

(2010) 10 BOM CK 0014

In the Bombay High Court

Case No : Appeal from Order No. 49 of 2001

Gangagar Ingole died thorough his L.Rs. (Rajaram Gangaram
Ingole and Dropadabai Ingole) and Subhash Ingole

APPELLANT

Vs

Malkarjun Hundekar, Ravindra Hundekar and Sanjay
Hundekar

RESPONDENT

Date of Decision : 19-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : (2011) 1 ALLMR 874 : (2011) 2 BomCR 616

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

Bench : Single Bench

Advocate : A.S. Deshmukh, for the Appellant; B.B. Wagh, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—The appellants herein/original plaintiffs filed R.C.S. No. 31 of 1985 against the defendants/respondents herein for recovery of the encroached portion of the land and also claimed mesne profits. One Gangaram was the father of plaintiff No. 1 and grand father of plaintiff No. 2 and 3 and defendant No. 1 is the father of defendant Nos. 2 and 3. Gangaram was the original owner of Survey No. 55 admeasuring 15 acres and 31 Gunthas. Gangaram was the owner of Survey No. 54. These lands were adjoining and adjacent to Survey No. 55. 27th January, 1976 the plaintiffs got the land measured from the D.I.L.R., and the said authority found that the respondents have encroached upon the plaintiffs land to the extent of 10 R. The plaintiffs therefore, filed suit against the defendants. The said suit was heard on merits and the trial Court decreed the suit by observing that the respondents have encroached upon the plaintiffs' land. The respondents herein filed appeal being Appeal No. 206/1990. The learned appellate Judge heard the appeal and was pleased to remand the matter to the trial Court for retrial. After retrial, the learned trial Court again held in favour the plaintiffs and decreed the suit to the extent of 16 R. The respondents

again filed R.C.A. No. 142 of 1996 and the learned appellate Judge, who heard the appeal, again remanded the matter back to the trial Court for fresh trial. Therefore, aggrieved by the said order, this appeal from order has been filed by the appellants.

2. The learned Counsel for the appellants submitted that the lower appellate Court has remanded the matter back even for the second time. When the trial Court has adjudicated the matter on 2nd occasion, it was not proper for the lower appellate Court to remand the matter back to the trial Court for fresh adjudication. According to the learned Counsel for the appellants, the lower appellate Court instead of remanding the matter for second time ought to have framed and recast the issue and should have proceeded with hearing of the appeal on merits.

3. Though the respondents are served and appearance is entered on their behalf, when the matter was called out, none appeared for them. No reply has been filed on behalf of the respondents and in absence of any reply either oral or written, the pleadings in this appeal from order remained un-controverted on behalf of the respondents.

4. After hearing the learned Counsel for the appellants and perusal of the pleadings in the appeal and annexures and also the reported judgments of the Honourable Supreme Court, I am of the opinion that this appeal from order deserves to be allowed. The following substantial question of law falls for consideration of this Court in this appeal from order:

Whether the lower appellate Court was justified in remanding the matter for second time to the trial Court when the appellate Court is vested with the powers to frame and adjudicate the issues by recording evidence and after hearing the parties?

5. Perusal of the Order 41, Rule 23 of the CPC empowers the Court to remand the matter back to the trial Court for fresh adjudication. However, in the instant case, the lower appellate Court has remanded the matter back to the trial Court second time instead of deciding the matter itself by framing necessary points. The Supreme Court in case of Ashwinkumar K. Patel Vs. Upendra J. Patel and Others, held that the power of the appellate Court under Order 41, Rule 23 should not ordinarily be exercised merely because in its view reasoning of lower court in some aspects was wrong. When the material is available before the appellate Court, the appellate Court itself should decide the appeal, one way or the other. The same view is reiterated by the Honourable Supreme Court in subsequent pronouncements.

6. On perusal of the judgment and order passed by the learned Ad hoc Addl. District Judge, Nanded in C.R.A. No. 142 of 1996, it appears that the Court framed two points for its consideration. The first point was framed as to whether the trial court properly framed the issues and on that finding is given that the trial Court has not framed the issues and another issue was framed as to

whether the impugned judgment and decree needs to be set aside and the Court has recorded finding in affirmative. ON going through the reasons recorded by the lower appellate Court, it clearly appears that on general discussion, the appellate Court had come to the conclusion that the trial Court has not framed the issues properly. The Court was alive to the fact that in earlier round of litigation the matter was remanded back to the trial Court and the lower appellate Court was adjudicating the matter second time. Therefore, if the lower appellate Court felt that proper issues were not framed by the trial Court, it was open for the appellate Court to frame necessary points and decide the matter there itself instead of asking the parties again to go before the trial Court. In fact, such exercise of remanding the matter second time to the trial Court, that too when the lower appellate Court itself was competent to decide the points which fell for its consideration, was unnecessary delaying the matter and thereby causing injustice to the parties. Therefore, in my opinion, the lower appellate Court ought to have decided the matter there itself by framing necessary issues and by giving proper opportunity to the parties to put forth their case. Therefore, second remand order was absolutely unwarranted and undeserving in view of the fact that the lower appellate Court is vested with the powers to frame the issues and adjudicate the issues finally.

7. Therefore, the impugned judgment and order dated 17th July, 2001 passed in R.C.A. No. 142 of 1996 is quashed and set aside. The R.C.A. No. 142 of 1996 is restored to its original position. The lower appellate Court is directed to frame necessary points and after giving opportunities to the parties concerned, to decide the said appeal on merits, in accordance with law, within a period of six months from the date of receipt of order of this Court. The Appeal From Order is allowed to above extent and disposed of. Civil Application, if any stands disposed of. Original record, if any, to be sent to the lower appellate Court.