviate delay and ensure finality to the

proceedings.

Order 41 Rule 25 of the Code empowers the Appellate Court to frame issues and refer them for trial to the Court from whose decree the appeal is preferred. The powers under Rule 25 can be invoked by the Appellate Court when the Court that passed the decree has omitted to frame or try any issue, or to determine any question of fact, essential to decide the suit upon the merits. While remitting the issues, the Appellate Court is empowered to direct the trial Court to take additional evidence on such issues. When issues are remitted in exercise of powers under Order 41 Rule 25 of the Court, the Appellate Court continues to be in seisin of the matter . In such case, the trial Court has to try the issues referred by the Appellate Court and return the evidence to the Appellate Court together with its findings and reasons thereon. The Appellate Court thereafter has to decide the appeal on the additional evidence and additional findings recorded by the trial court.

15. The powers of remand conferred on the Appellate Court can be exercised only in accordance with the above-referred provisions. It is also well settled that the Appellate Court should be circumspect in ordering a

remand as it is well known that unwarranted order of remand results in prolonged litigation and consequent manifest injustice to the litigants. In this regard, it would be advantageous to refer to the decision of the Apex Court in ***P. Purshottam Reddy & Anr. v. Pratap Steels Ltd.***² wherein the Apex Court has held as under:-

“The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in a appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence oral or documentary, is allowed to be produced either

² AIR 2002 SC 771

*before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23 A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rule 23 and 23 A. In view of the express provision of these rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in *Mahendra v. Sushila*, AIR (1965) SC 365, at p. 399, it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand de hors the Rules 23 and 23A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties,. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.”*

16. Similarly, in the case of ***Municipal Corporation, Hyderabad vs.***

Sundersingh³ the Apex Court has held thus:-

11. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be

3 [2008] 8 SCC 485

satisfied. It is further well settled that 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. The appellate court cannot shirk its duties.

17. The validity of the impugned order of remand has to be tested on the touchstone of the relevant provisions and the above stated well-settled principles governing power of remand.

18. It is not in dispute that in the instant case the provisions of Order 41 Rule 23 were not attracted. The Appellate Court had also not taken recourse to Order 41 Rule 25 of CPC. The learned Judge, in exercise of the powers under Rule 23 A CPC, quashed and set aside the judgment and decree whilst directing the trial court to decide the matter afresh. A careful scrutiny of the impugned judgment reveals that the Appellate Court has considered the retrial necessary for the following reasons:-

- (i) That the plaintiff had not sought declaratory relief even though the defendant had challenged her title in respect of the suit property.
- (ii) That the issue regarding validity of the Power of

Attorney was not framed and

(iii) That the suit property was not properly identified.

19. The foremost question is whether the learned Judge was justified in remanding the suit for retrial with liberty to the plaintiff to amend the plaint as to seek a declaratory relief. As stated earlier, the plaintiff had claimed to be the owner in possession of the suit property by virtue of sale deed dated 31st May, 2005. The plaintiff had filed the suit for permanent injunction alleging that the defendant was interfering with her possession in respect of the suit property. The defendant in her written statement raised a defence that she had already purchased the entire property including the suit property by Deed of Sale dated 29th February, 1992. In short, the defendant claimed to be the owner of the suit property. It was in the light of these averments that the learned Judge had granted liberty to the plaintiff to amend the plaint as to incorporate a declaratory relief.

20. It is pertinent to note that the suit was filed in the month of January 2006 and the written statement, disclosing the defence was filed immediately thereafter. The liberty to amend the plaint as to seek declaratory relief has been given in the year 2016. While granting such

liberty, the learned Judge neither considered the question whether the declaratory relief was barred by the law of limitation nor heard the defendant on the said issue.

21. The learned Judge has ordered re-trial by granting liberty to the plaintiff to amend the plaint and seek a declaratory relief, mainly on the ground that the suit for injunction simplicitor was not maintainable. As regards the maintainability of the suit for injunction simplicitor, in the absence of relief for declaration and or possession, the Apex Court in *Anathulla Sudhakar (supra)* has held as under:

11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in

dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not the issue of title."

22. In the instant case, the plaintiff, who is the dominus litus, was aware of the defence as disclosed in the written statement, despite which the plaintiff had not filed an application for amendment either before the trial

court or before the District Court seeking leave to amend the plaint as to seek a declaratory relief. Even before this Court, the stand taken by the plaintiff is that the pleadings as well as the evidence on record sufficiently proves her title and possession in respect of the suit property. In short, the plaintiff has chosen not to amend the plaint on the premise that there is no defect or cloud on her title. The plaintiff proceeded with the suit knowing fully well the defence raised by the defendant and the issues involved in the suit. In such circumstances, the question, if any, regarding the maintainability of the suit for permanent injunction simplicitor, in the absence of a prayer of declaration of title, was required to be decided based on the pleadings and evidence on record, keeping in mind the aforesaid principles in this regard. In other words, the learned Judge was required to decide the appeal on its own merits on the basis of the pleadings and evidence on record.

23. Under the circumstances, the learned Judge was not justified in remanding the suit by granting liberty to the plaintiff to amend the plaint as to seek declaratory relief, without there being any such application or prayer for amendment and further without considering the question of

limitation and hearing the defendant on the said issue.

24. As regards framing of additional issue regarding validity of Power of Attorney, the learned Judge has lost sight of the fact that the judgment and decree cannot be set aside for failure to frame any issue. Even if the trial Court omits to frame an issue, Rule 24 of Order 41 enables the Appellate Court to resettle the issue and decide the appeal on the basis of the evidence on record if such evidence is sufficient to pronounce the judgment. Furthermore, in terms of Rule 25 of Order 41 of CPC the Appellate Court has ample powers to frame such issue and refer the same for trial and thereafter to decide the Appeal after considering the additional evidence and findings recorded by the Trial Court on the additional issue.

25. Be that as it may, in the instant case, the suit filed by the plaintiff was for injunction simplicitor. Hence the only issue that was relevant to decide the suit was as to whether the plaintiff was in lawful possession of the suit property and whether the defendant was interfering or disturbing her lawful possession. The learned trial Judge had already framed these issues and the parties had adduced their evidence knowing fully well the

case pleaded by them and the issues involved in the suit. Hence, even if the validity of Power of Attorney was required to be considered while deciding the issue of lawful possession, the Appellate Court could have considered the said question and recorded its finding on the basis of the evidence available on record. The learned District Judge was therefore not justified in directing the learned Judge to frame the issue regarding the validity of the Power of Attorney, and further remanding the suit for framing an issue regarding the validity of Power of Attorney and/or for recording evidence on such issue.

26. Now coming to the question of appointment of the Commissioner, the learned Judge has held that there was dispute as regards the identity of the suit property and hence it was not possible to arrive at any finding as to which of the parties was in possession of the suit property. The learned Judge therefore remanded the suit with direction to the trial court to appoint a commissioner to identify the suit property. It is to be noted that both parties had adduced oral as well as documentary evidence. The learned Judge has neither appreciated the evidence on record nor considered the legality of the findings rendered by the trial court. In the event the Trial

Court had not considered the question of identity of the suit property, the learned Judge could have evaluated the evidence and determined the case on merits in terms of Rule 24 order 41 or proceeded under rule 25 order 41 of the Code, as the case may be. Furthermore, if the learned Judge was of the view that the evidence on record was not sufficient to decide the case on merits and that the appointment of the Commissioner was essential to enable it to pronounce the judgment or for any other substantial cause, the learned Judge, after recording the reasons, could have received additional evidence under Rule 27 of Order 41 of CPC, keeping in mind the well settled principles governing reception of additional evidence; enunciated by the Constitutional Bench of the Apex Court in *K. Venkatramiah vs.A. Seetharama Reddy*⁴, and reiterated in *Surjit Singh vs. Gurwant Kaur*⁵. In the instant case the learned Judge has not undertaken any such exercise and has remanded the suit mechanically, ignoring the relevant provisions relating to remand and has thus subjected the parties to a long-drawn and unwinding litigation. The order of remand therefore cannot be sustained.

27. Under these circumstances and in view of discussion supra, the appeal is allowed. The impugned order of remand dated 14th June 2016

⁴ AIR 1963 SC 1526

⁵ (2015) 1 SCC 665

passed by the District Judge I, Ratnagiri, in Regular Civil Appeal No.21 of 2010 is hereby quashed and set aside.

. The Regular Civil Appeal stands restored to the file of the learned District Judge and the same shall be decided afresh after hearing the respective parties.

. It is made clear that this Court has only considered the legality of remand and has not expressed any opinion on the merits of the issues involved in the suit or appeal. The District Judge shall therefore decide the appeal on its own merits.

. Both the parties shall appear before the District Court on 24th July, at 11.a.m.

28. In view of disposal of the Appeal, Civil Application No.942 of 2016 does not survive and the same is disposed of.

(ANUJA PRABHUDESSAI, J.)