



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

APPEAL FROM ORDER NO.64 OF 2018

1. Govind s/o Ambadasrao Kulkarni,
Age : 63 years, Occu : Advocate
2. Nalini w/o Govind Kulkarni,
Age : 61 years, Occu.: Teacher

Both R/o.: Somesh Colony, Behind
Kalamandir, Nanded at present
Taroda (Kd), Malegaon, Nanded,
Tq. & Dist. : Nanded

... **APPELLANTS**
(Orig. Plaintiffs)

VERSUS

1. Anantrao S/O Vinayakrao Joshi,
Age : 70 years, Occu.: Retired,
R/o.: Asarjan, Tq. & Dist. Nanded
Through G.P.A. Harishchandra
2. Harishchandra s/o Madhavrao Tribhuvan,
Age : 71 years, Occu.: Retired,
R/o.: Bisen Nagar, V.I.P. Road, Nanded
Tq. & Dist. Nanded
3. Devprakash s/o Devidas Tunganwar,
Age : 50 years, Occu.: Service,
R/o.: Somesh Colony, Behind Kalamandir,
Nanded, TQ. & Dist Nanded

... **RESPONDENTS**
(Orig. Defendants)

....
Advocate for the Appellants : Mr. Hamzakhan I. Pathan
Advocate for Respondent No.2 : Amit A. Mukhedkar
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CORAM : SANDIPKUMAR C. MORE, J.
RESERVED ON : 02/02/2024.
PRONOUNCED ON : 12/04/2024.

JUDGMENT :

1. The appellants, who are the original plaintiffs in RCS No.358 of 2000, have preferred this appeal against the judgment and order

dated 06/12/2017 in Regular Civil Appeal No.57 of 2010 passed by the learned District Judge, Nanded i.e. the first appellate court. Under the aforesaid impugned judgment and order, the learned first appellate court has set aside the judgment and decree dated 30/08/2007 in RCS No.358 of 2000 and remanded the matter back to the trial court i.e. 4th Joint Civil Judge (Junior Division), Nanded for decision on merit.

2. The background facts are as under :

The present appellants had filed RCS No.358 of 2000 against the present respondents / original defendants for declaration of ownership by way of adverse possession alongwith permanent and mandatory injunction in respect of house property mentioned therein. The learned trial court had decreed the said suit by dismissing the counter-claim of the original defendants. Against this, original defendant Nos.1 & 2 preferred Regular Civil Appeal No.57 of 2010, which was in fact dismissed by the learned first appellate court initially on 01/10/2011 by passing an order on applications Exhibit-4, 11 & 15 filed by the present appellants. However, present respondents Nos.1 & 2 had preferred Second Appeal No.542 of 2012 against the said dismissal and in the said appeal, this court set aside the earlier dismissal of the RCA No.57 of 2010 and directed the learned first appellate court for decision on

merit alongwith applications Exhibit-4, 11 & 15 in original appeal. Hence, this appeal.

3. The learned counsel for the appellants / plaintiffs submits that the learned first appellate court contrary to the direction of this court, did not decide the appeal on merit and remanded back to the learned trial court by setting aside the decree in the original suit. He pointed out that the learned first appellate court did not pass any order on applications Exhibit-4 & 11 despite direction of this court. Thus, he requested for setting aside the impugned judgment and order and direction to the learned trial court to decide the suit on merit.

4. On the contrary, the learned counsel for respondents No.2, strongly opposed the submissions made on behalf of the appellants. According to him, the learned first appellate court has rightly remanded the matter back to the trial court by setting aside the decree in original suit as the learned first appellate court was not in position to decide the appeal on merit since counter-claim made by respondent Nos.1 & 2 was erroneously dismissed in default by ignoring the settle principles of law. He pointed out that even this court in Second Appeal No.542 of 2012 has observed the illegality committed by the learned first appellate court in dismissing

the appeal initially only on the basis of applications Exhibit-4 & 11 filed by the present appellants.

5. Heard rival submissions. Also perused entire documents on record alongwith impugned judgment and order.

6. Admittedly, the learned first appellate court after direction of this court in Second Appeal No.542 of 2012, has remanded the matter back to the trial court for decision on merit by setting aside the decree passed in RCS No.358 of 2000. The impugned judgment and order indicate that the learned first appellate court is of the opinion that counter claim of original defendant Nos.1 & 2, who are present respondent Nos.1 & 2, was wrongly dismissed by the learned trial court without giving them any opportunity to lead evidence. It has also been held that the learned trial court contrary to the mandate of Order XVIII Rule 4 of CPC exhibited the documents relied upon by the appellants / plaintiffs without deciding admissibility of such documents in absence of evidence by the plaintiff thereon. Thus, in short it appears that the learned first appellate court due to aforesaid reason, has remanded back the matter to the learned trial court for deciding the suit afresh by giving an opportunity to present respondent Nos.1 & 2 to lead evidence in

respect of their counter-claim and to cross-examine the witness of plaintiffs.

7. It is significant to note that this court in Second Appeal No.542 2012 has observed that initial dismissal of RCA No.57 of 2010 in view of Exhibits-4 & 11, was completely erroneous and it was wrongly observed that dismissal of the counter-claim for possession in default being unchallenged, would operate as '*resjudicata*' on the findings recorded in the suit. This court has clearly observed that the learned first appellate court ought to have considered that dismissal of the counter-claim in default being not a decision on merit would not operate *res judicata* on the findings recorded in the suit. Further, it has also been held by this court in the second appeal that the learned first appellate court failed to deal with concept of ownership by adverse possession, whether mere lapse of twelve years would result into ownership of the occupier. Further, it is also opined that the claim of adverse possession would be adjudged also with reference to legal position as to whether plaintiffs can lay claim by a suit for for such declaration, looking at the decision of the Hon'ble Apex Court in the case of ***Gurudwara Sahib vs Gram Panchyat Village Sirthala and another, reported in (2014) 1 SCC 669***. As such, from the very observation of this court, it is evident that no opportunity was given to the present respondent

Nos.1 & 2 for cross-examination of witness of the plaintiffs. Moreover, at the time of closing evidence of plaintiffs, the learned trial court directly dismissed their counter-claim without keeping it for their evidence on it. Therefore, considering all these aspects the learned first appellate court appears to have granted an opportunity to defendant Nos.1 & 2 to contest their claim on merit. Moreover, this court has also expressed opinion that the claim of the appellants / plaintiffs in respect of their adverse possession over the suit house needs to be revisited. Further, the learned first appellate court has also rejected the applications Exhibit-4 & 11 and therefore, it cannot be said that the learned first appellate court did not decide those applications. In view of the same, there is no perversity in the impugned judgment and order passed by the learned first appellate court in Regular Civil Appeal No.57 of 2010 on 06/12/2027 and accordingly, the appeal from order stands dismissed.

(SANDIPKUMAR C. MORE, J.)