

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

APPEAL FROM ORDER NO.110 OF 2010

- . Prakash S/o Suka Patil,
Age : 65 years, Occ : Agri & Business,
R/o. Lohatar, Tq. Pachora,
Dist.- Jalgaon **.. Appellant**
[ori. Defendant]

Versus

- . Gulab Ukha Pardeshi
(since deceased)
through his L. Rs. **.. Respondent**
[ori. plaintiff]

1A. Vimalbai W/o Gulab Pardeshi,
Age: 70 years, Occu: Household

1B. Sanjay S/o Gulab Pardeshi,
Age: 45 years, Occu: Agril.

1C. Subhash S/o Gulab Pardeshi,
Age: 40 years, Occu: Agril.

1D. Ganesh S/o Gulab Pardeshi,
Age: 37 years, Occu: Agril.

All R/o. Lohatar, Tq. Pachora,
Dist. Jalgaon **.. Opponents**

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Advocate for Appellant:
Mr. V. R. Dhorde

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CORAM:	ARUN R. PEDNEKER, J.
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Reserved on:	07.06.2023
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Pronounced on:	13.06.2023
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JUDGMENT:

1. Heard.

2. Although, the legal heirs of the sole respondent are served none has entered appearance in the matter. As the case is pending for long time, it is taken up for hearing.

3. In the present Appeal From Order the appellant is challenging the order passed by the learned District Judge allowing the appeal and setting aside the Judgment of the Civil Judge, Junior Division and remanding the case to the Civil Judge, Junior division for fresh trial.

4. Facts leading to the filing of the petition can be summarized as under.

A. The plaintiff / respondent filed a suit for possession of the land encroached by the defendant admeasuring 0H-31R. and for mesne profits. It is the case of the plaintiff that the defendant owns and possess agricultural land in gut

no.138/1 admeasuring 1H-22R. with
potkharab 0H-03R situated at Mauje
Lohthar, Taluka - Pachora, District -
Jalgaon. The plaintiff also owns and
possesses agricultural land in gut
no.138/2 admeasuring 0H-37R. It is the
case of the plaintiff that in April-1994,
the defendant and his father ploughed the
southern side east-west and common
boundary of gut no.138/1 and 138/2 and
encroached in gut no.138/2 to the extent
of area of 0H-31R. The plaintiff,
thereafter, applied for measurement by
TILR on 11.06.1994 of gut no. 138/2 and
138/1. Accordingly, measurement was
carried out with notice to the defendant
and adjoining land owners. After the
measurement, TILR prepared map and filed
report. In the measurement it appeared
that the defendant has encroached in gut
no.138/2 owned by the plaintiff.
Therefore, the plaintiff prayed for the

possession of the encroached suit property of 31R alongwith with mesne profits and costs of suit.

B. The defendant filed the written statement and denied the allegations made by the plaintiff. The defendant submitted that since 1973-74 he is residing at Dombiwali, Mumbai and doing a dairy business. The defendant denied the fact of measurement and stated that the plaintiff with TILR prepared a bogus report and map and that certified copies of the map are not verified. The defendant further submitted on 05.03.1993 plaintiff carried measurement of gut no.138/2 and the same fact has not been disclosed in the court. As per measurement of 05.03.1993, there was no encroachment by the defendant in the agricultural land of plaintiff. The trial court formulated the following issues:-

	ISSUES	FINDINGS
1.	Does the plaintiff prove that the defendant has encroached upon an area of 31R of the land gut no.138/2 belonging to him?	In Negative
2.	Whether the plaintiff is entitled to the possession of the 31R area, as prayed for?	In Negative
3.	Whether the plaintiff is entitled for mesne profit?	In Negative
4.	Whether the defendant is entitled for compensatory costs?	In Negative
5.	Whether the suit suffers from law of limitation? If yes, what effect?	In Negative
6.	Does the defendant prove that he has became owner of the disputed area 31 R by way of adverse possession?	In Negative
7.	What decree and order?	Suit dismissed with costs

C. On consideration of the evidence led in the matter the trial court held that on the measurement carried out on

05.03.1993, the plaintiff, defendant and other persons were present and the TILR report indicated that defendant has not encroached in gut no.138/2 by demolishing the common boundary. The trial court observed that on the second application filed for measurement the second measurement was not carried out by following the proper procedure and the plaintiff had filed both the applications to carry out the measurement. There was no complaint from the plaintiff that the earlier measurement was wrong. The trial court also observed that during the second measurement the notice was not issued to the adjoining land owners and at the time of second measurement the boundaries were in existence. On consideration of the evidence the trial court held that there was no encroachment by the defendant in gut no.138/2 and thus plaintiff has failed to prove that the

defendant encroached in 31R of land in gut no.138/2 owned by the plaintiff. The trial court has also rendered finding adversely against the plaintiff on the other issues and the suit was accordingly dismissed.

D. In an appeal filed before the appellate court, the appellate court formulated following points for determination:-

	Points	Findings
1.	Whether the Judgment and decree passed by the Trial Court Dismissing the plaintiff suit is legal and proper?	In the negative
2.	What order?	A per final order

E. The appellate court at paragraph no.13 held as under:-

"13. Considering both the measurement I found that the measurement done by Keshavrao Sonar is faulty whereas the measurement done by Suresh Mali was incomplete. Under such circumstance, proper course is to

effect the measurement of entire survey no.74 (of which Gat No. 139, 138 and 137 are the Gat Numbers) and so also the plaintiff's adjoining fields Gat No.136, 135 and 134, as per the revenue record through District Land Revenue Authority and after such measurement and report from them, to decide the matter afresh."

The appellate court, accordingly, set aside the order passed by the trial court and remanded the matter for fresh trial and decision.

5. The appellant has challenged the order of the appellate court in the present appeal.

6. Mr. V. R. Dhorde, learned counsel for the appellant submits that the order of remand should not be ordinarily passed in a routine manner. In the instant case, evidence was led before the trial court and on examination of evidence and the report submitted by the TILR, measurements were carried out. The plaintiff would either succeed or fail, he cannot be permitted to led further evidence in the matter. The learned counsel

further submits that there is no application by any of the parties to lead further evidence. The learned counsel submits that the material available on record was sufficient enough for the trial court to render it's finding and it has accordingly rendered the findings and dismissed the suit. The appellate court has not discussed, how the findings rendered by the trial court are perverse. The learned counsel further submits that, even if, a finding was rendered that the trial court has examined the evidence erroneously, the appellate court on the basis of material on record ought to have examined the evidence and render a Judgment itself. The appellate court has erred in remanding the matter and, thus, prayed that the matter be restored to the appellate court for decision on merits.

7. The learned counsel relies upon the Judgment of the Hon'ble Supreme Court in the case of **Sirajudheen Vs. Zeenath and others, 2023 (3) SCALE 348.**

8. Having considered the submissions, the law on the subject is discussed in the following Judgments of this court and the Hon'ble Supreme Court.

9. This court in the case of **Barku Pundlik Patil (Since deceased, Through LR's) Chandrakalabai Barku Patil and others Vs. Subhash Govindrao Pagare and others (supra)**, at paragraphs no.9 and 10 held 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(b). ...

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."

10. In case of **Sirajudheen Vs. Zeenath and others, 2023 (3) SCALE 348**, the Hon'ble Supreme Court has held at paragraphs no.9.2, 9.3 and 10 as under:-

"9.2. While explaining the scope of Rules 23 and 23-A of Order XLI CPC, in the case of *Municipal Corporation, Hyderabad (supra)*, this Court has observed as under: -

"32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what

basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order 41 Rule 23-A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a retrial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code.

34. An order of remand cannot be passed on ipse dixit of the court."

9.3. In the case of Sanjay Kumar Singh (supra) relied upon by the learned counsel for the respondent No. 1, this Court has observed as under: -

"7. It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence.

However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be

allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.

8. As observed and held by this Court in *A. Andisamy Chettiar v. A. Subburaj Chettiar* [(2015) 17 SCC 713], the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced."

10. It could at once be noticed that in terms of Rule 33 of Order XLI CPC, the Appellate Court is empowered to pass any decree and to make any order which ought to have been passed or made; and which may be considered requisite in a case. While the said Rule 33 prescribes general powers of the Court of appeal, the specific powers of remand are prescribed in Rules 23 and 23-A of Order XLI CPC. Hence, for the purpose of the case at hand, reference to aforesaid

Rule 33 remains inapposite. Having said so, we may proceed to examine if the order of remand in the present case could be justified with reference to the other referred provisions of Order XLI CPC?"

11. Coming to the facts of the case, it is most important to note that the plaintiff had led evidence in the matter. He had brought on record the reports of the TILR and the trial court based on the material had rendered findings on the issues. The trial court has held that the plaintiff on the basis of the evidence and the report of the TILR was not able to establish encroachment.

12. The appellate court while dealing with the first appeal against the Judgment of the trial court has not specified, how the findings recorded by the trial court are unsustainable or unjustified. The appellate court at paragraph no.13 observed that the measurement done by PW-2 Keshavrao Sonar is faulty, whereas the measurement done by Suresh Mali was not complete. As such, under such circumstance, proper course is to

effect the measurement of entire survey no.74, so also of the plaintiff's adjoining fields and to decide the measurement afresh.

13. The trial court has rendered a finding that the first TILR report at the instance of the plaintiff clearly indicates that there was no encroachment at the hands of the defendant. It was not established, why the second TILR report was called for by the plaintiff. The trial court has further held that the second report of the TILR was erroneous, as it was without notice to the adjoining land owners and that the boundary walls was intact at the time of the report and, as such, there was no encroachment. The appellate court could have analysed the evidence and rendered the finding in one way or other but it cannot send the matter for re-measurement of the property. The evidence was led on the subject and it is available on record. The appellate court could have rendered a finding based on the report of the TILR. The reversal has to be based on cogent reasons and for that matter, adverting to and

dealing with the reasons that had prevailed with the trial court remains sine qua non has been held in the case of **Sirajudheen Vs. Zeenath and others, 2023 (3) SCALE 348** (*supra*). No case was born out by any of the parties for production of additional evidence.

14. The trial court had rendered findings on the basis of evidence on record and whether those findings are sustainable or not is a matter entirely different and the appellate court may examine the same. But, merely because the appellate court treat the first measurement by TILR was faulty and the second measurement was incomplete, it could not treat the evidence as insufficient so as not to pronounce any Judgment. The first measurement was also at the instance of the plaintiff and that the trial court has held that the said measurement by the TILR does not show encroachment. When the plaintiff has lead evidence on the issue, and trial court has rendered a finding on the issue, the appellate court, cannot direct the parties to again carry

out measurement by TILR. The appellate court ought to have decided the issue on it's own merits, on the basis of material available before it. The appellate court has not again even considered all other issues decided by the trial court. In the facts situation, thus, the order passed by the appellate court is set aside and the appeal is restored for determination on merits.

15. The Appeal From Order is partly allowed and disposed of.

[ARUN R. PEDNEKER, J.]

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