

**(2011) 08 BOM CK 0034**

**In the Bombay High Court**

**Case No :** Appeal From Order No. 129 of 2007 with CA/10508 of 2007

Dhanaji Vishwanath Shinde and Others

APPELLANT

Vs

Nagorao Sambhaji Shinde

RESPONDENT

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**Date of Decision :** 30-08-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 107

**Citation :** (2012) 4 MhLj 854

**Hon'ble Judges :** S.S. Shinde, J

**Bench :** Single Bench

**Advocate :** Sachin Deshmukh, for the Appellant; S.S. Halkude, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

S.S. Shinde, J.—This appeal from order takes exception to the judgment and order dated 4th August, 2007 in Reg. Civil Appeal No. 38/2006 passed by the Ad-hoc District Judge-1, Latur. The Learned Counsel for the appellants submits that the remand order passed by the Appellate Court was absolutely unwarranted in the facts of this case. Without any discussion by the Appellate Court on merits of the matter, by cryptic reasoning in para 12 of the impugned judgment, the matter has been remanded back to the trial Court for fresh decision. The Learned Counsel also invited my attention to the substantial questions of law which are tendered across the Bar and taken on record. He submitted that the Appellate Court itself is competent and having jurisdiction and empowered like the Court of original jurisdiction to decide the issues and, therefore, it was not necessary for the Appellate Court to remand the matter back to the trial Court.

2. On the other hand, the Learned Counsel for the respondent submits that, in the interest of justice, the Appellate Court thought it fit to remand the matter back to the trial Court so that the parties to the suit would get proper opportunity to put forth their case. He also tried to justify the order of remand for appointment of the Commissioner and further measurement of the suit

property. According to him, no prejudice would be caused to the appellants herein because of the remand order.

3. The present appeal from order raises the following substantial questions of law :

i) Whether the first Appellate Court is justified while remanding the matter and not exercising the power vested in it u/s 107 of the Code of Civil Procedure, which empowers the Appellate Court to take additional evidence or to require such evidence to be taken?

ii) Whether the first Appellate Court has failed to exercise the jurisdiction vested in him thereby not assigning any reasons for remanding the matter to the trial Court?

iii) Whether the directions given by the Appellate Court in operative part of the order are self-contradictory and without assigning any reasons?

4. I have given due consideration to the rival submissions of the parties. The provisions of section 107 of the CPC reads, thus:

107. Powers of Appellate Court. -- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power -

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

5. Therefore, bare perusal of the aforesaid provision would make it abundantly clear that the Appellate Court can exercise the powers and jurisdiction like Court of original jurisdiction. The Appellate Court, while remanding the matter back to the trial Court, has given the following reasons in para 12 of the impugned judgment.

12. From the aforesaid discussion, it is quite clear that there is a dispute about the encroachment which cannot be resolved even after carrying out the measurement by two Cadastral Surveyors at different times. It is, therefore, essential to get an agreed map, and a Commissioner is required to be appointed to prepare the same to resolve the controversy between the parties to the litigation. In such circumstances, there is no alternative except to remand the matter to the trial Court for appointment of the commissioner for taking the measurement of the lands belonging to the plaintiff and the defendants to ascertain the actual encroachment, if any. As in absence of the agreed map, the

passing of decree would be fruitless.....

6. Therefore, from reading such cryptic reasoning, it is abundantly clear that the Appellate Court has not discussed anything on merits as to why remand order is necessary. That apart, the directions given in the operative part of the order in clauses (3) and (4) are conflicting with clause (5) of the said order. In clause (7) of the operative part, the Appellate Court directed the trial Court to decide the matter afresh. Therefore, it follows from the said clause that liberty has been granted to the parties to agitate all issues. If at all the Appellate Court wanted to remand the matter back to the trial Court, in that case, there should have been proper discussion on each of the issues which have been gone into by the trial Court. Such a blanket remand order with cryptic reasoning is not sustainable in law. Hence, the impugned judgment and order deserves to be quashed and set aside. In the result, the impugned judgment and order dated 4th August, 2007 in Reg. Civil Appeal No. 38/2006 passed by the Ad hoc District Judge-1, Latur is quashed and set aside and the RCA No. 38/2006 is restored to its original file. The Appellate Court to hear the parties and allow them to place on record necessary documents and evidence and, thereafter to decide the appeal there itself instead of remanding it to the trial Court. The appeal from order is allowed to above extent and stands disposed of.

Consequently, the civil application stands disposed of.