

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

**APPEAL FROM ORDER NO.213 OF 2020
WITH
CIVIL APPLICATION NO.75 OF 2020
IN
APPEAL FROM ORDER NO.213 OF 2020**

Bharat Kisan Mekale

...Appellant

Versus

1. Ravikumar Jethappa Kurne

...Respondents

....

Ms Gauri Godse, for the Appellant.

Mr. R.M. Haridas i/b. Mr. Prasad P. Kulkarni for the Respondents.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 2nd MARCH, 2022.

ORAL JUDGMENT :-

1. With consent of the parties the matter is heard finally at the stage of admission.

2. The Appellant herein has taken exception to order dated 01/11/2018 under Order 41 Rule 27 of the CPC and judgment and decree dated 26/03/2019 passed by the learned District Judge-3, Solapur in R.C.A. No.276 of 2017.

3. Heard learned counsel for the Appellant and Respondents. Perused the records and considered the submissions advanced by learned counsel for the respective parties.

4. Respondent No.1 (hereinafter referred to as the Plaintiff) had filed a suit for permanent injunction in respect of land admeasuring 156.06 sq. mts. from Survey No.8426/A/1 final plot No.159+160/330. The Plaintiff claimed that his grandfather Ladappa Kurne was an employee of Jam Mill, the original owner of the suit property. In the year 1930, the owner of the land allotted an open plot of land to Ladappa for accommodation purpose and that Ladappa constructed four rooms, toilet and bathroom in the said plot and started residing therein. The father of the plaintiff and later the Plaintiff continued residing in the said premises without any obstruction and interference from anyone.

5 The Defendant No.1 has purchased the suit property from Defendant No.4 vide deed of sale dated 14/10/2013. The Plaintiff claims that the clause in the sale deed whereunder the possession of the suit property is stated to have been handed over to the Defendant No.1 is false as the suit property is in his actual possession since the time of his

grandfather. The Plaintiff filed the suit for permanent injunction apprehending dispossession by the Defendant on the basis of the said sale deed.

6. The Defendant No.1 claims to have purchased the property from Defendant Nos.2 to 4, the successors of Vithal Mane, the original owner of the suit property. The Defendant No.1 denied that the Plaintiff was put in possession of the suit property and claimed that the Plaintiff has encroached in the suit property and constructed a tin shed in an open plot of the suit property and is in illegal occupation of the same.

7. It is the case of Defendant Nos.2 to 4 that Ambubai Mali had purchased the property from the Agent of Jam Mill. The property exchanged several hands and ultimately it was purchased by Defendant No.1 from Defendant Nos.2 to 4, who are the successor of the previous purchaser -Vithal Mane. These Defendants claim that they have transferred the title as well as possession of the suit property in favour of Defendant No.1.

8. The Trial Court framed issues and after considering the evidence adduced by the respective parties held that Plaintiff has failed to

prove that he is in settled possession of house No.48/1/31 and /or the suit property and hence dismissed the suit.

9. The Plaintiff challenged the judgment and decree in appeal No.276 of 2017. During the pendency of the appeal, Plaintiff filed an application under Order 41 Rule 27 for production of additional evidence. The Appellate Court by order dated 01/11/2018 partly allowed the said application and thereby permitted the Plaintiff to produce the documents, which were filed along with the list at Exhibit-31 and further held that the prayer for leading oral evidence relating to the said documents would be considered at the stage of final hearing.

10. The appeal finally came to be decided by the impugned judgment dated 26/03/2018. Learned Judge held that the Defendant No.1 has admitted that the Plaintiff is in possession of the suit property but since the Defendants have raised a plea of encroachment, the question for determination is whether the plaintiff is in settled possession of the suit property. Learned Judge further observed that :- *“the additional evidence is necessary to decide the real dispute between the parties especially in view of identity of suit property additional evidence is necessary to consider the identity of suit property and the property in*

which the plaintiff is residing i.e. Gavali Vasti. Whether Laxmi Peth is part and parcel of Gavali Vasti or not. The learned Trial Court had not considered the provisions of Section 58 of the Evidence Act and overlooked the vital admission given by defendant no.1 that the plaintiff is in possession of suit property. Similarly the additional evidence is also necessary to decide the real dispute between the parties.” On the basis of these observations, learned Judge partly allowed the appeal, set aside the judgment of the trial court and remanded the matter for fresh hearing, with liberty to the parties to lead additional evidence. Aggrieved by this order, the Defendant No.1 has filed this appeal.

11. Ms Gauri Godse, learned counsel for the Defendant No.1 submits that the documents, which were sought to be produced under Order 41, Rule 27 were within the knowledge of the Plaintiff. She submits that the Plaintiff was not diligent enough to produce the said evidence and as such the Appellate Court was not justified in allowing production of additional evidence at appellate stage and further in remanding the case with liberty to adduce additional evidence.

12. Per contra, Mr. R.M. Haridas, learned counsel for the Plaintiff submits that the documents sought to be produced under Order 41 Rule

27 are relevant to decide the issue. He further contends that the Appellate Court has remanded the suit in exercise of powers conferred under Order 41 Rule 23 A of the CPC, which in the facts of the case is neither arbitrary nor illegal.

13. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

14. The questions raised in this appeal are two fold, viz:-

- (i) Whether the learned Judge was justified in allowing the application under Order 41 Rule 27 of CPC.
- (ii) Whether the Appellate Court was justified in remanding the matter and ordering retrial.

15. Section 107 (1) (d) confers powers on the Appellate Court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. It would be also relevant to refer to the provisions under Order 41 Rule 27, 28 and 29 of CPC, which relate to admission of additional evidence at Appellate stage and prescribe the mode of taking additional evidence. These provisions read thus:-

Rule 27. Production of Additional Evidence in Appellate Court.

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether **oral or documentary**, in the Appellate Court, But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Rule 28. Mode of taking additional evidence.

Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

29. Points to be defined and recorded.

Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

16. A plain reading of these provisions indicate that additional evidence is admissible at appellate stage in the following circumstances (1) When the lower court has refused to admit evidence, which ought to have been admitted. (2) if a party was unable to produce such evidence despite exercise of due diligence or (3) when the Appellate Court, requires such additional evidence to enable it to pronounce judgment or for any other substantial cause. The admissibility of document under clause (b) would depend upon whether or not the Appellate Court requires additional evidence to pronounce judgment or any other substantial cause.

17. In *Union of India vs. Ibrahim Uddin and Anr. (2012) 8 SCC 148*, the Apex Court has held that an application under Order 41 Rule 27 is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and or the evidence sought to be

adduced have any relevance /bearing on the issue involved. The Apex Court has held that the true test is whether the Appellate Court is able to pronounce the judgment on the material before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands, some inherent lacuna or defect become apparent to the Court. These principles are reiterated in **A. Andisamy Chettiar vs. A. Subburaj Chettiar (2015) 17 SCC 713.**

18. Whenever the Appellate Court allows additional evidence under Order 41 Rule 27, in terms of Rule 28 of Order 41 the Appellate Court can itself take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to record the additional evidence and to transmit the same to the Appellate Court. Where additional evidence is directed or allowed to be produced, Rule 29 mandates the Appellate Court to specify the points to which the evidence is to be confined. These provisions do not contemplate setting aside of judgment and remand of case. Power of remand is conferred under Section 107(1)(b) of CPC, which can be exercised under the circumstances specified in Order 41 Rule 23, 23A and 25 of CPC. The relevant provisions read thus:-

Rule 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 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.

Rule 23-A. 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

Rule 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 resettling 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.

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 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.

19. The power to remand the matter under Rule 23 is limited. It can be exercised only when a suit is disposed of upon a preliminary point and the decree is reversed in appeal. Rule 23A enables the appellate court to remand the suit to the trial court when such suit is disposed of on merits and the appellate court considers that a retrial is necessary for

proper adjudication of the case. Whereas, when the evidence on record is sufficient to finally determine the suit, Rule 24 enables the Appellate Court to pronounce judgment, after resettling the issues, if necessary, notwithstanding the judgment of the trial court has proceeded wholly on some ground other than that on which the Appellate Court proceeds. This Rule is intended to bring finality to the proceedings, without shuttling the parties from court to court, and to ensure speedy justice. Rule 25 empowers the Appellate Court to frame issues and refer them for trial to the Court from whose decree the appeal is preferred. The power under Rule 25 can be invoked by the Appellate Court when the Trial Court has omitted to frame or try any material issue or to determine any question of fact, which is essential for a decision on merits. While remitting the issues the Appellate Court can direct the trial court to take additional evidence on such issues. The trial court can try only such issues as are referred to it and return the evidence to the Appellate Court with its findings and reasons thereon. The Appellate Court which continues to be in seisin of the matter has to decide the appeal on merits on receipt of the additional evidence and findings recorded by the Trial Court.

20. In the instant case, the documents which were sought to be produced at appellate stage were mainly public documents in the form of

property holder's card, electric bill, tax receipt, voters I card, etc. The authenticity and genuineness of these documents was not in dispute. The suit for perpetual injunction is on an assertion of settled possession. Hence these documents are relevant to decide the issue of possession and to pronounce the judgment. Consequently, exercise of power under Order 41 Rule 27 cannot be said to be unjustified or arbitrary.

21. It is to be noted that the learned Judge having allowed the application under Order 41 Rule 27 had two options contemplated under Order 41 Rule 28 of CPC. i.e. either to record the evidence itself or to direct the Court from whose decree the appeal had been preferred to record such evidence. The Appellate Court, in total disregard to this provision held that the issue of leading additional evidence would be considered at the stage of final hearing and finally upon hearing the parties, set aside the judgment and remanded the case to the Trial Court for recording additional evidence.

22. It is sought to be contended that the order of remand was in exercise of power under Order 41 Rule 23 A of CPC. It is pertinent to note that the legislature has conferred vast powers on the Appellate Court to meet any contingency and pronounce judgment finally. It can take

additional evidence or require such evidence to be taken, it can frame or settle issues, it can re-appreciate the evidence and it can remand the matter when it is covered either by Rule 23, 23A, or 25 CPC.

23. In the instant case, despite allowing additional evidence under Order 41 Rule 27 of CPC the Appellate Court has not exercised the powers conferred by Section 107(d) of CPC but has reversed the judgment and remanded the case for retrial. It is well settled that the power of remand has to be exercised with great circumspection and not in a casual or cavalier manner. In this regard, it would be advantageous to refer to the decision of the Hon'ble Court in ***Shivakumar vs Sharanabasappa, AIR 2020 SC 3102*** the Hon'ble Supreme Court has reiterated that "*A conjoint reading of Rule 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and retrial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates life of the litigation*

without serving the cause of justice. An order of remand only the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventuality which may justify an order of remand or where remand would be rather necessary depending on the facts and given set of circumstances of a case.”

24. Reverting to the facts of the present case the Appellate Court has remanded the matter for retrial on the ground that the parties had not established the identity of the suit property and had not proved whether Laxmi Peth is part and parcel of Gavali Vasti. As noted above, the Plaintiff had come with a specific case that his grandfather had constructed four rooms, toilet and bathroom in the suit property with permission of the then owner of the property and that he is in settled possession of the suit property since then. The Defendant No.1, who has purchased the suit property from Defendant Nos.2 to 4 claims that he has been put in possession of the suit property. He has also raised a plea of encroachment. Since the suit was simplicitor for injunction, the question was whether the Plaintiff was in settled possession of the suit property.

Both the parties having adduced evidence in support of their respective claims, the Appellate Court was required to decide the issue of possession on the basis of the evidence on record. The Appellate Court instead of evaluating the evidence and deciding the matter finally has given an opportunity to the parties to adduce fresh evidence to establish the identity of the suit property, when the identity of the suit property was never in dispute. Even otherwise, the scope of remand is not to give an opportunity to the parties to fill up the lacunae by adducing fresh evidence. The Appellate court has passed the order in a very casual manner, dehorse the above noted relevant statutory provisions. The impugned order suffers from jurisdictional infirmity and hence cannot be sustained.

25. Under the circumstances, the appeal is allowed. The impugned judgment and decree dated 26/03/2019 passed in Regular Civil Appeal No.276 of 2017 is set aside. The Appellate court is directed to take additional evidence in accordance with Order 41 Rule 28 of CPC and to decide the appeal on the basis of the evidence on record.

26. The Civil Application stands disposed of in view of disposal of the Appeal.

(SMT. ANUJA PRABHUDESSAI, J.)