

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

**APPEAL FROM ORDER NO.54 OF 2010
WITH
CIVIL APPLICATION NO.4815 OF 2010**

1. Madhukar s/o Dashrath Bhila Patil,
Age- 60 years, Occupation- Agriculturist,
2. Sau. Ashabai w/o Madhuka Patil,
Age- 54 years, Occupation- Agriculturist,

Both,

R/o:- Sarangkheda, Tq.- Shahada,

Dist.- Nandurbar

.. Appellants

[original defendants]

Versus

1. Avinash s/o Bhila Patil,
Age- 36 years, Occupation- Agriculturist,
2. Sumanbai w/o Bhila Patil,
Age- 56 years, Occupation- Agriculturist

Both,

R/o:- Sarangkheda, Tq.- Shahada,

Dist.- Nandurbar

.. Respondents

[original plaintiffs]

...

Advocate for Appellants:

Ms. Medha Pramod Patel h/f. Mr. Milind Patil

Advocate for Respondents:

Mr. C. C. Deshpande h/f. Mr. C. R. Deshpande

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

JUDGMENT:

1. Heard.

2. By the present Appeal From Order, the appellants are challenging the order passed by the District Judge reversing the judgment of the Civil Judge, Junior Division and remanding the matter for fresh trial. The facts giving rise to filing of the present appeal can be summarized as under.

A. The respondents / plaintiffs filed RCS No.75 of 1997 for perpetual injunction restraining the defendants / appellants from interfering with the common bandh (embankment) on gut no.460 and 456, owned by the appellants situated at Sarangkhedha, Taluka – Shahada, District – Dhule. The plaintiffs contended that the plaintiffs have a right of way to approach their lands and that they were enjoining the easementary rights to access their fields. Written statement was filed in the matter. The

defendants submits that the plaintiffs have alternate road to reach their land. During the pendency of the suit, the plaintiffs moved an application for appointment of court commissioner. Based on the material, the trial court formulated following issues:-

	<u>ISSUES</u>	<u>FINDINGS</u>
1.	Do the plaintiffs prove that they have easementary right of suit way as claimed ?	Negative
2.	Do they prove the existence of suit way as contended ?	Affirmative
3.	Whether defendants prove that the plaintiff are having their usual alternate way as contended ?	Affirmative
4.	Whether plaintiffs are entitled to injunction as sought for ?	Negative
5.	To what releif and decree ?	As per final order

B. The trial court on consideration of the evidence of the plaintiffs and also the report of the court commissioner answered the issues. The trial court ultimately dismissed the suit for the reason that there is an alternate way of

approaching gut no.457/1, owned by the plaintiffs. It also held that the plaintiffs have changed their case from easement of necessity to easement by prescription. The trial court further held that the disputed undertaking given by defendants, which is Article-A is produced by the plaintiffs but surprisingly is not proved by the plaintiffs that it is in the handwriting of the defendants and that on perusal of that disputed piece of writing, it appears that there are number of witnesses who had put their signatures on the said disputed undertaking but none were examined before the court and, thus, the disputed undertaking is not proved as per the law of evidence and the plaintiffs had every opportunity to prove that document but they had not done so. Thus, the trial court finally dismissed the suit with costs.

C. In an appeal filed by the respondents, on consideration of the same material the appellate court held that Article-A is not proved by the plaintiffs and that Article-A may go to the root of the matter. The appellate court further held that the defendants contentions about an alternate way is also not properly proved. The learned trial court has not properly appreciated evidence with proper care. The appellate court held that sufficient evidence is not brought on record and the matter in dispute has not been properly dealt with. Hence definitely a finding should be marked as points no.1 and 4 in affirmative and 2 and 3 in negative. The appellate court formulated following points:-

	<u>POINTS</u>	<u>FINDINGS</u>
1.	Whether plaintiffs prove that they have easementary right to use suit way described in plaint ?	In the affirmative

2.	Whether defendants prove that there is alternate way for the plaintiffs to reach the suit lands ?	In the negative
3.	Whether the learned trial court appreciated the evidence on record in proper perspective ?	In the negative
4.	Whether the order of learned trial court requires interference ?	In the affirmative
5.	What order ?	As per final order

D. The appellate court set aside the order of the trial court and remanded the matter for fresh adjudication and to decide afresh and parties were also to lead evidence.

E. Against the order of the appellate court, the appellants have filed the present Appeal From Order.

3. Ms. Medha Pramod Patel holding for Mr. Milind Patil, learned counsel for the appellants relies upon the Judgment of 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, Appeal From Order No.35 of 2022, dated 09.11.2022 and also the Hon'ble Supreme Court in case of Arvind Kumar Jaiswal (D) Thr. Lr. Vs. Devendra Prasad Jaiswal Varun, Civil Appeal No.1059 of 2023 (SLP (C) No.9172 OF 2020), dated 13.02.2023, to contend that the matter ought not to have been remanded since sufficient evidence is already on record and that the remand order should not be made for giving further opportunity to the plaintiffs to fill in the lacunae in evidence.

4. Per contra, Mr. C. C. Deshpande holding for Mr. C. R. Deshpande, learned counsel for the respondents submits that the impugned order is an order of remand and this court should not interfere with the same, as the appellants will have an opportunity to plead it's case before the trial court.

5. Having considered the rival submissions the law of remand has been discussed in various

cases by the Hon'ble Supreme Court so also by this court.

6. 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). The Hon'ble Supreme Court in the case of Mohan Kumar Vs. State of Madhya Pradesh and others, (2017) 4 SCC

92, at Paragraph No.20, has observed as under:

"20. In other words, the High Court having held that the plaintiff was not able to prove his title to the land in the suit due to non-examination of his vendor, all that the High Court, in such circumstances, should have done was to remand the case to the trial court by affording an opportunity to the appellant to prove his case (title to the land) and adduce proper evidence in addition to what he had already adduced. This, the High Court could do by taking recourse to powers under Order 41 Rule 23-A CPC."

10(b). The Hon'ble Supreme Court in the case of Corporation of Madras and another Vs. M. Parthasarthy and others, (2018) 9 SCC 445, at Paragraph Nos.11 and 15, has observed as under:

11. It is an admitted fact that the respondents (plaintiffs) had filed an application under Order 41 Rule 27 of the Code in their first appeals before the first appellate court (CMP No. 1559 of 1993) praying therein for production of additional evidence in appeals. It is also an admitted fact that this application was allowed and the additional evidence was not only taken on record but also relied on by the appellate court as Exts. P-16 to P-20 for allowing the appeals filed by the respondents which, in consequence, resulted in decreeing all the four civil suits.

15. Having allowed the CMP No. 1559 of 1993 and, in our opinion rightly, the first appellate court had two options, first it could have either set aside the entire judgment/decreed of the trial court by taking recourse to the provisions of

Order 41 Rule 23-A of the Code and remanded the case to the trial court for retrial in the suits so as to enable the parties to adduce oral evidence to prove the additional evidence in accordance with law or second, it had an option to invoke powers under Order 41 Rule 25 of the Code by retaining the appeals to itself and remitting the case to the trial court for limited trial on particular issues arising in the case in the light of additional evidence which was taken on record and invite findings of the trial court on such limited issues to enable the first appellate court to decide the appeals on merits."

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."

7. From the above Judgment, it is apparent that the order of remand is not to be passed in a routine manner; as it elongates the life of the litigation without serving the cause of justice. An order of remand cannot be passed only on the

ground that the trial court has not properly appreciated the evidence; as the appellate court itself has the jurisdiction to enter into the facts and appreciate the evidence.

8. In cases where the re-trial 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.

9. 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?"

10. Coming to the facts of the case and applying the law above, in the instant case, the trial court has considered the documentary as well as oral evidence as also report of the commissioner and has rendered findings on the issues raised. The trial court has also recorded that as far as Exhibit-A is concerned, full opportunity was given to the plaintiffs and they have failed to establish the said document. The appellate court while re-appreciating the evidence has not held that how the finding recorded by the trial court is erroneous on the issues. The appellate court could have itself rendered it's finding on the issues as the evidence is already on record. Remanding the matter for de-novo trial, when there is no application for further evidence,

so also, when there was already an opportunity to lead evidence and the same having been lead by the parties, an order of remand is not justified. The appellate court should have entered into the merits of the matter and rendered a decision on the same. I have not expressed anything on the merits of the matter, as I leave it for the appellate court to decide the same and pass an appropriate order.

11. In this view of the matter, I hold that the appellate court has wrongly remanded the matter and, accordingly, the impugned order of the appellate court is set-aside and the appeal is restored to the appellate court for fresh decision on merits.

12. The Appeal From Order is partly allowed and disposed of. In view of disposal of the Appeal From Order, the Civil Application is also disposed of.

[ARUN R. PEDNEKER, J.]

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