

Sushma

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 9 OF 2018
WITH
CIVIL APPLICATION NO. 11161 OF 2022
WITH
CIVIL APPLICATION NO. 894 OF 2018

Omni Velji Vasave and another ... Appellants

Versus

Shankar Rajya Padvi and others ... Respondents

...

Mr. S.V. Natu – Advocate for Appellants

Mr. R.D. Bhalerao – Advocate for Respondent No. 1 to 3

....

CORAM : GAURI GODSE, J.

DATE : 21st February, 2023

PER COURT :

1. This appeal is filed by the original defendants for challenging the order of remand passed by the learned District Judge-1, Nandurbar, by judgment and order dated 05th October, 2017, in Regular Civil Appeal No. 44 of 2012.
2. By the impugned order, the judgment and decree dated 22nd March, 2012, passed by the learned Civil Judge Junior Division, Nawapur, in Regular Civil Suit No. 16 of 2004 is quashed and set aside and the suit is remanded back to the trial Court for

fresh decision. By the impugned order the Trial Court is also directed to appoint Court Commissioner for the purpose of carrying out survey.

3. By order dated 13th March, 2018, notice was issued to the respondents. Respondents are served and represented through Advocate. Both the learned Advocates appearing for the parties agreed that the Appeal From Order can be decided finally at admission stage. Appeal From Order is taken up for final disposal.
4. Respondents had filed Regular Civil Suit No. 16 of 2004 praying for declaration of ownership of the suit property bearing Gat No. 141/1 and 141/2. There was also a prayer made for possession of the suit property. In the alternative, there was a prayer made for possession after removal of encroachment of an area of 1 acre 10 gunthas out of the suit property. The defendants denied the suit claim on the ground that they are having title over the suit property. The defendant no. 1 claimed to be daughter of one Raoji. The claim of ownership of the defendants on the suit property was based upon a family arrangement of the year 1971. The defendants relied upon a mutation entry no. 514 in support of their pleadings claiming

ownership of the suit property. On the basis of the pleadings of the parties, the learned trial Judge framed following issues :

- “1) Whether plaintiffs proves that they are the owner of Gat No. 141/1 and 141/2, area 1 H 70 R of Panghram village, Tal. Nawapur ?
- 2) Whether defendants proves that the defendant No.1 is only daughter of Ravaji Maulya ?
- 3) Whether the plaintiffs are entitled to declare them as owner of the suit property as sought ?
- 4) Whether the plaintiffs are entitled for possession of the suit property ?
- 5) Whether alternatively the plaintiffs are entitled as owner to get possession of encroached land, 1 acre 10 gunthe ?
- 6) Whether the plaintiffs are entitled for mesne profit ?
- 7) Whether cause of action arise for filing the suit ?
- 8) Whether suit is within limitation ?
- 9) Whether suit contravene with provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act ?
- 10) Whether suit is liable for dismiss for want of non joinder of necessary parties ?

11) What order and decree ?”

5. Thus, the learned trial Judge framed specific issues with respect to the ownership rights of the plaintiffs on Gat No. 141/1 and 141/2 as well as framed an issue as to whether the defendants proved that defendant no. 1 was the only daughter of Raoji. On the basis of the issues framed, the parties led the evidence and the trial Court dismissed the suit.

6. Being aggrieved by the dismissal of the suit, the plaintiffs had preferred Regular Civil Appeal No. 44 of 2012. The first appellate Court framed points for consideration as under :

“1. Does the plaintiffs prove their title to the suit properties ?

2. Does the plaintiffs prove that they are the owners of the land admeasuring 8.9 plus 0.16 acres in Gat No. 140/1 to 140/4 (old 91/1) ?

3. Does the defendants prove that they are the owners of the land admeasuring 4.10 acres in Gat No. 141/1 and 141/2 ?

4. Does the plaintiffs prove that the defendants have encroached on their land ? If, yes, to what extent ?

5. Are the plaintiffs entitled for the declaration of ownership and for possession of the suit properties, or in the alternative for recovery of possession of the encroached portion over their

land ?

6. Are the plaintiffs entitled for getting the mesne profit, if yes, at what rate ?

7. Is the suit within limitation ?

8. Whether the impugned judgment and decree passed by the learned trial Court calls for any interference ?

9. What order and decree ?”

7. On the basis of the points for consideration that were framed the first appellate Court examined the evidence and recorded findings on the claim of the defendants, based on mutation entry no. 514. In paragraph no. 33 of the impugned judgment the first appellate Court held that the parties had acted upon mutation entry no. 514 by virtue of which Rajya (predecessor in title of plaintiffs) had received Gat No. 91/1 and defendant no. 1 had received Gat No. 91/2. The first appellate Court recorded that 7/12 extract at exhibit 42 in respect of Gat No. 140/4 recording the name of Rajya would show that he was cultivating the land since 1976 and 1977. The first appellate Court also recorded that it was not in dispute that Gat No. 140 was earlier Gat no. 91/1 and Gat no. 141 was earlier Gat no. 91/2. Thus, the first appellate Court has also recorded findings on the other points

for determination framed by the first appellate Court and has given reasons for recording those findings.

8. Perusal of the impugned judgment shows that the first appellate Court on appreciation of evidence, has arrived at conclusions on the points for consideration that were framed. However, after recording findings on the points for consideration that were framed, the first appellate Court has referred to the reliance placed by defendant no. 1 on the mutation entry 514 and held that in view of the alternative prayers of the plaintiffs, the trial Court ought to have framed proper issues. The first appellant court thus re-framed the issues which read as under :

“I) Whether the plaintiffs prove that they are the owners of the land admeasuring 8.9 plus 0.16 acres in Gat No. 140/1 to 140/4 (old 140 (old 91/1) ?

II) Whether the defendants prove that they are the owners of the land admeasuring 4.10 acres in Gat No. 141/1 and 141/2 (old 141 (old 91/2) ?

III) Whether the plaintiffs prove that the defendants have encroached on their land ? If, yes, to what extent ?”

9. The first appellate court has given reasons for recasting the issues by relying upon the reasoning recorded by the trial Court.

Hence, by re-framing issues the first appellate court has set aside the decree passed by the trial court and has remanded the matter back for decision on the issues that are re-framed. Considering the alternative prayer with respect to removal of encroachment the first appellate court has also directed the Trial Court to appoint Court Commissioner for the purpose of taking measurement of the properties of the parties.

10. Being aggrieved by the said order of remand the defendants have preferred the present Appeal From Order. Learned counsel for the appellants has submitted that perusal of the plaint would show that a specific prayer in the suit is for the purpose of declaration of title on the suit property i.e. Gat No. 141/1 and 141/2. He submitted that the prayer for possession as well as the alternative prayer for removal of encroachment is with respect to the same suit property.
11. He further submitted that the defendants denied the suit claim and further claimed the ownership of the suit property. Hence, the trial Court had framed proper issues with respect to the rights claimed by the parties. Thereafter, the parties led evidence on the basis of the issues that were framed. He submitted that the first appellate Court had in fact framed points for

determination and arrived at conclusions after recording findings on the points for determination. It is further submitted that the first appellate Court has remanded the matter back by framing fresh issues. However, there are no reasons recorded for setting aside the decree of dismissal of the suit which was filed for declaration of ownership. He submitted that the reasons given for remand are on the basis of alternative prayer of the plaintiffs which is for removal of encroachment. However, in the re-casted issues by the first appellate Court, the burden is casted upon the defendants to prove ownership of the suit property i.e. Gut No. 141/1 and 141/2.

12. Learned counsel submitted that the claim of ownership is by the plaintiffs by filing the suit, hence, the initial burden is upon the plaintiff to prove the ownership of the suit property. However, the first appellate Court has casted that burden on the defendants by re-framing the issues. He further submitted that even otherwise the plain reading of the plaint would show that the trial Court had framed proper issues and the parties have also led evidence. He thus submitted that there is absolutely no reason recorded by the first appellate Court for re-casting the issues and remanding the matter back to the trial court for

decision afresh. In support of his submissions, the learned counsel for the appellants relied upon the decision of the Hon'ble Supreme Court in the case of *Arvind Kumar Jaiswal (D) Thr. LR. Versus Devendra Prasad Jaiswal Varun*¹. He relied upon this decision in support of his submission that when evidence is already led by the parties in the trial Court and a decision could be rendered by the first appellate Court on appreciation of such evidence, then an order of remand is not warranted. He submitted that it was always open for the first appellate Court to direct the Trial Court to record fresh evidence and then record findings on a particular issue in terms of Rule 25 of Order XLI of the Code of the Civil Procedure 1908 ("CPC"), by keeping the appeal pending. Thus, the learned counsel for the appellants submitted that the order of remand passed by the first appellate Court is not sustainable and the appeal should be remanded back to the District Court for decision on the basis of the evidence already on record. He thus, submitted that there is absolutely no reason for remand and hence, the order of remand be set aside.

13. Learned counsel appearing for the respondents/plaintiffs submitted that the first appellate Court has rightly remanded the

¹ SLP (C) No. 9172 of 2020

matter back to the trial Court by framing proper issues. He submitted that the defendants have specifically come up with the case that defendant no. 1 was the only daughter of deceased Raoji and was claiming through deceased Raoji. He further relied upon the reasoning given by the Trial Court on the issue no. 2 which was framed. He submitted that the trial Court has specifically recorded the findings that the defendant no. 1 had failed to prove that she is the only daughter of deceased Raoji. Hence, in view of defendant no. 1 failing to prove the case that defendant no. 1 was only daughter of deceased Raoji, the first appellate Court has rightly casted the burden upon the defendants to prove that they are owners of the suit property that is Gat Nos. 141/1 and 142/2. He, thus, relied upon the reasoning given by Trial Court to support the order of remand passed by the first appellate Court.

14. I have considered the submissions made by both the parties. There is no dispute that the suit is filed for declaration of title of suit property Gat Nos. 141/1 and 141/2. The prayers in the suit are specifically for possession and alternative prayer for removal of encroachment with respect to the same suit property. There is also no dispute that the present appellants have pleaded that they

are claiming title over the suit property on the ground that the defendant no. 1 is the only daughter of deceased Raoji.

15. I have perused the copy of the plaint as well as the written statement. The perusal of the plaint shows that the suit is filed on the ground that the plaintiffs are owners of Gat Nos. 141/1 and 141/2. In paragraph no. 3 of the plaint, it is specifically contended that on the basis of mutation entry nos. 514 and 543, defendant no. 1 was claiming to be daughter of Raoji and further, on the basis of the name of her husband that was recorded by way of mutation entry no. 543, the defendants were claiming right in the suit property. Thus, the pleadings of the plaintiffs are with respect to the objection to the defendants claiming right over the suit property on the basis of the revenue record. Hence, the suit was filed for declaration of title as well as possession and in the alternative for removal of encroachment in respect of the suit property. Perusal of the plaint also shows that the claim of the defendants through Raoji by relying upon the revenue record, was specifically disputed by the plaintiffs.
16. Perusal of the written statement shows that the defendants are claiming rights in the suit property through Raoji. Thus, on the basis of the pleadings of the parties specific issues were framed

with respect to the claim of ownership of the plaintiffs over the suit property. The perusal of the plaint also shows that the suit is not for possession on the basis of title. However, in view of the dispute of the parties the prayer is specifically for a declaration that the plaintiffs are owners. Thus, once the suit is filed for declaration of ownership with respect to a particular property, the initial burden will be upon the plaintiffs to prove their title on the basis of pleadings and evidence. In such circumstances, considering the specific pleadings of the parties, the issues framed by the Trial Court cannot be faulted with. The evidence led by the parties and the reasoning given by the Trial Court cannot be a basis for re-framing the issues. The issues are always required to be framed on the basis of the pleadings of the parties. The perusal of the impugned judgment shows that the first appellate Court has examined the entire evidence on record by framing proper points for determination and have also recorded conclusions on appreciation of the evidence on record.

17. I do not find that the issues that are re-casted by the first appellate Court are in accordance with the pleadings of the parties. I find merits in the submissions made by the learned counsel for appellants that there was no reason for recasting the

issues. The first appellate Court had in fact already examined the evidence on record and hence, the first appellate Court was required to give decision by appreciating the evidence on record. The decision of the Hon'ble Supreme Court relied upon by the learned counsel for the appellants specifically holds that in a given case, even if an issue is not framed or the Trial Court has failed to determine any question of fact, it is always open for the first appellate Court to render the decision on appreciation of the evidence that is already on record and there should not be an order of remand to the Trial Court.

18. In the present case after appreciating the evidence on record, if in the opinion of the first appellate Court any fresh issue arose in the suit and/or if any particular finding was required on the point of the alternative prayer of removal of encroachment, it was always open for the first appellate Court to call for evidence as per the provisions of Rule 25 of Order XLI of CPC and the same cannot be a reason for setting aside the decree passed by the Trial Court and remit the matter back to the Trial Court for fresh hearing. The Appeal could have always been kept pending and if specific finding was required on fresh issue if any, arisen in the matter, the findings could have been called for from the Trial

Court. Hence, I do not find any reason for remanding the matter to the Trial Court.

19. In such circumstances, the present appeal is required to be allowed and the Civil Appeal No. 44 of 2012 is required to be restored to the file of the District Court for deciding it afresh.

Hence, following order is passed :

- i. The impugned judgment and order dated 05th October, 2017, passed by the learned District Judge-1, Nandurbar is quashed and set aside.
- ii. Regular Civil Appeal No. 44 of 2012 is restored to file of the learned District Judge-1, Nandurbar for decision afresh.
- iii. The first appellate Court will decide the appeal as expeditiously as possible.
- iv. Parties will not unnecessarily ask for adjournment and will co-operate for early disposal of the appeal.
- v. Parties agreed to appear before the concerned District Judge at Nandurbar, on 27th March, 2023.
- vi. No fresh notice for appearance will be necessary.

[GAURI GODSE, J.]