

(2025) 04 DEL CK 1087
In the Delhi High Court
Case No : FAO No. 97 Of 2015

Desh Deepak

APPELLANT

Vs

Municipal Corporation Of Delhi & Anr

RESPONDENT

Date of Decision : 30-04-2025

Acts Referred:

Code of Civil Procedure, 1908 — Section 107, Order 41 Rule 1(u), Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 24, Order 41 Rule 27, Order 41 Rule 33
Delhi Municipal Corporation Act, 1957 — Section 478

Citation : (2025) 04 DEL CK 1087

Hon'ble Judges : Dharmesh Sharma, J

Bench : Single Bench

Advocate : Anurag Ahluwalia, Harshit Mahalwal, Chirag Madan, Rahul Agarwal, Ronit Bose

Final Decision : Allowed

Judgement

Dharmesh Sharma, J

1. The appellant has filed the present appeal under Section 107 1 read with Order XLI Rule 1(u) of the Code of Civil Procedure, 1908 'CPC', impugning orders dated 15.01.2015 and 04.02.20215 passed by the learned Additional District Judge-02 (Central), Tis Hazari Courts, Delhi 'Learned ADJ', in Regular Civil Appeal No. 160/2013, whereby the learned ADJ remanded back the Regular Civil Appeal to the learned Trial Court with the direction to give specific finding on the existence or non-existence of Plot No. B-373, Majlis Park, Delhi 'Premises in question'.

FACTUAL BACKGROUND :

2. Briefly stated, the facts necessary for adjudication of the present controversy are that on 31.10.1984, the premises in question were transferred by Sh. Gurbux Rai to respondent no. 2, Ms. Sunita Devi, by way of an Agreement to Sell and a Registered Will. Thereafter, the said premises were transferred by Ms. Sunita

Devi to the appellant through an Agreement to Sell and General Power of Attorney. Subsequently, on 21.07.1998.

3. Pursuant thereto, the appellant/plaintiff applied for mutation of the said premises vide letter dated 24.10.2000, which, as averred, was duly received and acknowledged by the office of the respondent No. 1/MCD at Civil Lines, along with the requisite documents under the Delhi Municipal Corporation Act, 1957 'DMC Act'. Despite submission of the mutation application and repeated visits by the appellant, no action was taken by the respondent No. 1/MCD. The appellant was, therefore, constrained to serve a legal notice dated 02.07.2004 upon the respondent No. 1/MCD.

4. On receiving no response from the respondent No. 1/MCD, the appellant instituted a civil suit for declaration and injunction titled Desh Deepak Tyagi v. Sunita Gupta & Anr Suit No. 791/2011/2004. The transfer of the premises in question was reiterated by defendant No. 1/respondent No. 2/Ms. Sunita Devi in favour of the appellant in her written statement.

5. In so far as respondent No. 1/MCD is concerned, in its written statement it contended that the suit was not maintainable in view of Section 478 of the DMC Act, and further alleged that the appellant's intent was to evade payment of lawful dues towards property tax. It was also asserted that the Civil Court lacked jurisdiction to entertain the matter.

6. Based on the pleadings of the parties, the following issues were framed:

"(i) Whether the plaintiff is the owner of the suit property? OPP.

(ii) Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD.

(iii) Whether the suit is not maintainable under Sec. 478 of the DMC Act? OPD,

(iv) Whether this court has no jurisdiction to entertain and decide the suit? OPD.

(v) Relief."

7. It is pertinent to mention that respondent No. 1/MCD failed to lead evidence, and its right was closed vide order dated 20.07.2007. It is matter of record that during the proceedings, the respondent No. 1/MCD stated that "in case all dues are cleared, MCD has no difficulty in mutating the property," pursuant to which the appellant submitted the requisite documents and obtained acknowledgment. However, the respondent No. 1/MCD later filed a Status Report claiming the property was a thoroughfare and that, in absence of a registered sale deed, mutation could not be effected.

8. Pursuant to the conclusion of final arguments, the learned Trial Court was pleased to direct that a site plan of the premises in question be placed on record by the appellant. It was further directed that, in view of the admitted position of the respondent No. 1/MCD regarding collection of property tax in respect of the

premises in question, the Demand and Collection Register be produced on the next date of hearing.

9. In compliance with the said directions, the original register was produced by the respondent No. 1/MCD, and the learned Trial Court, vide order dated 16.01.2012, was pleased to record that "the Demand and Collection Register has been brought by the MCD Department, which shows the entry pertaining to the suit property in the present case. Photostat copy of the same is being placed on the record." The suit was decreed in favour of the appellant on 31.01.2012, and the respondent No. 1/MCD was directed to mutate the premise in question in the name of the appellant within one month from the date of the decree and the appellant was also awarded the cost of the suit to be recovered from the respondent No. 1/MCD.

JUDGMENT BY THE TRIAL COURT

10. Suffice it to state that the learned Trial Court, vide judgment dated 31.01.2012, decided the Issue No.1 in favour of the appellant/plaintiff, holding that he had proved the entire chain of documents, including the Agreement to Sell dated 10.10.2000, in part performance of which the appellant/plaintiff had been put in possession of the suit property. The Issue No.2 was decided against the respondent No.1/MCD.

11. Insofar as the Issue No.3 is concerned, it was found that the appellant/plaintiff had served a notice dated 02.07.2004 (Ex.PW-1/8) upon the respondent No.1/MCD, and therefore, the relevant statutory provision had been duly complied with. As regards Issue No.4, the objection of the respondent No. 1/MCD was repelled, and it was held that the appellant/plaintiff was not seeking any relief based on the recovery of the property tax payments, and hence, the jurisdiction of this Court was not barred. Accordingly, the suit was decreed, and the respondent No.1/MCD was directed to mutate the name of the appellant/plaintiff as the owner of the suit property.

PROCEEDINGS BEFORE THE APPELLATE COURT

12. Aggrieved by the judgment and decree dated 31.01.2012, the respondent No. 1/MCD preferred a Regular Civil Appeal, assailing the findings of the learned Trial Court. It was, inter alia, contended that the documents relied upon by the appellant—namely, the Agreement to Sell, another Agreement to Sell, Registered Will, and General Power of Attorney—were insufficient to establish ownership in favour of the appellant.

13. It was further submitted that since Ms. Sunita Devi, the alleged executant of the Will, was still alive, the said Will had not come into operation and, therefore, could not transfer any right, title, or interest in the property. The respondent No. 1/MCD also disputed the ownership of Ms. Sunita Devi over the suit property. As regards the General Power of Attorney, it was contended that the same did not confer ownership rights upon the appellant. It was additionally urged that the

Agreement to Sell, being an unregistered document, could not transfer title in respect of immovable property, in the absence of a duly registered instrument such as a Sale Deed or Gift Deed recorded in Book No. 1 under the Registration Act.

14. It was further contended that the learned Trial Court erred in holding that the testimony of the appellant remained unrebutted and that an adverse inference was liable to be drawn against the respondent No. 1/MCD for having failed to lead evidence. It was submitted that the learned Trial Court failed to appreciate the settled principle of law that a party must succeed on the strength of its own case, and not on the weakness or absence of the defence. It was urged that the appellant could not be declared the owner of the premise in question merely on the ground that the respondent No. 1/MCD did not lead evidence or failed to effectively cross-examine the appellant. In fact, it was asserted that the appellant had been duly cross-examined by the respondent No. 1/MCD on two separate occasions, but the learned Trial Court had taken it off the record vide order dated 15.04.2011.

15. It was also contended that the learned Trial Court failed to appreciate that the appellant, having sought the relief of declaration with respect to ownership of the premises in question, was required to pay ad valorem court fee on the market value of the property as on the date of institution of the suit. However, no such ad valorem court fee was paid by the appellant. It was urged that, notwithstanding the fact that evidence was not led on behalf of the respondent No. 1/MCD, the learned Trial Court was nonetheless duty-bound to consider the prevailing circle rates of the area in question for the purpose of determining the valuation of the suit vis-à-vis the declaratory relief claimed—an exercise which was admittedly not undertaken.

16. Lastly, it was urged before the learned Appellate Court that the learned Trial Court failed to consider that the premises in question formed part of a public gali, in which the doors and windows of adjoining properties bearing Nos. B-286, B-288, B-372, and B-374 open. It was further contended that the direction to mutate the premises in favour of the appellant was erroneously issued. Additionally, it was submitted that the premises in question was neither enclosed by any boundary wall nor bore any distinct identification.

17. During the course of proceedings before the learned Appellate Court, a detailed status report dated 09.10.2014 was filed by an official of the respondent No. 1/MCD pursuant to the order dated 11.09.2014, wherein it was specifically stated that no plot bearing No. B-373, Majlis Park, Delhi, was found to exist. By way of the impugned order, the learned Appellate Court was pleased to remand the matter to the learned Trial Court with a direction to return a specific finding on the existence or non-existence of Plot No. B-373, Majlis Park, Delhi. The relevant portion of the impugned order dated 15.01.2015 is reproduced below:-

“The appellant as well as respondent in the main suit have raised number of

contradictory pleas but the core of the dispute between the parties is whether the said plot of which the plaintiff/ respondent herein has sought mutation is in existence or not. Accordingly, for the decision of the present appeal at this stage detailed discussion regarding the fact and law is not required as the judgment of the Ld. Trial Court on the question of existence of plot No B-373, Majlis Park, Delhi is based on mere probabilities and no specific findings has been given by the Ld. Trial Court that the plot in question is in existence as while adjudicating upon the matter and deciding the issue of relief it has been observed by the Ld. Trial Court in para no. 14 of the judgment on page no. 9 that the space which the defendant no. 2 / MCD (appellant herein) is alleging to be a gali and vacant was probably the space for the plot. This suggests that the finding of the Ld. Trial Court on the existence of the plot in question is not specific and perverse as the same is based on mere probabilities which is not permissible under the Civil law. A decree cannot be passed on the basis of mere probabilities in a Civil suit as has been done by the Ld. Trial Court in the present dispute. The Ld. Trial Court is required to give specific finding based on cogent and straight forward evidence regarding the existence or non-existence of the plot No. B-373, Majlis Park, Delhi. As such, the conclusion reached by the Ld. Trial Court in the present dispute is merely based on probabilities as such the present suit is required to be remanded back to the Ld. Trial Court for the fresh decision on the above point after providing opportunity to both the parties to prove their respective stands regarding the existence of the plot in question.

Further, during the arguments on the appeal on 11.09.2014, as the Id. Counsel for the MCD claimed that the land of which the respondent is seeking mutation is a public land i.e. a road existing between the properties on both the sides and in order to determine the existence of the plot, MCD was directed to file detailed status report vide order dated 11.09.2014 and the said order was complied with by the MCD and the Deputy Assistant and Collector, Civil Lines, MCD Zone filed the status report and in the said report, it has been specifically mentioned that no plot no. B-373, Majlis Park, Delhi is in existence. Accordingly, the Ld. Trial Court is also required to examine the official who has filed the status report in pursuance of the order dated 11.09.2014 and to give opportunity to the Id. Counsel for the plaintiff/respondent herein to cross examine the said witness. In view of the above discussion without going into the merits of the appeal at this stage, the present suit is remanded back to the Ld. Trial Court with the direction to give specific finding on the existence or non-existence of plot no. B-373, Majlis Park, Delhi. However, if after the trial, the Ld. Trial Court reached the conclusion that the said plot is in existence."

SUBMISSION ON BEHALF OF THE PARTIES:

18. The learned counsel for the appellant has contended that the learned Appellate Court erred in remanding the matter for a de novo trial, as the said direction was based solely on the ipse dixit of the learned Appellate Court, without justification, and contrary to the law laid down by the Apex Court in

Municipal Corporation, Hyderabad v. Sunder Singh (2008) 8 SCC 485. It was submitted that the remand order effectively amounted to a complete remand under Order XLI Rule 23 of the CPC, which is applicable only where a suit is disposed of on a preliminary issue. In the present case, however, all issues framed by the Trial Court were duly adjudicated upon with reasons.

19. Learned counsel for the appellant further placed reliance on the judgment of the Apex Court in Sirajudheen v. Zeenath & Ors. 2023 SCC OnLine SC 196, to urge that an Appellate Court is not permitted to adopt the facile course of remand merely on the premise that certain evidence, which ought to have been adduced, was not brought on record.

20. It is submitted that the learned Appellate Court erred in failing to appreciate that the admission by respondent No. 1/MCD regarding the existence of their own Demand and Collection Register, which reflects the entry of the suit property in the MCD records, constitutes a significant piece of evidence.

21. It is further contended that the learned Appellate Court erred in not considering that Resolution No. 1102 of the MCD, dated 14.02.1980, expressly provided that sites or lands in Adarsh Nagar and Majlis Park, designated for community facilities or other public purposes, could be acquired through the Secretary of L&B, with alternative plots offered to those affected by such acquisition. It was submitted that the premises in question did not fall within the category of such sites or lands, and no attempt was made by the respondent No. 1/MCD to apply the provisions of the resolution to the suit property. This fact was not disputed by the respondent No. 1/MCD during the proceedings before the learned Trial Court.

22. Per contra, learned Additional Standing Counsel for the respondent No. 1/MCD has submitted that the premises in question is part of a gali/street/throughfare intended for public use. It was contended that the appellant has misused the legal process to wrongfully claim public land as his own. The Status Reports dated 13.07.2010 and 09.10.2014 explicitly state that the disputed land, located between B-372 and B-374, is a thoroughfare/gali/street approximately 30 feet in width. Additionally, it was noted that doors and windows of the adjoining properties open into the gali, and a sewer line exists within it.

23. It is submitted that the learned Trial Court failed to consider the Sanctioned Plan filed by the respondent No. 1/MCD, which is part of the trial record. The Sanctioned Plan clearly indicates that Plot No. 373 does not exist, and the space between Plot Nos. 372 and 374 is designated as a public gali. Furthermore, it is submitted that according to the site plan, the gali continues to exist between the adjacent plots, Nos. 288 and 286. Upon review of the Sanctioned Plan, it is evident that the design of the map reflects similar empty spaces between various other plots, which serve the purpose of providing interconnections between wider galis/streets.

24. Learned Additional Standing Counsel for the respondent No. 1/MCD submits

that the appeal is not maintainable, as the determination of whether the property in dispute is a gali or a plot constitutes a triable issue, which should be decided by the learned Trial Court based on the evidence, rather than mere probabilities. It was further submitted that the Demand and Collection Register relied upon by the appellant before the learned Trial Court fails to clearly indicate whether the appellant or any of the alleged previous owners are the taxpayers for the disputed property, as the "Name of Taxpayer" column is filled with the term "The Owner."

25. Learned Additional Standing Counsel for the respondent No. 1/MCD submitted that the learned Trial Court erred in not properly appreciating the Site Plan, Status Reports, and photographs placed on record by the respondent to establish that the premises in question form part of a public gali and not a private plot. It was further contended that the learned Trial Court wrongly drew an adverse inference against the respondent No. 1/MCD merely because no defence evidence was led, despite the settled position of law that the burden of proof lies on the plaintiff to establish entitlement to the relief sought. Reliance was placed on *Smirit Debbarma v. Prabha Ranjan Debbarma & Ors.* 2023 SCC OnLine SC 9, wherein the Supreme Court held that non-contestation does not ipso facto entitle the plaintiff to a decree.

ANALYSIS AND DECISION

26. I have given my thoughtful consideration to the submissions advanced by learned counsels for the rival parties at the Bar. I have gone through the relevant records of this case as also the case-laws cited at the Bar.

27. At the outset, the impugned order dated 15.01.2015 passed by the learned ASJ/Appellate Court cannot be sustained in law. First things first, the suit filed by the appellant/plaintiff primarily sought a direction to respondent No.1/MCD to mutate the premises in question in his favour. There was no denial by the respondent No.1/MCD challenging the right, title, or interest of the appellant/plaintiff in the premises in question and/or for that matter denying his possession over the property in question. The findings given by the learned Trial Court in its original judgment dated 31.01.2012 were categorical in holding that the appellant/plaintiff had successfully proved the entire chain of documents with regard to the premise in question, thereby establishing his ownership and possession, particularly in light of the admission by defendant No.1/respondent No. 2 herein/Ms. Sunita Rani, the original owner of the premises in question. Further, there was no challenge to the existence of the premise in question either.

28. It bears repetition that a statement was made by a Junior Law Officer of respondent No.1/MCD on 14.01.2010 to the effect that, in case all dues were paid or cleared, respondent No.1/MCD would have no objection to mutating the property in favour of the appellant/plaintiff, subject to the completion of the requisite mutation formalities.

29. It also emerges from the record that the MCD was directed, vide order dated

17.11.2011, to produce the demand and collection register, and the same was duly produced. The register reflected an entry pertaining to the suit property. Furthermore, a 'No Due Certificate' dated 04.04.1997 was issued in respect of Plot No. B-373, Majlis Park, Delhi (Ex.DW1/5).

30. It appears that the respondent No.1/MCD, going beyond its pleadings, took a somersault and attempted to give a different colour to the entire subject matter by raising an issue that no property bearing No. B-373, Majlis Park, Delhi existed, and that the premises in question was in fact a thoroughfare. The said aspect was duly considered and dealt with by the learned Trial Court in the impugned judgment dated 31.01.2012, in the following words: -

"The present suit has been filed by the plaintiff seeking the relief of declaration that the plaintiff be declared to be in the possession of the suit property as the owner and the defendant no 2 be directed to get the name of the plaintiff mutated as owner of the suit property. As discussed in the issue no 1 above, the plaintiff is the owner of the suit property. The no dues with respect to the suit property has been exhibited as DW1/5. In DW1/5, dated 4.4.1997, it has been specifically mentioned that as per the Demand and Collection Register, the suit property stands assessed at Rs 100/- and no dues are pending upto 31.3.1997. The relevant Demand and Collection Register as mentioned above, was produced at the time of the Final arguments at the instance of the court. The relevant page, Exh as C1 shows that the suit property has been assessed at Rs 100. Status report has been filed by the MCD, exhibited as C2., in which it has been stated that the land could not be mutated in the name of the plaintiff as during inspection it was found that the said suit plot does not exist and it is a thoroughfare and further on the ground that mutation can be done only on the basis of the registered sale purchase document. As far as the objection that the title of the property can be based only on registered documents, the same has been dealt with in the discussion under issue no 1 above. Certain photographs, Exh as C3 were filed by the defendant no 2/MCD, It was argued by the counsel for the defendant no 2 that as per the site plan and the inspection report there is no such plot in the Majlis Park and that the said space is vacant. As per the photographs there exists plot no B372 and B374, and in place of B373, i.e. the suit plot, there is a vacant space. However, it is the admission of the MCD, itself that they have been collecting the taxes with respect to the suit plot, the same gets mention in their own Demand and Collection Register. Furthermore it was also admitted by the counsel for the defendant no 2 that the plot no B372 and B374 exist. The court is of the opinion that the plot numbers are not given by any individual, they are given by the MCD only. Therefore, it is difficult to imagine that MCD would give 372 and then 374 no to the plot. The space, which the defendant no 2/ MCD, is alleging to be a gali and vacant, was probably the space for the plot and since plaintiff and the erstwhile owners of the suit plot were not residing in the suit land, therefore the same was being used a gali and for parking. Even a look at the photographs of area of Majlis Park where the suit plot is alleged to be situated, Ex. C3, substantiate the above finding. The plaintiff

has proved all the letters which he had written at different times in order to get the property mutated in his name, Exh PWI/5 to PWI/8. The testimony of the plaintiff has remained un rebutted. The defendant has not been able to prove that the plaintiff has not applied for the mutation of the plot. It was argued by the counsel for defendant no 2 that the plaintiff has not deposited all the relevant documents to get the property mutated. A suggestion to this effect was put to the plaintiff in his cross examination, to which the plaintiff had replied that it is incorrect that all the documents necessary for mutation were not supplied to the MCD, however, the defendant no 2 has not been able to prove anything contrary to the stand taken by the plaintiff.

The MCD, throughout the case has taken different pleadings. In the W.S. it was alleged that the suit is barred and that the plaintiff has filed the present suit only to evade taxes without trying to get the property mutated, during cross examination of the plaintiff, the impression was given that the plaintiff had not applied properly, and then the status report filed by the defendant said that no mutation was done as no such plot exists. However, the documents filed by the defendant no 2 contradict their own case."

31. Evidently, the learned Appellate Court, in its order dated 15.01.2015, failed to address the aforesaid findings and observations made by the learned Trial Court. There was led no evidence that the premises in question has always been treated as a thoroughfare or public gali since the very beginning. Considering the time elapsed since the filing of the suit on 21.12.2004, it is evident that the delaying tactics adopted by the respondent No. 1/MCD has brought about a sea change that has been detrimental to the interest of the appellant/plaintiff.

32. As a result, the power to remand the matter was not exercised in accordance with the law. At this juncture, it would be apposite to refer to the provisions contained in Rules 23, 23-A, 24, 27, and 33 of Order XLI of the CPC: -

"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, which 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. Where evidence on record sufficient, Appellate Court may determine case finally.- Where the evidence upon the record is sufficient to enable the Appellate

Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

27. Production of additional evidence in Appellate Court.—(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

33. Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

33. While explaining the scope of Rules 23 and 23-A of Order XLI of the CPC, in the case of Municipal Corporation, Hyderabad (supra), the Apex Court has observed as under: -

“32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders

refusing to adduce secondary evidence.

33. Order 41 Rule 23-A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a retrial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code.

34. An order of remand cannot be passed on ipse dixit of the court.....”

34. It may at once be noticed that, in terms of Rule 33 of Order XLI of the CPC, the learned Appellate Court is empowered to pass any decree or make any order which ought to have been passed or made, and which may be considered necessary in the facts of a given case. While Rule 33 confers general powers on the learned Appellate Court, the specific powers of remand are contained in Rules 23 and 23-A of Order XLI of the CPC. Therefore, in the context of the present case, reference to Rule 33 is misplaced and inapposite.

35. The crux of the matter is that Order XLI Rule 23 of the CPC applies only where a decree has been passed on a preliminary issue, and Rule 23-A is attracted when a retrial is considered necessary. In the face of the fact that categorical findings were recorded by the learned Trial Court on each of the issues, there was no occasion for the learned Appellate Court to remand the matter simpliciter on the basis of objections which were neither raised nor espoused by respondent No.1/MCD.

36. There is no gainsaying that the question of whether the premises in question constitutes a public way or road is not the subject matter of the present suit or appeal. The only issue for consideration is whether a property bearing No. B-373 exists, and whether the appellant/plaintiff is entitled to have the same mutated in his name. The question of whether any easementary rights have been acquired by the owners or occupants of adjoining premises over the subject property is a matter entirely extraneous to the issues framed in the present case, and would, if at all, be required to be adjudicated in separate legal proceedings involving the concerned parties.

37. In view of the concession afforded by respondent No.1/MCD, and considering that the entire dues towards house tax and other charges had been duly paid, there was no scope for any U-turn on the part of respondent No.1/MCD in denying the appellant/plaintiff the fruits of the suit. Accordingly, the impugned order dated 15.01.2015 passed by the learned Appellate Court, directing a retrial, was completely unwarranted and unsustainable in law. It is also pertinent to note that the premises in question was never claimed to be an acquired property by respondent No.1/MCD.

38. In view of the foregoing discussion, the present appeal is allowed. The impugned order dated 15.01.2015 passed by the learned Appellate Court is hereby set aside. Consequently, the original judgment dated 31.01.2012 passed

by the learned Trial Court is held to be lawful, valid, and binding on respondent No.1/MCD.

39. Accordingly, respondent No.1/MCD is directed to forthwith mutate the property bearing No. B-373, Majlis Park, Delhi, in favour of the appellant/plaintiff. The appellant/plaintiff shall also be entitled to the costs of the proceedings.