

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

APPEAL AGAINST ORDER NO. 33 OF 2017.

Chandu s/o Vithoba Zade,
aged about 60 years, occupation Carpenter,
R/o Kothari, Tq. Ballarpur,
District Chandrapur.

...APPELLANT
...ORIGINAL DEFENDANT

Versus

1. Shri Sudhakar s/o Raghunath Potdukhe,
aged about 53 years, occupation business and cultivation,
R/o Gadchandur, Tq. Korpana, District Chandrapur.
2. Sau. Sheela w/o Ashokrao Tapase,
aged about 43 years, occupation Household,
R/o Dadmahal Ward, Chandrapur,
Tq. and District Chandrapur.
3. Sau. Asha w/o Nandkishor Hazare,
aged about 48 years, occupation Household,
R/o Ekori Ward, Chandrapur,
Tq. and District Chandrapur.
4. Smt. Anjanabai wd/o Raghunath Potdukhe,
aged about 88 years, occupation Household and cultivation,
R/o Kothari, Tq. Ballarpur, District Chandrapur.

...RESPONDENTS
...ORIGINAL PLAINTIFFS

WITH

APPEAL AGAINST ORDER NO. 40 OF 2017.

Suresh s/o Wasudeo Kandkattiwar,
aged about 44 years, occupation Service,
R/o Kothari, Tq. Ballarpur, District Chandrapur.

...APPELLANT
...ORIGINAL DEFENDANT

Versus

1. Shri Sudhakar s/o Raghunath Potdukhe,
aged about 53 years, occupation business and cultivation,
R/o Gadchandur, Tq. Korpana, District Chandrapur.
2. Sau. Sheela w/o Ashokrao Tapase,
aged about 43 years, occupation Household,
R/o Dadmahal Ward, Chandrapur,
Tq. and District Chandrapur.
3. Sau. Asha w/o Nandkishor Hazare,
aged about 48 years, occupation Household,
R/o Ekori Ward, Chandrapur,
Tq. and District Chandrapur.
4. Smt. Anjanabai wd/o Raghunath Potdukhe,
aged about 88 years, occupation Household and cultivation,
R/o Kothari, Tq. Ballarpur, District Chandrapur.

...RESPONDENTS

...ORIGINAL PLAINTIFFS

WITH

APPEAL AGAINST ORDER NO. 41 OF 2017.

Gosai s/o Bhima Kashyenwar,
aged about 70 years, occupation Shepherd,
R/o Kothari, Tq. Ballarpur, District Chandrapur.

...APPELLANT

...ORIGINAL DEFENDANT

Versus

1. Shri Sudhakar s/o Raghunath Potdukhe,
aged about 53 years, occupation business and cultivation,
R/o Gadchandur, Tq. Korpana, District Chandrapur.
2. Sau. Sheela w/o Ashokrao Tapase,
aged about 43 years, occupation Household,
R/o Dadmahal Ward, Chandrapur,
Tq. and District Chandrapur.
3. Sau. Asha w/o Nandkishor Hazare,
aged about 48 years, occupation Household,
R/o Ekori Ward, Chandrapur,
Tq. and District Chandrapur.

4. Smt. Anjanabai wd/o Raghunath Potdukhe,
aged about 88 years, occupation Household and cultivation,
R/o Kothari, Tq. Ballarpur, District Chandrapur.

...RESPONDENTS
...ORIGINAL PLAINTIFFS

Shri M.P. Khajanchi, Advocate for the appellants.
Shri Rohit Joshi, Advocate for the respondents.

.....

CORAM : PUSHPA V. GANEDIWALA, J.
DATED : 13/02/2020.

ORAL JUDGMENT

These are defendants' appeals under Section 104 read with Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 (In short "C.P.C.") against the orders of remand dated 31/03/2017 passed by the learned District Judge, Chandrapur in RCA Nos. 194/2009, 199/2009 and 193/2009.

2. Shortly stated, the plaintiffs filed three suits for the reliefs of removal of encroachment, possession, permanent injunction and damages for three separate parts of the land bearing field Survey No. 482, situated at Mouza Kothari, Taluka Ballarpur, District Chandrapur (hereinafter referred to as "the suit property"). The plaintiffs claim to be the co-owners of the suit property.

3. The defendants in all the suits in their written statements specifically denied the ownership of the plaintiffs so also took the plea of adverse possession. The Trial Court framed necessary issues and recorded evidence as adduced by the parties and dismissed the suits by recording finding that the plaintiffs have failed to prove their ownership to the suit property. Accordingly, the Trial Court answered the issues with regard to possession and permanent injunction in negative and the other issues with regard to encroachment and damages were not decided, being rendered infructuous.

4. Feeling aggrieved, plaintiffs carried the aforesaid judgments and decrees before the First Appellate Court. The First Appellate Court reversed the finding with regard to ownership of the plaintiffs over the suit property and remanded the matters with directions to the Trial Court for appointment of qualified Surveyor as a Commissioner from the office of District Inspector of Land Records for ascertaining the fact and extent of encroachment by the appellants/defendants over field Survey

No. 482. The First Appellate Court also directed the parties to appear before the Trial Court and disposed of the appeals.

5. Feeling aggrieved by the finding with regard to the ownership over the suit property in favour of the plaintiffs and the order of the remand, the appellants/defendants preferred these appeals.

6. I have heard Shri M.P. Khajanchi, learned counsel for the appellants/defendants and Shri Rohit Joshi, learned counsel for the respondents/plaintiffs.

7. While admitting these appeals, this Court by order dated 04/09/2018 framed the following substantial questions of law :-

i. Whether the learned District Judge has committed an error of jurisdiction and has acted beyond the jurisdiction conferred by the provisions of Order – XLI Rule 23 - A of the Code of Civil Procedure, 1908 ?

ii. Whether the learned District Judge is right in conclusively deciding that the plaintiffs have proved

their ownership over the suit property, relying on the additional evidence produced by the plaintiffs in the appeal ?

iii. Whether the learned District Judge should have kept the issue about proof of title of the plaintiffs over the suit property open for consideration by the trial Court while remanding the matter ?

8. Shri Khajanchi, learned counsel for the appellants/defendants emphatically argued on the scope of power of remand of the Appellate Courts under Order 41 Rules 23, 23-A and 25 of the C.P.C. The learned counsel also argued on the point of considering the additional evidence by the First Appellate Court without giving an opportunity to the appellants/defendants to rebut the same.

9. On the contrary, Shri Rohit Joshi, learned counsel for the respondents/plaintiffs, while supporting the impugned judgment and decree, submitted that the Appellate Court has ample power under Order 41 Rule 33 to pass any order. And under Section 99 of the C.P.C., the Appellate Court shall not reverse or modify the decree on the ground of mere technicality.

The learned counsel also submitted that the First Appellate Court has passed the judgment and decree within the scope of powers under Order 41 rule 23 of the C.P.C.

10. I have considered the submissions advanced on behalf of both the parties.

11. At the outset, as per law, the Appellate Court while allowing one party to lead additional evidence shall extend an opportunity to the other party to rebut the said evidence. In the instant cases, perusal of records would show that the First Appellate Court instead of deciding the applications of the respondents/plaintiffs filed under Order 41 Rule 27 of the C.P.C., kept the same pending for decision at the time of final hearing. It is pointed out by the learned counsel for the appellants/defendants that the First Appellate Court after hearing the arguments on behalf of both the sides kept the matters for pronouncement of judgments and in the judgments, allowed the applications for adducing additional evidence and considered the documents which were annexed with the

application. The First Appellate Court on the basis of those documents recorded the finding in favour of the plaintiffs with regard to ownership over the suit property and on the basis of this finding, the First Appellate Court reversed the judgment and decree of the Trial Court and remanded the matters for appointment of Commissioner to ascertain the fact and extent of encroachment of field Survey No.482.

12. In the above facts situations, the First Appellate Court, in my view, has committed a grave error in not following the procedure as provided in law in not giving an opportunity of rebutting the evidence which was allowed to be led by the plaintiffs and on the basis of the said evidence, the judgment and decree of the Trial Court came to be reversed.

13. The plaintiffs' suits were for removal of encroachments and possession. The Trial Court gave a negative finding with regard to ownership of the plaintiffs over the suit property and restrained itself to decide other issues, being rendered infructuous. The Trial Court, in my opinion, has also committed an error in not following the procedure as per order

14 Rule 2 of the C.P.C. It is mandatory for the Trial Courts to decide all the issues even though the suit could have been disposed of on the preliminary issues.

14. A perusal of the records would reveal that both, the First Appellate Court and the Trial Court, have committed errors in not following the procedure which prejudicially affected the interest of the other side. The Trial Court, without deciding the other issues dismissed the suits, while the First Appellate Court without extending an opportunity of rebutting the additional evidence, reversed the decree of the Trial Court.

15. In such circumstances, the orders of remand, being infected with the procedural faults need to be quashed and set aside and the appeals need to be allowed and the same are accordingly allowed. I answer all the questions accordingly. The impugned judgment and decree dated 31/03/2017 passed by the learned District Judge, Chandrapur in Regular Civil Appeal Nos. 194/2009, 199/2009 and 193/2009 are quashed and set aside. The First Appellate Court is directed to decide the applications filed by the appellants/defendants under Order 41

Rule 27 of the C.P.C.in accordance with law, before pronouncing the judgments. In the circumstances, parties to be bear their own costs. The parties to appear before the Appellate Court on 02.04.2020.

JUDGE

Sumit.