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(This order is modified as per the order dated 28.3.2025 passed in Review
Application No. 35 of 2025)

A.O. 2.24 R-1.odt

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
APPEAL FROM ORDER NO. 2 OF 2024**

Rauf Baig s/o. Ismail Baig,
Age 50 years, Occ. Business,
R/o. Kamal Mohalla, Lal Baugh,
Khuldabad, Taluka Khuldabad,
District : Chhrapati Sambhaji Nagar,
(Old Aurangad).

.. Appellate
(Original Plaintiff)

Versus

1. Sumanbai @ Rukhmanbai Kachru Jadhav,
Age 81 yearse, Occ. Household,
R/o. Sulibhanjan, Taluka Khuldabad,
District : Chhrapati Sambhaji Nagar,
(Old Aurangabad).
2. Gautambai Vitthal Bankar,
Age 66 years, occ. Labour,
R/o. Sulibhanjan, Taluka Khuldabad,
District : Chhrapati Sambhaji Nagar,
(Old Aurangabad).
3. Babasaheb s/o. Kacharu Jadhav,
Age 45 years, Occupation Labour,
R/o. Sulibhanjan, Taluka Khuldabad,
District : Chhrapati Sambhaji Nagar,
(Old Aurangabad).
4. Sunita Prakash Deokar,
Age 59 years, Occupation Labour,
R/o. Sulibhanjan, Taluka Khuldabad,
District : Chhrapati Sambhaji Nagar,
(Old Aurangabad).
5. Ratan S/o. Kacharu Jadhav,
Age 43 years, Occ. Tailor,
R/o. Shulibhanjan, Taluka Khultabad,
District Chhatrapati Sambhaji Nagar,
(Old Aurangabad)

. Respondents
(original defendants)

Mr. N.S. Shah, Advocate h/f . Mr. S.V. Natu, Advocate for the appellants
Smt. H.N. Jadhav, Advocate for respondent Nos. 1 and 5.

CORAM :S.G. CHAPALGAONKAR, J.

DATE : 21st NOVEMBER, 2024.

JUDGMENT :-

1. Heard Mr. N.S. Shah, learned advocate holding for Mr. S.V. Natu, Advocate for the appellant and Smt. H.N. Jadhav, Advocate for respondent Nos. 1 and 5. Although respondent Nos. 2,3 and 4 are served with the notice of this appeal, they failed to cause their appearance.

2. By consent of parties, appeal is heard on the following substantial questions of law :-

[I] Whether the appellate court was justified in remanding the case to the trial court by setting aside the judgment and decree dated 25.6.2015 passed by the trial court in R.C.S. No. 37 of 2013 ?

[II] Whether the appellate court exercised jurisdiction within the parameters of Order 41 Rule 23 of C.P.C.

3. Brief facts of the case, necessary for adjudication of the present appeal are summarized as under :-

Appellant/plaintiff had instituted R.C.S. No. 835 of 2003 against the respondents/defendants seeking a decree of perpetual injunction in respect of the suit property i.e. land Gat No. 17 admeasuring 82R situated at village Shuli Bhanjan, Taluka Khultabad, Dist. Aurangabad. The said suit was decreed in favour of the plaintiff

and the deceased-defendant Kachru Kondiba Jadhav was restrained from causing obstruction or making encroachment over the suit property. According to plaintiff, in wake of such injunction, Kachru Jadhav raised construction of house in Gat No. 17, adjacent to Khultabad-Shulibhanjan Road, by making encroachment to the extent of 15x20 feet area over the suit property. The plaintiff had, therefore, adopted recourse of execution in R.D. No. 151 of 2006. The Executing Court was pleased to appoint a Court Commissioner to find out the encroachment, if any, at the hands of the defendant/judgment debtors. The Court Commissioner submitted his report dated 8.6.2012 alongwith measurement map, which depicts defendants encroachment on the suit land. However, the Execution Proceeding was disposed of with observation that the Executing Court cannot go beyond the decree. Consequently, plaintiff/appellant instituted present suit / R.C.S. No. 37 of 2013, seeking delivery of possession by removing encroachment shown in measurement map. The defendants appeared in the suit through advocate, filed written statement contending that land in the ownership and possession of the plaintiff is situated in Gat No.17, alleged measurement map is incorrect, the construction raised by defendants is on altogether different land than Gat No. 17.

The plaintiff examined two witnesses in support of his case. PW-2 Anil is a cadastral surveyor, who approved the measurement map indicating encroachment of defendants over the plaintiff's land. Unfortunately, defendants failed to cross examine the witnesses. Consequently, "No Cross" order was passed. The defendants failed to avail opportunity to lead evidence. Eventually, evidence was closed, after giving opportunity to the defendants. Finally, trial court accepted the

case of the plaintiff and decreed the suit for possession. It is a matter of record that decree is already executed and on 29.9.2015, the possession of encroached area is handed over to the plaintiff.

The respondents/defendants filed Regular Civil appeal No. 53 of 2022 before the District court in the year 2018 alongwith application for condonation of delay. Although, appellate court had declined, this Court condoned the delay and directed registration of appeal. Consequently, appeal was taken up for hearing on merit and came to be allowed vide impugned order dated 23.10.2023, by which the judgment and decree passed by the trial court has been quashed and set aside and suit has been remanded back to the trial court with direction that the suit be re-registered and defendants be granted opportunity to cross-examine plaintiff's witnesses, adduce own evidence and decide the case afresh.

4. Mr. N.S. Shah, learned advocate for the appellants vehemently submits that trial court failed to follow mandate under Order 41 Rule 23 of C.P.C. and mechanically remanded the matter back to the trial court. He would submit that appeal memo before first appellate court, nowhere stipulate reason as to what precluded defendants from cross-examining witnesses of the plaintiff or adduce their own evidence during the trial. In spite of fullest opportunity, if defendant failed to cross-examine plaintiff's witnesses or lead his own evidence, in absence of explanation for such lapse, appellate court could not have remanded the matter. He would submit that the trial court had decreed the suit in the year 2015. Even the decree was executed. Thereafter, an appeal was

filed in the year 2018 alongwith application for delay condonation. He would, therefore, submit that there was no ground for remand of the matter under the scheme of Order 41 Rule 23 of C.P.C.

5. In support of his submission, he relies upon the judgment of the Supreme Court in the case of *Syeda Rahemunissa Vs. Malan Bi reported in (2016)10 SCC 315*, and judgment of this Court in the case of *Barku Pundlik Patil (died) through LRs vs. Subhash Govindrao Pagare, reported in 2023(1) Mh.L.J. 720*.

6. Per contra, Smt. H.N. Jadhav, learned advocate appearing for respondents would submit that respondents have specifically raised defence in the written statement that their construction is in different Gat Number than that of the plaintiff. The four boundaries given in the plaint or map prepared by the surveyor are incorrect. Since the advocate engaged on behalf of the defendants failed to communicate progress of the matter or cross-examine plaintiff's witnesses, the decree has been passed. Fair opportunity needs to be given in case of the dispute pertaining to immovable property. The appellate court has taken a pragmatic view of the matter and directed remand of the suit for re-trial thereby granting opportunity in favour of the defendants to cross-examine the plaintiffs witnesses and adduce their own evidence. In that view of the matter, no interference is warranted in this appeal.

7. Having considered the submissions advanced, it is apposite to refer to the provisions of Order 41 Rule 23 which deals with the powers of the appellate Court, which read thus :-

Order 41 Rule 23 :-

Remand of case by Appellate Court.- 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, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re- admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

*23-A. Remand in other cases.-Where 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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under **Rule 23**."*

The mandate of aforesaid provision has been considered and explained by the Honourable Supreme Court in the case of **Shivakumar and others Vs. Sharanbassappa reported in (2021) 11 SCC 277**.

"26.4.A conjoint reading of Rules 23, 23A and 24 of Order XLI 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 XLI CPC](#) and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial 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.”

Similarly, in case of **Sayed Rahumunissa (supra)** the Supreme Court observed in para. 35 as under :-

*“35. It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. **In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court. The High Court instead should have decided the appeals on merit pts. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals.”***

8. Bearing in mind principles of law as espoused by the Supreme Court, if facts and circumstances of the present case are examined, it is clear that the defendants had caused appearance before the trial court through an advocate and filed written statement. Issues were framed and evidence of the plaintiff's witnesses was recorded. Since defendants'

advocate failed to cross-examine the plaintiff's witnesses, "No Cross" order was passed. Even the defendants failed to lead their evidence. Consequently, based on the evidence recorded on behalf of the plaintiff, trial court proceeded to pass the decree. The memo of appeal filed on behalf of defendants before first appellate Court, nowhere stipulate the reason as to why plaintiff's witnesses were not examined or defendants have not lead evidence. One line allegation that the advocate has not communicated progress of the matter would not be sufficient. Only by putting blame on advocate, a party cannot take benefit to overcome his own fault or negligence in attending court proceeding. Record shows that plaintiff instituted suit in the year 2013 and same has been disposed of in the year 2015. Pertinently, the decree passed by the trial court has been executed in the year 2015 itself and respondent had not taken any steps till 2018. Though, delay in filing the appeal was condoned, fact remains that the defendants were not diligent or grossly negligent in defending litigation.

9. The observations in impugned judgment, indicate that no reasons are recorded for adopting recourse of remand of suit. The appellate court merely observes that since it is a civil dispute pertaining to property rights, an opportunity needs to be given to defendants to cross examine plaintiff's witnesses or lead their evidence. However, the appellate court nowhere recorded any finding as to what precluded the defendants from availing opportunity to cross-examine plaintiff's witnesses or adduce their own evidence before the trial court. If defendants were negligent in defending the case and once they failed to avail opportunity made available to them as per law, in absence of reasons for such default, casual order of remand cannot be permitted. It is trite that a party cannot

be permitted to fill up the lacuna or order of remand is not to be passed merely for allowing the party to fill up the lacuna in its case. In that view of the matter, it was necessary on the part of the appellate court to consider and decide the appeal, on the basis of evidence already tendered into service before the trial court and record finding on re-appreciation of the material already on record, as a last fact finding court.

10. In result, questions of law framed above is answered negative. Hence, the following order :-

ORDER

- [i] The Appeal from Order is partly allowed;
- [ii] The impugned order dated 23.10.2023 passed by the First Appellate Court in R.C.A. No. 53 of 2022, is hereby quashed and set aside.
- [iii] The proceeding is remitted to the appellate Court to re-decide the Regular Civil appeal No. 53 of 2022, on its own merit, in accordance with law.
- [iv] Parties to appear before appellate court on 9.12.2024.
- [v] The appellate court shall expeditiously decide appeal on its own merits, after giving opportunity of hearing to the parties, in any case within period of one year from date of this order.
- [vi] Civil application, if any, stands disposed of.

[S.G. CHAPALGAONKAR, J]

grt/-