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

***SECOND APPEAL NO. 645 OF 2014
with
CIVIL APPLICATION NO. 1524 OF 2014***

Kanu Govind Dhuri and Ors. ... Appellants/Applicants.

V/s.

Ramchandra Anant Dhuri and Ors. ... Respondents.

Mr. A.S. Khandeparkar a/w. Amogh Karandikar i/b. Khandeparkar
& Assoc. for the Appellants/Applicants.

Mr. S.M. Railkar for Respondent 1.

Coram : N.M. Jamdar, J.

Date : 13 April 2017.

P.C. :-

On 30 March 2017 following order was passed in the
Second Appeal after hearing both sides :-

“The learned counsel for Appellants submits that the learned District Judge, Sindhudurg-Oros, had allowed the application for producing additional evidence in furtherance of the case of the Appellant that, the road in question is for the

benefit of the entire village and is a public road. He submitted that inspite of allowing the application for additional evidence and producing certified copies on record there is no discussion by the Appellate Court on this aspect. He submits that therefore, the proceedings will have to be remanded. The learned counsel for Respondents seeks time to take instructions. Stand over to 5 April 2017, under the caption, 'for directions'."

On 5 April 2017 following order was passed :

" The learned counsel for the Respondent seeks time for ascertaining the status of the application below Exhibit-25. Stand over to 13 April 2017. To be listed under the caption "For Directions". Parties are put to notice that even though the matter is to put under the caption "For Directions", the Court may consider disposing of the matter finally as the question of law involved in this appeal is, whether having permitted production of additional evidence, whether the District Judge could have decided the appeal without deciding the application Exhibit-12 under Order XLI Rule 28 of the Code of Civil Procedure, 1908 more particularly, the existence of public road. Ad-interim order to continue till the next date."

2. The learned Counsel for the Respondents states that he has perused the Roznama and he has not found any record as regards the application below Exhibit 12. In view of what is indicated in the above two orders, the proceedings therefore will have to be remanded

to the learned District Judge. The learned Counsel for the parties state that no reasons in support of the order be given as it may affect the merits of the rival contentions upon remand.

3. Accordingly, the Second Appeal is admitted on the following question of law :-

“ As to whether the learned District Judge was right in passing the impugned judgment and order without deciding the application at Exhibit 25 under Order 41 Rule 28 of the Code of Civil Procedure after permitting the Appellant to produce certain additional evidence on record ?”

4. As indicated in the earlier two orders, considering the nature of the dispute and that having allowed the application for production of additional evidence, the learned District Judge ought to have decided the application below Exhibit 25 and considering the veracity and the evidentiary value of the documents and should have taken a decision accordingly. Since the learned District Judge has not done so, a clear error of law is committed.

5. Accordingly, the judgment and order passed by the learned District Judge, Sindhudurg dated 13 October 2014 is

quashed and set aside. The Appeal bearing No. 163 of 2013 stands restored to file of the learned District Judge, Sindhudurg. The Appeal will be decided on its own merits. The Application below Exhibit 25 shall also be decided on its own merits. All contentions of the parties are kept open.

6. The parties will appear before the learned District Judge on 6 June 2017. Ad-interim order operating in the Second Appeal will continue for period of four weeks after the date of appearance of parties before the learned District Judge, Sindhudurg. Further continuation, if any, will be on its own merits. The Civil Application stands disposed of.

(N.M. Jamdar, J.)