

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

**APPEAL FROM ORDER NO. 24 OF 2022
WITH CIVIL APPLICATION NO. 6863 OF 2022**

Laxmibai w/o. Santoshrao Kad
Age : 57 yrs., Occ.- Household,
R/o. Kad Pimpalgaon,
Tq. Jafrabad, Dist. Jalna

.... APPELLANTS
(Orig. Plaintiff)

VERSUS

Sandeep s/o. Madhavrao Kad Patil
Age : 42 years, Occ.- Agriculture,
R/o. Plot No. 48, Maharana Pratap
Housing Society, N-7, CIDCO,
Aurangabad, Dist. Aurangabad.

... RESPONDENT
(Orig. Defendant)

WITH
**APPEAL FROM ORDER NO. 22 OF 2022
WITH CIVIL APPLICATION NO. 12966 OF 2022**

Laxmibai w/o. Santoshrao Kad
Age : 57 yrs., Occ.- Household,
R/o. Kad Pimpalgaon,
Tq. Jafrabad, Dist. Jalna

.... APPELLANTS
(Orig. Defendant)

VERSUS

Sandeep s/o. Madhavrao Kad Patil
Age : 38 years, Occ.- Agriculture,
R/o. Plot No. 48, Maharana Pratap
Housing Society, N-7, CIDCO,
Aurangabad, Dist. Aurangabad.

... RESPONDENT
(Orig. Plaintiff)

Mr. S. G. Shete, Advocate for the appellant
Mr. S. V. Dixit, Advocate for the respondent

CORAM : **R. M. JOSHI, J.**
RESERVED ON : **03/04/2023**
PRONOUNCED ON : **10/04/2023**

JUDGMENT :-

1. Laxmibai Kad has preferred these appeals from order against the judgments and decree passed in Reg.Civil Appeal No. 69/2018 and Reg.Civil Appeal No. 214/2012 dated 25/01/2022 setting aside judgments and order passed in Regular Civil Suit No. 02/2010 dated 03/03/2018 and in Reg.Civil Suit No. 81/2009 dated 26/06/2012.
2. Parties are referred to as Laxmibai and Sandeep for the sake of convenience.
3. Sandeep filed R.C.S. No. 81/2009 against Laxmibai for perpetual injunction in respect of 74 Are land from gut No. 379 situated at village Pimpalgaon Kad, Tq. Jafrabad, Dist. Jalna. It is a case of Sandeep that his mother Padmabai purchased land gut No.379 admeasuring 1 H 19 R from erstwhile owner under registered sale deed bearing No. 2017/1987 and her name is mutated vide mutation entry number 424 dated 01/05/1987. It is alleged that on 12/06/1997 who is the adjoining owner of gut No. 383 tried to encroach upon the peaceful possession of the plaintiff's mother over the suit property and hence suit

for perpetual injunction bearing R.C.S. No. 60/1997 was filed. It is further stated that in the meantime plaintiff's mother sold 1 H 19 R land out of gut No. 379 to Manjulabai under sale deed and remaining 74 R land came to the share of Sandeep in the partition with his mother. It is alleged that on 10/08/2009 defendant obstructed his possession over the suit land and hence this suit for injunction came to be filed.

4. Laxmibai, defendant denied the contention of the plaintiff and his title and possession over 74 R land is disputed. On this ground dismissal of suit is sought.

5. In R.C.S. No. 02/2010, Laxmibai, plaintiff filed suit for perpetual injunction against defendant Sandeep with the contention that she is owner of gut No. 383 admeasuring 1 H 31 R land and having potkharaba of 11 R situated at Pimpalgaonkad, Tq. Jafrabad. It is claimed that on the basis of partition of the year 1997 the suit land came to be allotted to her mother's share and her mother executed sale deed in favour of plaintiff's husband for the consideration of Rs.17,000/-. It is claimed that plaintiff is in possession and cultivation of the suit land for last 2009 years and in the year 2009 since Sandeep tried to obstruct her possession suit came to be filed.

6. Sandeep filed written statement at Exhibit 21 admitted the ownership of plaintiff over gut No.383 however the possession of the plaintiff over the suit land is disputed by raising objection regarding boundaries.

7. Learned Trial Court permitted the parties to lead evidence and by passing judgment and decree dated 03/03/2018 decreed R.C.S. No. 02/2010 restraining Sandeep from obstructing possession of the plaintiff over the suit land without following due process of law. By passing judgment and decree dated 29/06/2012 in R.C.S. No. 81/2009 suit filed by Sandeep was dismissed.

8. Sandeep carried both these judgments in appeal before the First Appellate Court by filing RCA No. 214/2012 against the judgment and decree passed in RCS No. 81/2009. He also filed appeal being RCA No. 69/2018 against the judgment and decree passed in RCA No. 02/2010 dated 03/03/2018.

9. The First Appellate Court by passing impugned judgments and decree remanded both suits back to the Trial Court for their decision. Being aggrieved by these orders present appeal came to be filed.

10. Learned counsel for the appellant/Laxmibai contends that she has successfully proved her case before the Trial Court in RCS No. 02/2010 and after admitting her title over the gut No. 383, it was not open for the First Appellate Court to remit the matter back to the Trial court by causing interference in the decree passed in her favour. With regard to RCS No. 81/2009, it is contended that the burden was on plaintiff/Sandeep to prove his case and merely because he has failed to lead evidence, it is not open for the learned First Appellate Court to set aside the judgment and decree and remit the matter back to the Trial Court for decision afresh. To support his contentions he place reliance in case of ***Sirajudheein Versus Zeenath and Ors., 2023 LiveLaw (SC) 145***. According to him if Court finds that evidence in possession of the party has not be produced, it can assume that the production of the same would be unfavourable to the person who withholds it and on that basis the remand of the matter cannot be justified. He further states that merely because a particular evidence ought to have been adduced but had not been adduced, the Appellate Court cannot adopt the course of remanding of the matter.

11. Learned counsel for the respondent/Sandeep on the other hand has supported the judgments in question by stating that the First Appellate Court after placing reliance on the judgment of Hon'ble Apex

Court in case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs., AIR 2008 SCC 2033** has remanded the matter back to the Trial Court for consideration afresh. According to him no prejudice muchless any irreparable loss is likely to be caused to the appellant by order of remand of the case.

12. There is no dispute about the fact that the agricultural land bearing gut Nos. 379 and 383 claimed to be owned and possessed by Laxmibai and Sandeep are abutting to each other. However there is dispute in respect of 74 Are land. Perusal of the pleadings in suit filed by Sandeep being RCS No. 81/2009 indicates that he claimed to be in possession and ownership of the suit property admeasuring 74 R land from gut No. 379 and he alleges obstruction thereto by Laxmibai. Laxmibai has denied the title of Sandeep over the said land. Before the Trial Court except for the production of 7/12 extract indicating name of the mother of Sandeep over the 74 R land from gut No. 379 he has not produced any other document to substantiate his title. In this regard the First Appellate Court has observed by making reference to the judgment of Hon'ble Apex Court in case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs** (cited supra). The relevant observations in paragraph 17(c) can be reproduced as under:

"17 (c) But a finding on title cannot be recorded in a

suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.”

13. In this suit though specific averment is made in plaint about title and the same has been refuted by defendant, no specific issue in that regard is framed by Trial Court. Similarly, as the question of fact and law relating to title is involved, it was not proper for First Appellate Court to record findings thereon for first time. This would have resulted into loss of the opportunity of first appeal to aggrieved party. Thus having regard to the issue involved in suit filed by Sandeep. Learned First Appellate Court relying upon judgment of Hon'ble Apex Court in case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs** (cited supra) has rightly passed order of remand. Pertinently, in the facts of the case cost of Rs.10,000/- is imposed upon Sandeep, payable to Laxmibai.

14. As regards suit of Laxmibai bearing RCS No. 02/2010, though the defendant has admitted that she is owner of gut No. 383.

However, there is specific denial in respect of her title about 74 R land which is matter of dispute between them. The First Appellate Court has taken aid of the aforesaid observation made by the Hon'ble Apex Court in case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs** (cited supra).

15. In the judgment in RCA No. 69/2018 it is observed that there was dispute between the parties in respect of the western boundaries and the onus of proof was shifted on the plaintiff in view of the specific objection raised by the defendant. It was held that the plaintiff did not adduce any evidence to prove her western side boundary. It is also observed that the findings regarding the possession of Laxmibai and Sandeep cannot be convincingly recorded in respect of the disputed land. The First Appellate Court therefore found it appropriate to set aside the judgment an decree and sent RCS No. 02/2010 back to the Trial Court.

16. Considering nature of dispute between adjoining owners of agricultural lands, the real dispute between the parties is required to be decided finally. Pertinently the suit of Sandeep was dismissed on the ground that he did not cause measurement of the land prior to filing of the suit. Similarly, in case of Laxmibai, she also did not lead evidence to

substantiate the western side boundary of her land bearing gut bearing 383. It is settled law that the dispute between the parties in respect of encroachment, shall not be decided on oral evidence but by measurements of disputed lands. Though present case is not for a removal of encroachment but there is dispute as to who is having title and possession over the disputed 74 R land, in such case also to bring finality of dispute it is just and necessary to measure the lands of rival parties. The order of remand cannot be considered as shortcut for disposal of appeals, but in facts and circumstances of the case it had no other option but to relegate the suits back of the Trial Court.

17. To avoid eventuality of denying the opportunity of first appeal against finding of facts there was no propriety to allow parties to lead evidence before Appellate Court. Hence, course adopted by the First Appellate Court in the present case, to relegate suits to trial Court, having regard to the facts and circumstance of the case cannot be faulted with. In the result, appeals stand dismissed. Pending civil applications, if any, stand disposed of. No order as to costs.

(R. M. JOSHI, J.)

18. After pronouncement of judgment, learned counsel for the appellant states that during the pendency of this appeal, Trial Court was

restrained from proceeding with the trial. He seeks extension of the said order till six weeks.

19. This Court has already held that there was no other option for the First Appellate Court but to relegate the matter back to the Trial Court. In the circumstances, extension of stay is refused.

(R. M. JOSHI, J.)

ssp