

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

APPEAL FROM ORDER NO. 33 OF 2012

Jilani Babukhan Pathan
Age : 70 years, Occu. Agriculture,
Resident of : At Ambehol,
Taluka and District Osmanabad.

**....Appellant
(Ori. Plaintiff/respondent)**

Versus

Hamid Babukhan Pathan
Age : years, Occu. Agriculture,
Resident of : At Ambehol,
Taluka and District Osmanabad.

**....Respondent
(Ori. Defendant/Appellant)**

Mr. P.U. Gujrathi h/f. Mr. V.P. Latange, Advocate for appellant.

Mr. P.S. Chavan, Advocate for respondent.

CORAM	: ARUN R. PEDNEKER, J.
CLOSED ON	: 05/07/2023
DELIVERED ON	: 14/07/2023

JUDGMENT :

1) By the present Appeal From Order, the appellant/original plaintiff is challenging the judgment and order dated 14.10.2011 passed in Misc. Application No. 117 of 2011 and the judgment and order dated 5.7.2011 passed in Civil Appeal No. 256/2010 by the learned District Judge-2, Osmanabad, setting aside the judgment and decree passed in R.C.S. No. 237/2005 dated 29.9.2010 passed by the Joint Civil Judge, Senior Division, Osmanabad and remanding the matter back to the Trial Court for fresh trial by tendering opportunities to both the parties for framing the proper issues in the light of the observations made in the judgment of the Appellate Court.

2) The brief facts, giving rise to the present Appeal From Order, can be

summarized as under :-

The parties are inter-se related. The suit is filed for declaration and permanent injunction and in alternatively, for possession of the suit land. The case of the plaintiff/appellant is that the plaintiff and the defendant/respondent are the real brothers inter-se. Their parents died long ago. At the time of demise of their parents, both plaintiff and defendant were minors and since the death of parents they are residing separately. The plaintiff averred that he along with other six persons purchased the lands bearing Survey No. 75 area admeasuring 22 Acre 39 Gunta, Survey No. 76, area admeasuring 19 Acre 22 Gunta and Survey No. 77 from north side, area admeasuring 8 Acre 15 Gunta from Ganesh Vaidya r/o. Sanja Wes, Taluka and District Osmanabad on 16.4.1968 by registered sale deed for consideration of Rs.20,000/-. All these three survey numbers are adjacent to each other and they are bounded as follows :-

Towards East	-	Land of Sk. Jumman and Dina Gaikwad
Towards South	-	½ share from Survey No. 77 of Damu and Vithal Gaikwad.
Towards West	-	Boundary of Junoni
Towards North	-	Government Road.

3) The plaintiff has contended that in the sale transaction, plaintiff had contributed an amount to the extent of 1 Ana, so he obtained ownership and possession of the above said lands to the extent of 1 Ana share. The plaintiff claimed that to contribute in the sale transaction, his in laws provided financial aid to him. After transaction, name of plaintiff along with other six persons are mutated by the competent authority in the Government record by mutation entry. Thus, the plaintiff became owner to

the extent of 1H 16 R. land in the above properties.

4) The plaintiff averred that he is exclusive owner and possessor of his 1 Ana share to the extent of 1 H. 16 R. land. His land is divided into two parts as there is partition amongst seven persons. The land in possession of the plaintiff is the suit land.

5) The plaintiff averred that the income of the suit land was not sufficient and there was marriage of his daughter for which he was in debt to one Shabbir Husen Pathan. The said Shabbir Pathan insistent plaintiff to refund debt. Hence, plaintiff approached the defendant in the year 1992 and requested to advance hand loan of Rs.9000/-. Defendant advanced hand loan, but for security of the said loan amount, he asked plaintiff to give blank stamp paper of Rs.10/- along with his signature on it. As the plaintiff was in need of money, he handed over one blank stamp paper of Rs.10/- along with his signature to the defendant in the presence of the witnesses. It is the further case of the plaintiff that in the year 1992 he left village in search of work to another place and thereafter, he returned back to his village in the year 2004. He approached a bank for loan and for taking loan he had applied for 7/12 extract of the suit land. At that time, plaintiff found that defendant has managed to enter his name in 7/12 extract of the suit land by mutation entry No. 100 with collusion of the then Talathi of that place by misusing blank stamp paper given by plaintiff to the defendant. From the mutation entry, it revealed that the plaintiff had allegedly executed consent deed on stamp paper of Rs.10/- and plaintiff and defendant had jointly purchased suit land on 16.4.1968. It further revealed that as in suit land defendant has $\frac{1}{2}$ share, and the plaintiff has allotted his $\frac{1}{2}$ share to the defendant. It is the case of the plaintiff that he never

executed any document in favour of defendant or other person in respect of the suit land. Defendant had no right, title over the suit land. It is the case of the plaintiff that the defendant threatened to dispossess the plaintiff and therefore, he filed a suit for declaration of ownership and injunction.

6) The defendant resisted the suit by filing written statement. He submitted that the plaintiff is his elder brother and he was manager of their joint family. On 16.4.1968 plaintiff and defendant jointly purchased the suit land from joint nucleus. The suit land was joint family property of plaintiff and defendant. As plaintiff was elder and manager of family, sale transaction took place in his name. On 24.5.1992 partition took place between the plaintiff and the defendant and in that partition half share is allotted to him and the half share of plaintiff is purchased by the defendant for consideration of Rs.6,000/- and that he has contended that he is in exclusive possession of the suit land since prior to 1992. It was submitted that plaintiff executed consent deed, partition deed on stamp paper of Rs.10 and admitted that the suit land is purchased jointly and allotted ½ share to the defendant and the name of the defendant is recorded in 7/12 extract as owner and possessor of the suit land. Hence, the defendant submitted that the suit of the plaintiff is liable to be dismissed. The Trial Court formulated following issues and recorded answer against each issue as under :-

Issues	Findings
1. Whether plaintiff proves that, he is the owner .. and possessor of the suit property ?	Yes.
2. Whether plaintiff proves the alleged .. obstruction over suit property ?	Yes.
3. Is plaintiff entitled for the relief of declaration .. as prayed ?	Yes.

- | | | | |
|----|---|----|---------------------|
| 4. | Is plaintiff entitled for the relief of perpetual injunction as prayed ? | .. | Yes. |
| 5. | Is plaintiff entitled for the alternative relief of possession of suit property as prayed ? | .. | Does not survive. |
| 6. | What order and decree ? | .. | As per final order. |

Additional Issues :

- | | | | |
|----|---|----|-----|
| 1. | Whether the defendant prove that on 16.4.1968 plaintiff and defendant had jointly purchased the suit property from joint nucleus ? | .. | No. |
| 2. | Whether defendant prove that, he is exclusive owner of suit property by partition dated 24.5.1992 and by purchase of half share from the plaintiff for consideration of Rs.6000/- ? | .. | No. |
| 3. | Whether defendant proves that he has become owner of suit property by rights of adverse possession ? | .. | No. |
| 4. | Whether the suit is barred by law of limitation ? | .. | No. |

7) The Trial Court, on consideration of material on record, decreed the suit filed for declaration of ownership and declared that the plaintiff is the owner of the suit property and restrained the defendant, his agent or anybody acting on his behalf permanently from obstructing the peaceful possession and enjoyment of the plaintiff over the suit property without due process of law.

8) The defendant challenged the judgment and decree of the Trial Court before the Appellate Court. The Appellate Court, after considering the material on record, has formulated the following points for determination

and recorded answer against each point, as follows :-

POINTS	FINDINGS
1. Does the appellant prove that the lower Court .. failed to appreciate properly oral and documentary evidence on record and came to the wrong conclusion ?	In affirmative.
2. Does the appellant prove that the lower Court .. wrongly placed the burden upon the appellant as regards the issues No. 1 to 4 and additional issues ?	In affirmative.
3. What order ?	.. As per final order.

9) The Appellate Court held that the Trial Court has wrongly placed the burden upon the appellant/plaintiff as regards the issues and following observations are made at para No. 11, relevant portion which is as under :-

“...Having considered such tone and animus of the appellant as regards the suit property, the endoresement recorded by the lower Court on Exh. 45 can not be accepted as correct admission and endoresement.”

At para 12 the Appellate Court has observed, relevant portion of which is under :-

“...At this stage, it needs to be observed that the learned counsel for the respondent also submitted that because there was endorsement by the lower Court on exh. 45 mentioning that other side admitted the document and therefore, the respondent was mislead. In case it was known to the respondent that the respondent has to prove the document at exh. 46. Respondent might have examined proper person to prove the execution and effect of the said sale deed.”

10) Thereafter, the Appellate Court remanded the matter back to the Trial Court for fresh trial by tendering the opportunities to both the parties for framing the proper issue in the light of the observations made in the

judgment. The above order is challenged by the appellant/plaintiff in the present Appeal From Order.

11) The learned counsel for the appellant/plaintiff that there is specific admission in the written statement as regards Exh. 45 and there is clear admission in respect of Exh. 45, sale deed that plaintiff and defendant had jointly purchased the suit property, hence the Appellate Court erred in remanding the matter back to the Trial Court. The Appellate Court should have entered into the examination of evidence and rendered finding on it's own. The Appellate Court erred in holding that the admission of the advocate is not good enough in the form of endoresement that it is an admitted document, which is not good enough. When the document was specifically denied and order was passed to that effect under Order XII, Rule 2 of Civil Procedure Code.

12) The learned counsel further submits that the Appellate Court has erred in remanding the matter and it could have entered into examination of evidence on record and rendered appropriate findings for determination of the appeal. When the parties have not prayed to lead further evidence and on the basis, the Appellate Court has erred in not examining the evidence on record and rendering findings on the issues in the matter. Remand is not an easy way out and it prolongs the life of the litigation. In view of the same, the learned counsel submits that the order passed by the Appellate Court be set aside and suit of the plaintiff be decreed.

13) Per contra, the learned counsel for the respondent/defendant submits that the Appellate Court has rightly remanded the matter for reconsideration. The application Under Order XII, Rule 2 was rejected and that the documents were not exhibited by the parties and merely because

endorsement is made by the advocate, the Trial Court has wrongly admitted the document and wrongly relied upon the document. The admission given is no admission in the eye of law. Thus, he submits that the order passed by the Appellate Court is correct. The Appellate Court has also held that the plaintiff has not produced any alleged document to prove his case. The same has been admitted, Exh. 45, by the defendant. The plaintiff has also not proved the document. As such, the Appellate Court has taken a different view of the matter and matter is rightly remanded.

14) The law on this subject is discussed by this Court in **Barku Pundlik Patil (Since deceased, Through LR's) Chandrakalabai Barku Patil and others Vs. Subhash Govindrao Pagare and others, Appeal From Order No.35 of 2022, dated 09.11.2022.** The relevant portion i.e. para nos. 9 and 10 in the above case is as under :-

"9. Order 41 Rule 23 deals with the remand of case by Appellate Court. Rule 23 deals with a situation 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. Order 41 Rule 23-A provides that, whether 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.

10. The Hon'ble Supreme Court has considered the scope of power of Remand by Appellate Court under Order 41 Rule 23-A in various Judgments as under:-

10(a). ...

10(c). In the case of P. Purushottam Reddy and another Vs. Pratap Steels Ltd., 2002 (2) SCC 686, the Hon'ble Supreme Court has held that only in exceptional cases, where the conditions stipulated by provisions of Order 41 Rule 23-A of the Code of Civil Procedure, 1908 are

satisfied that such an order of remand can be passed.

10(d). The Hon'ble Supreme Court in the case of Shivakumar and others Vs. Sharanabasappa and others, (2021) 11 SCC 277, at Paragraph Nos.26.4 and 26.4.1, has observed as under:

"26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 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 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a 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 the life of the litigation without serving the cause of justice. An order of remand only on 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 eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

26.4.1. ...Such cases where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill- up the lacuna in its case."

15) Having considered the rival submissions and the law on remand of case to the trial Court by the Appellate Court as discussed in above judgment, I am of the opinion that the order of remand is not to be lightly passed. It is not easy way out. The order of remand could be passed only when the evidence is not sufficient to render the judgment. The Appellate Court can examine the evidence on record and render findings on issues of

the case. Either the Appellate Court has to render a finding on examination of the evidence that the plaintiff has failed to establish that Exh. 45 is proved, or it can render a finding to the effect that there is sufficient evidence on record that Exh. 45 is proved. However, plaintiff cannot be directed to lead further evidence and to establish his case on Exh. 45, moreso, when the plaintiff has not made a prayer for leading further evidence. Parties have already lead evidence in this case and the plaintiff does not wish to lead further evidence. Opportunities were available to the plaintiff to lead evidence and the trial Court on examination of the evidence on record has believed Exh. 45. The Appellate Court on the basis of material can render a finding on the issue.

16) In view of the discussion made above, the judgment and order passed by the Appellate Court is set aside and the matter is remitted back to the Appellate Court for fresh adjudication. However, it is made clear that I have not observed anything on merits of the case and the Appellate Court shall not be influenced by any of the observations made by this Court in this order. The Appellate Court to decide the appeal in accordance with law. Appeal from Order is disposed of. Record and proceedings be sent back to the Appellate Court.

[ARUN R. PEDNEKER J.]

SSC/