



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

APPEAL FROM ORDER NO. 10 OF 2018

Babarao S/o Ramrao Rathod,
Age : 56 Years, Occu. : Service,
R/o Shivaji Chowk, Behind the
Hero Honda Showroom, Loha,
Tq. Loha, Dist. Nanded. .. Appellant

Versus

01. Sou. Rajabai w/o Balaji Fuke,
Age : 42 Years, Occu. : Service,

02. Rupesh S/o Balaji Fuke,
Age : 22 Years, Occu. : - Not Known,

Both R/o Loha, Tq. Loha,
Dist. Nanded.

03. Shivaji S/o Sitaram Rathod,
Age : 41 Years, Occu. : Service,
R/o Shivaji Chowk, Behind the
Hero Honda Showroom, Loha,
Tq. Loha, Dist. Nanded. .. Respondents

Shri Ajit M. Gholap, Advocate for the Appellant.
Shri U. R. Awate, Advocate i/by Talekar and Associates for the
Respondent Nos. 1 and 2.
The Respondent No. 3 is served.

CORAM : SHAILESH P. BRAHME, J.

CLOSED FOR JUDGMENT ON : 29.09.2025
JUDGMENT PRONOUNCED ON : 06.10.2025

JUDGMENT :-

. Order of remand passed on 30.10.2017 by lower Appellate Court in R.C.A. No. 04 of 2015 is impugned in the present appeal from order preferred by the original defendant No. 2. The substantial question of law needs to be addressed is as follows :

(i) Whether order of remand is legal and valid and it is necessary in the given facts and circumstances of the case ?

2. Respondent Nos. 1 and 2 filed R.C.S. No. 117 of 2011 for injunction contending that appellant caused obstruction to their 20 feet approach road located on the Eastern boundary of CTS No. 3154/1 and 3154/2. Appellant and other defendants are alleged to have started construction on the road. The claim of the respondents/plaintiffs is denied by the appellant. The existence of road is not in dispute. The appellant and another defendant are said to have been in lawful possession of their properties since their purchase.

3. Parties adduced evidence. The sale deeds at Exhibit 38 and 42 were produced on record. Sanctioned layout plan was produced before the Trial Court, but that was not exhibited. Trial Court held that plaintiffs failed to make out case of encroachment and illegal construction on the road and the suit was dismissed.

4. Being aggrieved, R.C.A. No. 04 of 2015 was preferred. It

was allowed partly by impugned order and matter was remanded to the Trial Court to take recourse to Order XXVI Rule 9 of the Code of Civil Procedure (for the sake of brevity and convenience hereinafter referred as to the 'C.P.C.').

5. Learned counsel Mr. Ajit Gholap for the appellant submits that it is perversity to record that there was boundary dispute between the parties. The order of remand is contended to be unwarranted because due opportunity was given to the respondents/plaintiffs to adduce the evidence. It is submitted that virtually impugned order would amount to collection of evidence. When the adequate material was available before the lower Appellate Court, matter should not have been remanded to the Trial Court. It is submitted that impugned order would amount to filling up of lacunas.

6. Per contra, learned counsel Mr. Awate appearing for respondent Nos. 1 and 2 submits that a certified copy of sanctioned layout supports that there is 20 feet road on the Eastern side of the plots of the respondents-plaintiffs. The grounds were raised before the lower Appellate Court for remanding the matter. The sale deeds at Exhibit 38 and 42 corroborate the plaintiffs case. It is submitted that in order to decide the issue of encroachment, it is necessary to have the local inspection. It is submitted that the Trial Court should have resorted to Order XXVI Rule 9 of the C. P. C. to decide the real controversy between the parties. It is further submitted that the

impugned order is equitable one and cannot be faulted.

7. I have considered rival submissions of the parties. The description of the property in the plaint and the averments of the sale deeds produced on record would indicate that on the Eastern boundary of the plots of the plaintiffs a road having width of 20 feet is located. Appellant and other defendant's plots are on the other side of the road. The road in question is in between the houses of the plaintiffs and the defendants.

8. The material placed on record does not indicate that there is any boundary dispute between the parties. Four boundaries of the subject matter belonging to the plaintiffs and four boundaries of the houses of the appellant and the defendant No. 2, their ownership and possession are not disputed. It is nobody's case that plaintiffs and the defendants are adjoining property holders. There is a road in between their properties. I find force in the submissions of the learned counsel Mr. Gholap that the observations of the Trial Court in para No. 12 of the judgment that it was a boundary dispute, which is further reiterated by the lower Appellate Court is perverse.

9. Plaintiffs have made allegations that defendants encroached on the Eastern side road and attempted to make construction illegally. If the encroachment is on the public road, then that gives cause for the plaintiffs to approach the local authority for removal of encroachment. No such attempt is made

by the plaintiffs. The local authority is not party to the proceeding. They were under obligation to prove the encroachment. Having failed in doing so, it would not be open for them to seek remand of the matter for resorting to Order XXVI Rule 9 of the C. P. C. That would amount to collection of evidence or filling up of the lacunas. The lower Appellate Court has over looked this aspect of the matter.

10. My attention is adverted to prayers of the appeal memo filed before the lower Appellate Court. A prayer of remand was made. There was no boundary dispute between the parties. The sale deeds showing title of the plaintiffs are on record. A certified copy of the sanctioned layout was also before the lower Appellate Court. It is rightly contended by the appellant that when adequate material was before the lower Appellate Court, there was no necessity to remand the matter.

11. It was not the grievance of the plaintiffs that they were not given opportunity to lead the evidence. Neither was it their case that certain material was discovered subsequently, which was required to be brought on record. The sanctioned lay out plan was not disputed by the defendants. In such a situation remanding the matter for appointment of Commissioner and for local inspection, is patent illegality.

12. A useful reference can be made to principles reiterated in para No. 36 by the Supreme Court in the matter of Sayedda Vs.

Malanbee reported in *(2016) 10 SCC 315* that remand cannot be for the sake of remand without making out any warrant for the remand.

13. Mr. Ajit Gholap, learned counsel relies on the **judgment dated 29.01.2018 decided by the Coordinate Bench in Appeal From Order No. 20 of 2017 in the matter of Taher Ahmed Salim Ahmed Vs. Mrs. Sandhya Girish Badge** to buttress that remand should not be taken as a matter of course. Such power should be exercised sparingly. I propose to follow principles laid down in para Nos. 12 and 14 of the judgment. Further reliance is placed on the judgment of the Madras High Court in the matter of Balasubramania Iyer Vs. Subbaih Thevar and another reported in *AIR 1965 Madras 417*, which is considered in judgment of the Supreme Court supra. Further reliance is placed on the **order dated 13.02.2023 passed by the Supreme Court in S. L. P. (Civil)No. 9172 of 2020 in the matter of Arvind Kumar Jaiswal (D) through L.Rs. Vs. Devendra Prasad Jaiswal Varun**. I find that impugned order is unsustainable.

14. For the reasons stated above, I answer substantial question of law in the negative. Consequently, following order is passed.

O R D E R

A. Appeal from order is allowed.

B. Impugned judgment and order dated 30.10.2017 passed by the lower Appellate Court in R.C.A. No. 04 of 2015 is quashed and set aside.

C. R.C.A. No. 04 of 2015 is restored to the lower Appellate Court, which shall be decided on its own merits as expeditiously as possible.

D. Parties shall appear before the Appellate Court on 03.11.2025.

[SHAILESH P. BRAHME J.]

bsb/Sept. 25