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SA 728 & 29.13.odt

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

**SECOND APPEAL NO. 728 OF 2013
WITH
SECOND APPEAL NO. 729 OF 2013.**

Charandas S/o. Nivrutti Gavle,
Age 57 years, Occ. Service,
R/o. Ahmedpur, Tq. Ahmedpur,
Dist. Latur.

.. APPELLANT
(Orig. Defendant)

VERSUS

1. Dagdu S/o. Nivrutti Gavle,
Age 59 years, Occ. Service.
2. Manohar s/o. Nivrutti Gavle,
Age 55 years, Occ. Meson,
Both R/o. Ahmedpur, Tq. Ahmedpur,
District Latur.

..RESPONDENTS
(Orig. Plaintiffs)

Mr. J.R. Patil, Advocate for appellant
Mr. Anand Chawre, Advocate for respondents.

CORAM : S.G. CHAPALGAONKAR, J.

**RESERVED ON : 11TH MARCH, 2025.
PRONOUNCED ON : 19th MARCH, 2025.**

JUDGMENT :

1. Appellant/original defendant impugns the common judgment and decree dated 9.7.2013 passed by District Judge, Ahmedpur in R.C.A. No. 108 of 2011 and 109 of 2011, thereby dismissing RCS No. 108 of 2011 and allowing R.C.S. No. 109 of 2011, directing defendant to hand over vacant possession of constructed room in the suit plot as

described in Para. No. 8A of plaint. (For sake of convenience, parties are referred as per their original status in suit)

2. Respondents/original plaintiffs instituted suit bearing RCS No. 109 of 2011 for declaration of ownership and perpetual injunction qua suit plot situated at Survey No. 85/2/1 at Ahmedpur, more particularly, described in plaint para. No.5. Plaintiffs and defendant are real brothers. Plaintiffs contend that they purchased suit plot from Babarao Apparao Kadam. They were put in possession of suit property. They developed the plot and constructed a room for storage of construction material. Defendant, without any right and concern in the suit property, started disturbing their peaceful possession and gave threat to dispossess plaintiffs from suit plot. On 29.11.2001, defendant denied plaintiffs ownership over suit plot and as such, cause of action arose to file suit. Hence, they claim relief of declaration of ownership and perpetual injunction against defendant.

3. Defendant refuted averments in plaint. According to him, he contributed equally with plaintiffs in purchase of suit plot. He paid equal contribution to vendor of plot – Babarao Kadam alongwith plaintiffs. However, by misleading vendor Babarao Kadam, they got executed sale deed in their name. According to him, he resides alongwith his family in suit plot.

4. Trial court framed issues, recorded evidence of parties and concluded that plaintiffs have proved their title, however, failed to prove possession; eventually passed decree declaring that plaintiffs are owners of suit plot and rejected the relief of perpetual injunction.

5. Plaintiffs and defendant filed respective appeals before

learned District Judge at Ahmedpur. During pendency of appeal, plaintiffs filed an application for amendment of plaint, thereby seeking the relief of possession and incorporating averments regarding their dispossession during pendency of said suit. The appellate court allowed such amendment, eventually framed additional issue was framed as under :-

Sr. No.	ADDITIONAL ISSUE	FINDING
1.	Whether plaintiffs prove that during the pendency of the suit in the month of July 2003, defendant dispossessed plaintiffs from the room constructed on the suit plot ?	Yes.

6. Plaintiffs and defendant were permitted to lead evidence on additional issue and finally appeal filed by defendant came to be dismissed, whereas, appeal filed by plaintiffs came to be allowed, granting decree of possession in favour of plaintiffs.

7. In this background, the present second appeals are filed.

8. Mr. Patil, learned advocate for appellant/defendant submits that suit was instituted for relief of declaration of ownership and perpetual injunction. Trial court, after recording evidence of parties, accepted case of plaintiffs as to relief of declaration of ownership, however, refused to grant decree of injunction, holding that defendant is in actual possession of property. Plaintiffs filed appeal against refusal to grant relief of perpetual injunction. During pendency of said appeal, they moved an application for amendment of plaint for incorporating averments regarding dispossession by defendant and for adding the prayer for grant of decree of possession. The appellate court, therefore,

framed additional issue, particularly, on the point of fact of alleged dispossession by defendant. Appellate court, further proceeded to record evidence of plaintiff No.1 (at Exh.93) on additional issue as per amendment and concluded that plaintiffs have proved dispossession at the hands of defendant and granted decree of possession in favour of plaintiffs. According to Mr. Patil, the procedure adopted by appellate court was not in conformity with the provisions of Order 41 Rules 25 and 26 of C.P.C.

9. Per contra, Mr. Chaware, learned advocate for respondents/plaintiffs submits that fact of dispossession of plaintiffs was already brought on record before the trial court. Evidence to that effect was available on record of trial court. After amendment of plaint, merely evidence of plaintiff No.1 was recorded at Exh.93 at appellate stage, and after considering same alongwith other evidence already on record. He would, therefore, urge that no prejudice is caused to defendant due to the procedure adopted by appellate court. He would, therefore, justify judgment and decree passed in appeal.

10. Having considered the submissions advanced following substantial questions of law arise for consideration in this appeal :-

- [I] Whether appellate court is justified in recording evidence in deference to the amendment of plaint and rendering finding of fact at appellate stage, instead of relegating the issue of alleged dispossession of plaintiffs to trial court ?
- [ii] Whether the procedure adopted by appellate court is inconsistent with the provisions of Order 41 Rules 25 and 26.
- [iii] Whether right of defendant is prejudiced on account of

recording evidence and rendering a finding on issue of dispossession at appellate stage, causing loss of opportunity to assail the finding in appeal.

12. Learned advocates for respective parties advanced their submissions on aforesaid substantial questions of law and requested to decide appeals, at admission stage.

13. Order 41 Rules 25 and 26, which are germane for deciding the controversy involved in these appeals, read thus :-

“25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.—Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor 1 [within such time as may be fixed by the Appellate Court or extended by it from time to time].

26. Findings and evidence to be put on record. Objections to findings.
(1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding”.

(2) Determination of appeal.—After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.”

14. The aforesaid rules contemplate procedure where the appellate court frames an issue that has been omitted by trial court

whose decree was appealed from. In present case, appellate court allowed the prayer for amendment of plaint at appellate stage. Plaintiffs incorporated averment as to their dispossession during pendency of suit, eventually claimed relief of possession. Essentially, the issue framed was relating to factual aspect as to dispossession at the hands of defendant and requires recording of evidence. Eventually, examination of plaintiffs or his witnesses and their cross examination was necessary. In these circumstances, the appellate court was under obligation to follow the procedure in tune with Rule 25 and after framing necessary issue, ought to have referred the same to the trial court, with directions to record additional evidence required. In that contingency, the trial court would have recorded additional evidence and returned evidence with finding on issue to the appellate court. At this stage, the procedure under Rule 26 could have been resorted to by parties and presented their memorandum of objections to such finding. The appellate court, then, could have delivered judgment considering finding of trial court on all the issues, including additional issue so framed, keeping in mind the objections to the finding recorded by trial court. The appellate court appears to have failed to follow the above procedure.

15. In present case, non-observance of aforesaid procedure has certainly caused prejudice to the defendant, who lost an opportunity to get finding from trial court on the additional issue and in the event of adverse finding, to assail it before the appellate court under Rule 26. It is trite that, in cases, where additional evidence is required, appellate court has no option than to remit the issue for decision to the trial court for rendering its finding after recording of evidence. The law on the aforesaid aspect has been crystallized by the Allahabad High Court in the

case of ***Bhonu vs. Nizamuddin Vs. Nankulli and others reported in AIR 1997 (ALL) 236***, wherein their lordships has observed in para.15 as under :-

“15. Under these circumstances, the appellate judgment cannot be upheld. There should be a remand of the case so that the first additional issue touching the allegation of dispossession on 2.3.1980 be referred to the trial Court for a decision thereon after affording opportunity to the parties to lead evidence on that point. Once the issue is answered by the trial Court, the aggrieved party may be allowed an opportunity to file appeal, cross appeal, cross objection, as the case may be and only then the first appeal should be decided touching all the issues including the issue on Court on the question of recovery of possession.”

16. Similar legal position can be discerned from the exposition of law by the Supreme Court in the case of ***Gobila Gurnam vs. Kurinoti Ayappa and others AIR 1974 SC 1702***, and in the case of ***Smt. Bachchan Devi and another vs. Nagar Nigam Gorakhpur and another reported in AIR 2008 SC 1284***. The relevant observations are found in para. 10 of e judgment in case of ***Bachchan Devi (supra)***, which reads thus :-

“10. A bare reading of the provision makes it clear that the same comes into operation when the Court, from whose decree the appeal is preferred, has omitted to frame or try and issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order XLI Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate Court to do so. This is clear from the use of

the expression 'may'. But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor. Requirement for recording the finding of facts and the reasons disclosed from the facts is because the appellate court at the first instance has come to the conclusion that the lower court has omitted to frame or try any issue or to determine any question of fact material for the right decision of the suit on merits. It has to be noted that where a finding is called for on the basis of certain issues framed by the appellate court, the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of the first instance. This position was highlighted in [Gogula Gurumurthy and Others v. Kurimeti Ayyappa](#) (1975(4) SCC 458), where it was inter-alia observed in para 5 as follows:

"We consider that when a finding is called for on the basis of certain issues framed by the appellate Court the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of first instance. We find the same view taken in [Gopi Nath Shukul v. Sat Narain Shukul](#) (AIR 1923 All 384)."

17. In light of aforesaid legal position and the factual matrix, the procedure adopted by appellate court, thereby framing an additional

issue on the point of dispossession and then, to record evidence at appellate stage, cannot be countenanced. Once the appellate court finds that issue as to factual matrix was omitted by trial court, appellate court could have framed such issue and remitted the same back to trial court from whose decree appeal is filed, for recording evidence. After receiving the finding on the issue from trial court, parties could have been given an opportunity to raise their objection in terms of Rule 26 and then decide the entire appeal alongwith objections to the finding on additional issue recorded by trial court. This seems to have not been done. The right of defendant is therefore seriously prejudiced. The impugned judgment and decree is, therefore, unsustainable in law.

18. In the result, substantial questions of law will have to be answered as under :-

Substantial question No.1 is answered in the negative and substantial questions No. 2 and 3 are answered in the affirmative.

19. Hence, the following order :-

ORDER

- [I] The second appeals are partly allowed
- [ii] The common judgment and order dated 9.7.2013 passed by learned District Judge, Ahmedpur, in RCA No. 108 of 2011 and 109 of 2011 is hereby quashed and set aside;
- [iii] The appellate court shall remit the additional issue to the trial court for decision. In that event, parties would be at liberty to lead evidence on the additional issue before trial court. Trial court, after recording such evidence, record a finding thereon and return the evidence to the appellate court together with its finding and reasons therefor.

- [iv] On receipt of such finding, the aggrieved party shall be at liberty to file objections to the findings as contemplated under Order 41 Rule 26, within time fixed by appellate court.
- [v] The appellate court shall, thereafter decide the appeals in accordance with law.
- [vi] The appellate court shall endeavour to complete aforesaid procedure within a period of six months from the date of receipt of writ of present order, and for that purpose issue necessary directions to the trial court.
- [vii] Parties shall appear before the appellate court on 8th April, 2025.
- [viii] Record and proceedings be sent back.
- [x] Appeals stand disposed of in above terms without any orders as to costs. Pending civil application, if any, stands disposed of.

[S.G. CHAPALGAONKAR, J]

grt/-