

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

APPEAL FROM ORDER NO. 101 OF 2015

Digambar s/o. Bapusaheb Khadke,
Age 70 years, Occu. Pensioner,
R/o. Bhat Galli, Ambajogai,
Tq. Ambajogai, Dist. Beed.

**....Appellant
(Ori. Defendant)**

Versus

Vilas s/o. Shankarrao Kulkarni,
Age 55 years, Occu. Agril. & Service,
R/o. Bhat Galli, Ambajogai,
Tq. Ambajogai, Dist. Beed.

**....Respondents
(Ori. Plaintiff)**

Mr. A.V. Sonawane h/f. Mr. V.D. Sonawane, Advocate for the appellant.
Mr. Vivek Bhavthankar, Advocate for respondent.

CORAM	: ARUN R. PEDNEKER, J.
CLOSED ON	: 22/06/2023
DELIVERED ON	: 05/07/2023

JUDGMENT :

1) By the present Appeal From Order, the appellant/original defendant has challenged the judgment and order dated 17.8.2015 passed by the learned District Judge-4, Ambajogai, District Beed in Regular Civil Appeal No. 2/2012, setting aside the judgment and decree dated 30.11.2011 passed by the 3rd Jt. Civil Judge, Junior Division, Ambajogai in Regular Civil Suit No. 123/2006 and remanded the matter back to the trial court with direction to decide the suit afresh by giving proper opportunity to both parties to lead their evidence. The Trial Court had dismissed the suit filed by the respondent/plaintiff for possession of the alleged encroached area of 20 x 10 ft.

2) The case of the plaintiff in nutshell is that the plaintiff and one Mr.

Anil Kulkarni had jointly purchased house from its predecessor in title. It was 92 x 30 ft. in dimension. Southern half part of the said house was of the plaintiff and northern half part was of Mr. Anil Kulkarni. On 20.4.2001 Anil Kulkarni had sold his northern half part to the plaintiff. Thus, the plaintiff became owner of entire 92 x 30 ft. house. On 7.8.1998 defendant/appellant had purchased the house towards southern side of house of plaintiff. It is the further case of the plaintiff that when plaintiff was out of station in the year 2004, taking disadvantage of the absence of the plaintiff, the defendant encroached on 20 x 10 ft. portion on southwest corner of plaintiff's house and the defendant has erected a wall and roof of tin-sheets over said encroached portion. It is the case of the plaintiff that plaintiff requested the defendant to remove the said encroachment, but defendant refused to remove the encroachment. Hence, the plaintiff filed the present suit for removal of 20 x 10 ft. of encroached area.

3) Per contra, the defendant in his written statement denied the allegations of encroachment and even the dimension of the house of the plaintiff. The defendant has contended that he had purchased the particular area of dimension from its predecessor in title. The case of the defendant is that since his purchase of the house from 8.7.1998, the wall separating the house of the plaintiff and defendant belongs to the defendant and the defendant is in possession of the said purchased house and the defendant has never made encroachment on the house of the plaintiff as alleged. Therefore, he prayed for dismissal of the suit filed by the plaintiff.

4) The trial Court framed the following issues and recorded its findings which are as follows :

ISSUES	FINDINGS
1. Does plaintiff proves his title to the suit house property bearing Municipal House No. 2-194 admeasuring 92 x 30 feet of Ambajogai ?	In negative
2. Does he proves that, in the south west corner of his said house property, the defendant has made encroachment of east-west 20 feet and south-north 10 feet ?	In Negative
3. Does he proves that, defendant is illegally in occupation and enjoyment of said encroached portion of the plaintiff's house ?	In Negative
4. Whether suit is within limitation ?	Does not arise
5. Whether plaintiff is entitled to vacant possession of encroached portion of suit house bearing Municipal Corporation House No. 2-194 ?	In Negative
6. What order and decree ?	Suit is dismissed with costs.
5) After considering the material on record, the Trial Court has dismissed the suit of the plaintiffs by holding that the plaintiff has not been able to prove his title over the encroached portion of the suit house. The Trial Court has observed that as per the case of the plaintiff defendant has encroached over 20 x 10 ft. portion of his property which is exactly south-west corner of his property. To determine the encroached portion, exact measurement of the alleged portion is required. For that purpose opinion of expert is necessary and Civil Engineer of Municipal Council was appointed as Court Commissioner. He has submitted his report at Exh. 41. Both the parties have given no objection to the report of the Court Commissioner and accepted the report of the Court Commissioner. In the map appended to the report of the Commissioner, the alleged encroached portion is shown in the orange colour and it's dimension is shown as 8.45 x 2.35 meter, which is about 28 x 8 feet. The trial Court has held that plaintiff has failed to prove the exact quantum and location of the alleged encroachment and also the	

date on which the encroachment has taken place. Encroachment is pleaded as 20 x 10 ft. which does not correspond to the encroachment shown by the Court Commissioner in it's report. In para No. 30, the Trial Court has observed as under :-

"30. Therefore, plaintiff has neither proved his title over the 92 x 30 feet of suit house No. 2-194 nor has he proved the unlawful gaining or possession of defendant over 20 x 10 feet exact area towards the south-west corner of the house over which he is having title. Resultantly, I answer issue Nos. 02 and 03 in the negative."

Since the plaintiff failed to establish his title over the alleged encroached portion of the suit property, the suit was dismissed.

6) The plaintiff thus filed appeal before the District Court. The appellate Court after considering the material on record has framed following points for determination :-

POINTS	FINDINGS
1. Whether trial court was right in deciding issue of ownership of the suit property against appellant ?	In the negative.
2. Whether it is necessary to remand the matter for the ends of justice ?	Yes.
3. What order and decree ?	As per final order

7) In para No. 7 of the judgment the District Court has held as under :-

".....Though the fate of entire suit is based upon the report of Court Commissioner, his evidence is not made available before the trial court for the purpose of ascertaining the extent and nature of alleged encroachment. On this sole ground the impugned judgment and decree requires to be set aside and matter is requires to be remand back to the trial court for the purpose of deciding the same afresh by giving opportunity to the both parties to lead their appropriate evidence."

8) After rendering such finding the Appellate Court has remanded the matter back to the Trial Court for deciding it afresh by giving proper opportunity to both the parties to lead their evidence.

9) The appellate Court has further held as under :-

".....At the most the trial Court on the basis of discrepancies appearing in the sale deeds on record regarding measurements, etc. would have ruled that the plaintiff is the owner to the extent of 85 x 28 feet northern side portion of the property out of old house No. 2/177 (new house No. 2/194), but trial court can not negative the ownership of plaintiff over the entire suit properties merely because measurement thereof appearing in his sale transaction is either faulty or same do not tally with the measurement of defendant, etc. Anyhow the trial Court has committed error while deciding issue of ownership and also failed to appreciate the evidence of expert on the issue of encroachment in proper perspective."

10) The defendant/appellant has challenged the order passed by the appellate Court in the present proceeding. It is the contention of the defendant that the plaintiff having failed to establish his case, no fresh opportunity can be granted to the plaintiff and the entire proceedings conducted before the Trial Court be set aside. The plaintiff had ample opportunity to lead the evidence and the plaintiff has lead evidence in the matter. The Trial Court having considered the entire evidence has dismissed the case of the plaintiff. Since the Trial Court on the basis of the material was able to render the judgment, rejecting the claim of the plaintiff, it was not available for the appellate court to set aside the judgment and remand the matter back to the trial Court for fresh adjudication. The appellate Court in its appellate jurisdiction could have appreciated the evidence and pass appropriate final judgment. The order of remand merely prolongs the proceedings and gives an opportunity to the plaintiff to fill in lacuna in his

evidence.

11) Having heard the learned counsel for the parties, the judgment of the appellate Court to remand the matter under Order 41, Rule 23-A of Civil Procedure Code has been examined by Supreme Court in the case of Shivakumar and ors. Vs. Sharanabasappa and others, (2021) 11 SCC 277 and has held 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."

12) The Hon'ble Supreme Court in the case of **Sirajudheen Vs. Zeenath**

and others, 2023 (3) SCALE 348. The Hon'ble Supreme Court has held at as under:-

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?'"

13) The Hon'le Supreme Court has held that the order of remand is not to be lightly passed. The appellate Court can enter into the the evidence and render findings. The remand order should not be passed just because the plaintiff has failed to establish his case.

14) In the instant case, the Commissioner's report has been jointly accepted by the parties. The plaintiff had enough opportunity to lead the evidence in this matter and if on the basis of that evidence, the Trial Court has rendered the finding that the plaintiff has failed to prove it's case, then the appellate Court could have re-appreciate the evidence and rendered appropriate findings.

15) In view of the discussion made above, I hold that the order of the appellate Court is erroneous in law. Hence, the order passed by the Appellate Court is set aside and the matter is remitted back to the appellate Court to decide the matter on merits. I have not expressed anything as regards the merits of the case. Appeal from order is disposed of accordingly.

[ARUN R. PEDNEKER J.]