

02. The appellants claim exception to the judgment and order dated 24.12.2019 passed in Regular Civil Appeal No.156 of 2014 by the District Judge-4, Parbhani under which the judgment and decree of Trial Court in Regular Civil Suit No.74 of 2009 has been set aside and the

matter is remanded to the Trial Court with certain directions.

03. The appellants are the defendants of original suit. The respondents have filed the said suit for removal of encroachment and possession. After recording evidence, the Trial Court recorded negative finding against all the issues resulting into dismissal of the suit. Being aggrieved by the said decision, the respondents have preferred Regular Civil Appeal in which the First Appellate Court by passing the impugned order has remanded the matter.

04. The appellants' learned Counsel has assailed the impugned order by stating that the Appellate Court erred in remanding the matter. He took me through the judgment passed by the Trial Court to contend that the plaintiff has failed to establish his title as well as encroachment as alleged. The Trial Court also held that the suit is not maintainable for want of description of the suit

property as well as the suit was barred by the law of limitation. According to him the suit itself is not maintainable and therefore the order of remand is not sustainable in the eyes of law. On the other hand, the respondents' learned Counsel justified the impugned order by contending that in suit of encroachment, the order of remand with directions to appoint TILR was well justified.

05. Basically it was respondents' suit for removal of encroachment and recovery of possession of area measuring 1 Hectare 5 R. It is the case that in partition the plaintiffs have received land out of Survey No.129. Admittedly, the defendants have purchased their land in the year 1986 from brother of plaintiff No.1. It is the plaintiffs' case that in the sale-deed of defendants, the area was wrongly shown and therefore they have gradually encroached over the plaintiffs' property. Therefore, the suit for removal of encroachment.

06. Though the defendants' learned Counsel argued on the maintainability of the suit, since the Appellate Court has remanded the matter for fresh adjudication, these aspects are not relevant. Principally, it has to be seen whether the First Appellate Court was right in remanding the matter in terms of Order 41 Rule 23A of the Code of Civil Procedure. In other words, whether retrial is justified in the situation. Perusal of the impugned order discloses that the Trial Court has recorded evidence of measurement officer – Shri Kolhe, who has measured Survey No.129/2. Categorical finding has been recorded that the measurement officer has not carried out joint measurement. On my query, it is clarified that the defendants' land was not measured by the Officer. Having regard to the said fact, by placing reliance on the decision of this Court in case of Vijay Vs. State of Maharashtra, 2009(5) Mh.L.J.279, the Appellate Court thought it fit to remand the matter. While remanding the case, the Appellate Court has directed to appoint TILR as Court Commissioner to measure the land of both sides.

Obviously, when there is case of measurement, it is necessary to have joint measurement to decide point of encroachment. Since joint measurements were not carried by the Surveyor, the order of remand with specific direction is well justified. In view of that, the appeal carries no substance. Hence, dismissed. All points are kept open. No order as to costs.

[VINAY JOSHI,J.]