

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

**APEAL FROM ORDER NO.12 OF 2022
WITH CA/5489/2022 IN AO/12/2022**

**PRABHAKAR CHHAGAN APPA GAWALI ALIAS GHODKI
AND OTHERS
VERSUS
DURGADAS GOVINDA SURASE**

...
Advocate for Petitioners : Mr. G.N. Kulkarni (Mardikar)
Advocate for Respondent No. 1 : Mr.. Milind K. Deshpande

**CORAM : R.M. JOSHI, J.
DATE : 21st March, 2023**

PER COURT :

1. Heard.

2. This Appeal From Order is filed against judgment dated 20th January, 2022, passed in Regular Civil Appeal No. 74 of 2018, whereby, the first appellate Court has remanded the case to the Trial Court for decision afresh after permitting the parties to amend the pleadings.

3. Learned counsel for the appellants states that the first appellate Court fell in error in remanding the suit for re-trial by recording the reasons about the measurements done of the properties

not being proper. He further raised objection to the direction given by the first appellate Court permitting the parties to amend the pleadings.

4. Record indicates that the suit was filed by the plaintiffs for removal of encroachment with a specific averment that the plaintiffs are the owner of the property bearing Gut No. 1165. It is specifically stated therein that towards the eastern side of the said Gat defendants have encroached on the land of the plaintiffs. In order to substantiate his case, he relied upon the measurements carried through the surveyor.

5. Learned Trial Court has recorded specific findings that the measurement done by the Surveyor is not proper. On this count alone, it is held that the plaintiffs have failed to prove the encroachment against the defendant.

6. As against this, the learned first appellate Court has considered the pleadings of both sides and was of the view that there should be more specific pleading having regard to the nature of the suit. It is further held that the proper measurement is required for decision of the suit in respect of the encroachment.

7. The question arises before this Court as to whether the direction of first appellate Court of remanding the matter for decision afresh is contrary to the provisions of law.

8. In order to appreciate challenge to the impugned order, it would be necessary to take into consideration relevant provisions of Code of Civil Procedure, which deal with remand of the case by Appellate Court. Rule 23, 23 A and 24 of Order XLI of CPC, 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.”

Above provisions entrust sufficient power with Appellate Court to remand the case for retrial in appropriate case.

9. At this stage it must be relevant to take note of judgment of this Court in case of *Vijay Versus State of Maharashtra*, 2009 (5) Mh.L.J. 279, relied upon by learned First Appellate Court. In that case, while answering substantial question of law, it is held that “it

would not be proper to dismiss the suit simply because Court commissioner has not adopted a correct procedure of measurement and the exercise of re-measurement, according to the rules, will have to be got done through Court Commissioner again and again, if necessary, because of faults of Cadestrial Surveyor are not attributable to parties to the suit”. With these observations matter was remitted back to the trial Court.

10. In considered view of this Court, First Appellate Court committed no error in law by following above dictum which is squarely applicable to the present case. Having regard to the provisions of Order XLI Rule 23, 23 A and 24 of CPC and judgment cited supra, no fault can be found with remand of the case to the Trial Court.

11. With regard to the leave granted by First Appellate Court to the parties to amend the pleadings is concerned, perusal of impugned judgment shows that after carefully going into the pleadings of parties, Court was of the view that more precise pleadings are required for proper adjudication of suit. The said direction does not mean to allow parties to introduce new cause of action. What is being allowed is to have precise pleadings from both sides to enable the Court to know exact dispute posed for determination. Moreover, appellant

herein was unable to show what prejudice is likely to be caused by issuance of such directions.

12. Having considered the nature of dispute before the Trial Court in view of this Court the directions even to amend the pleadings would not cause any prejudice to the parties as it is always open for the appellant herein to counter the amended pleadings filed if any.

13. In these circumstances, no perversity is found in the impugned order to cause interference therein. Hence, Appeal stands dismissed.

14. Pending Civil Application also stands disposed of.

[R.M. JOSHI, J.]

SPChauhan