

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 604 OF 2026
WITH
INTERIM APPLICATION NO. 41571 OF 2026
IN
APPEAL FROM ORDER NO. 604 OF 2026

- 1) Gazi Salauddin Rehamatulla Hoole]
Alias Pardeshi Baba Trust, A Public Trust]
registered under The provisions of the]
Bombay Public Trust Act, 1950 and having Its]
Office at- Kasar Vadavali, Ghodbundar Road,]
Thane.]
- 2) Mr. Bashir Mohammed Hussein Patel]
Age: Adult, Occ. Trustee of the Defendant]
Trust, Having office at Kasar Vadavali,]
Ghodbandar Road, Thane]
- 3) Mr. Shabbir Abdul Rehman Shaikh]
Age: Adult, Occ. President of Defendant]
Trust, Having office at: Gazi Salauddin]
Rehamatulla Hoole]
Alias Pardeshi Baba Trust, Borivade]
Kasar Vadavali, Ghodbundar Road, Thane.]
- 4) Mr. Bahauddin Mohammed Ayyud Shaikh,]
Age: Adult, Occ. Secretary of Defendant]
Trust Having office at: Gazi Salauddin]
Rehamatulla Hoole]
Alias Pardeshi Baba Trust, Borivade]
Kasar Vadavali, Ghodbundar Road, Thane]
- 5) Zafar Suleman Shaikh]
Age: Adult, Occ. Treasurer of Defendant]
Trust]
Having office at: Gazi Salauddin Rehamatulla]
Hoole]
Alias Pardeshi Baba Trust, Borivade]
Kasar Vadavali, Ghodbundar Road, Thane.]

...Appellants

Versus

- 1) 1. New Shree Swami Samartha,]
Borivade Housing Company Private Limited]
A Company registered under the Companies]

- Act, 1956, having its Registered Office and]
principal Place of business at Revenue Sr. No.]
46, Village Borivade Taluka and District]
Thane- 400607 Known before conversion as]
New Shree Swami Samartha Borivade Village]
Co-operative Housing Society registered]
under The Maharashtra Co-operative]
Societies Act, 1960, having its Administration]
office at 11A, Suyash, Near Amar Hind]
Mandal, Gokhale Road (North),]
Dadar, Mumbai 400 028]
- 2) Mr. Niyaz Amir Sheikh,]
Age: Adult, Occ. Member of Defendant No. 1,]
Having office at: Gazi Salauddin Rehamatulla]
Hoole]
Alias Pardeshi Baba Trust, Borivade)]
Kasar Vadavali, Ghodbundar Road, Thane]
- 3) Mr. Sahul Abdul Kadi Varekar]
Age: Adult, Occ. Trustee of the Defendant]
Trust, Having office at Kasar Vadavali,]
Ghodbundar Road, Thane]
- 4) Mr. Mustak Ahmed Gaffur Shaikh]
Age: Adult, Occ. Trustee of the Defendant]
Trust,]
Having office at Kasar Vadavali,]
Ghodbundar Road, Thane]
- 5) Arif Merchand]
Age: Adult, Occ. Trustee of the Defendant]
Trust,]
Having office at Kasar Vadavali,]
Ghodbandar Road, Thane]
- 6) Mr. Abu Ibrahim Shaikh]
Age: Adult, Occ. Trustee of the Defendant]
Trust,]
Having office at Kasar Vadavali,]
Ghodbundar Road, Thane]
- 7) Mr. Mohammed Hasan Abdul Gafur Warekar,]
Age: Adult, Occ. President and]
Trustee of the Defendant Trust, Having]
office at Kasar Vadavali,]
Ghodbundar Road, Thane]
- 8) Mr. Afzal Umar Abdul Sattar Umarbhai]
Age: Adult,]
Occ. Vice President and Trustee of the]

Defendant Trust	]	
Having office at Kasar Vadavali,	]	
Ghodbundar Road, Thane.	]	
9) Mr. Zhahir Anwar Mohammed Ismail Warekar	]	
Age: Adult, Occ. Trustee of the Defendant	]	
Trust, Having office at Kasar Vadavali,	]	
Ghodbundar Road, Thane	]	<u>...Respondents</u>

Mr. Kailas Dewal i/b Mr. Yash Dewal a/w Mr. Ashwin Kulkarni, for the Appellants.

Mr. Shanay Shah (Counsel) a/w Mr. Hamza Lakhani (Counsel), Mr. Danish Qureshi, Mr. Ishaan Zaveri, Ms. Samaya Sharma, for Respondent No-1.

CORAM : SHARMILA U. DESHMUKH

RESERVED ON : JUNE 16, 2026

PRONOUNCED ON : JULY 01, 2026

ORDER :

1. Heard. **Admit.** With consent taken up for final disposal.
2. The Appeal is at the instance of the original Defendants, being aggrieved by the judgment dated 7th May, 2026 passed by the District Judge at Thane in Regular Civil Appeal No. 124 of 2025 remanding the suit to the Trial Court to frame and decide two additional issues and granting injunction till the final disposal of the suit.
3. The facts necessary to be expounded is that RCS No. 318 of 2002 was filed by the Plaintiffs seeking recovery of possession of the suit property, described in the plaint as comprising of a tomb and other structures surrounded by a fencing totally admeasuring 122' × 57' or 22m + 15.5 m on western side, x16.25 m on northern side, 22.25 m + 16 m on eastern side, and 17.25 m on southern side situated on survey no.

46, situated at Revenue Village Borivade, registration sub district and district of Thane. The Plaintiff also sought the relief of permanent prohibitory injunction restraining the Defendants from making further encroachments upon said property, obstructing the ingress and egress of the Plaintiff and its members in or upon the said property , and preventing the Plaintiffs from carrying out desired activities upon the said property.

4. The Plaintiff's case is that the Plaintiff was initially a co-operative housing society limited which, during the pendency of the suit, was converted into a private limited company. Under an agreement dated 17th June, 1982, the original owners alienated landed property bearing survey no. 46, admeasuring 1H-81R-1P, described as "said property", in favour of Samartha Development Corporation, a partnership firm, who then executed a package deal agreement on 29th June, 1982, with M/s Venus Housing Enterprises, who was a developer. Since the property was affected by green zone reservation, the property continued to remain barren land without any development. Eventually, it was decided between the original owner, Samartha Development Corporation and M/s Venus Housing Enterprises, and the office bearers of the original Plaintiff society that a deed of conveyance would be executed in favour of the Plaintiff herein. Accordingly, the deed was executed on 9th December, 1989, and the Plaintiff was put in possession of the said

property and every part thereof.

5. It is pleaded that in the year 1990-1991, a tomb was illegally constructed by the Defendants on a small portion, admeasuring 10' × 6', on the western portion of the property. Recently, there was further encroachment upon the area surrounding the said tomb, and a structure and fencing were constructed. The encroached portion, which was part and parcel of survey no. 46, has been described in the plaint as the suit property. Despite repeated requests made to the Defendants to remove the unauthorised construction, the Defendants failed to comply with the requisitions.

6. In December 2001, the Defendant No. 1 filed Regular Civil Suit No. 151 of 2001 in the Civil Court for declaration and injunction, laying claim to the entire survey no. 46. It is pleaded that, except the suit property, the entire survey no. 46 is vacant and in the peaceful possession of the Plaintiff. The cause of action is stated to have arisen only after October 1990-1991, when the Defendants encroached on the said property from time to time and also arose in the first week of April 2002, when entry of the members of the Plaintiff was threatened to be prevented and threats of further encroachments was given.

7. In the written statement, the Defendants raised an objection to the maintainability of the suit as the Society was required to obtain permission from Deputy Registrar of Societies, and on valuation. The

Defendants claimed to be in possession of said property including the suit property since last 200 years and that the religious functions of the Defendant No. 1 were being performed upon the said property including the suit property openly to the knowledge of the original owners. It was contended that the 7/12 extract produced by the Plaintiff makes it clear that the suit property and survey no. 46 stands in the name of the original owners in kabjedar column and in the crop cultivation column, the name of Defendant No. 1 is shown. It further contended that neither the Plaintiff nor Venus Housing Enterprises have the right to purchase the said property. It was contended that the Defendant trust had filed RCS No. 151 of 2001 which is pending before the Civil Court, and therefore, the present suit is required to be stayed.

8. The parties led evidence and the Trial Court vide judgment dated 5th April, 2025 answered the following issues:

Sr. No.	ISSUES	FINDINGS
1.	Does plaintiff prove its ownership and possession to the suit property ?	...Partly Affirmative
2.	Does plaintiff prove that defendants have encroached upon the suit land ?	...Affirmative
3.	Whether the suit is properly valued and the court fee paid is proper ?	...No
4.	Whether suit is bad for want of permission under Maharashtra Co-operative Societies Act ?	...No
5.	Whether suit is barred by law of limitation ?	...Yes
6.	Do defendants prove that their title to the suit land has been perfected by virtue of	

	adverse possession ?	...Negative
7.	Are the plaintiff is entitled to decree for possession ?	...Negative
8.	Whether Plaintiffs are entitled to decree of perpetual injunction order ?	...Negative
9.	Whether Plaintiffs are entitled for the reliefs prayer for ?	...Negative
10.	What order and decree ?	...As per final order

9. The Trial Court noted the admitted facts about possession of Defendants over portion of suit land and institution of RCS No 151 of 2001 by the Defendants against the Plaintiff. As far as the issue of ownership and title is concerned, upon consideration of the evidence on record, the Trial Court held that the Plaintiff is in possession of the land, except for the area of the dargah and answered the issue partly in the affirmative. While answering the issue, the Trial Court noted the order dated 10th March, 2025 passed by the High Court in Civil Writ Petition No 6607/2024 directing removal of encroachment. The Trial Court scrutinized the pleadings and evidence led by the Defendants to answer the issue of adverse possession against the Defendants in respect of entire Survey No 46. It held that extent of possession is not proved neither the Defendants have established as to when the possession became hostile to the Plaintiff.

10. On the issue of limitation, the Trial Court noted that the prescribed period of limitation for a suit for possession is twelve years.

The Trial Court noted the existence of a dargah shown in the 7/12 extract of the year 1989 and on 30th August, 1990, an area of 50' × 100' was declared as trust property by the Assistant Charity Commissioner. On the basis of the documents, it held that the dargah had existed prior to 1990, and that the period of limitation would begin in 1989 and expire in 2001 and the suit is barred by limitation.

11. Before the Trial Court during the final arguments, the order passed in Writ Petition No. 6607 of 2024, was tendered. The Trial Court considered the order passed by the High Court and noted that the proceeding was for demolition of an unauthorised illegal encroachment on survey no. 46 and that demolition was carried out of a structure being ground + one story of a mosque admeasuring 60 × 60 including a prayer hall admeasuring 10 × 20. The Trial Court held that this structure was distinct from the suit property, and that further encroachment and illegal construction by the Defendant trust was the subject matter of the suit being RCS No. 592 of 2023, which was withdrawn on 19th July, 2024. It observed that further encroachment by illegal construction by Defendant trust was subject mater of the suit and writ petition and that regarding the tomb as mentioned in the suit in hand, no other litigation was pending. Thus, holding that the Plaintiff has not been able to prove the extent of encroachment, suit not being within limitation and being undervalued, the Trial Court dismissed the suit.

12. The dismissal of the suit was challenged by the Plaintiffs by filing Regular Civil Appeal No. 124 of 2025 and cross objections were filed. The Appellate Court framed and answered the following points for determination :

Sr. No.	ISSUES	FINDINGS
1.	Whether plaintiff is the owner of the suit property ?	Yes.
2.	Whether defendants had encroached upon the suit property ?	Yes.
3.	Whether defendants have perfected their title by virtue of adverse possession ?	No.
4.	Whether suit property is improperly valued and insufficiently stamped ?	Redundant.
5.	Whether the suit is bad for the want of permission or Pre-suit notice under Maharashtra Co-operative Societies Act or the Maharashtra Public Trust Act ?	No.
6.	Whether the suit is barred by limitation ?	No.
7.	Whether the suit is maintainable for the want of authority to institute the suit ?	Issue to be tried by Trial Court.
8.	Whether plaintiff is entitled to the decree for perpetual injunction in the light of withdrawal of relief of possession in Appeal due to subsequent developments pending the Appeal ?	Issue to be tried by Trial Court.
9.	Whether interference into the judgment and decree under Appeal is called for ?	Yes.
10.	What order and decree ?	Appeal and Cross-objection are partly allowed with an order of remand

		under Order XLI, Rule 23-A of the Code of Civil Procedure, 1908, in terms of final order.
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13. Before the Appellate Court, the argument on behalf of the Plaintiff was that as the unauthorised structure of Defendants was demolished pursuant to the order passed by High Court, the Plaintiff, now being in vacant possession of the entire survey number does not require the relief of recovery of possession and the suit to that extent is withdrawn. The claim was restricted to perpetual injunction against the continued unlawful activities of attempted encroachment or dispossession on part of the Defendants. The Appellate Court records that an application has been filed under Order XLI, Rule 27 of CPC for production of evidence in form of copies of High Court orders, information obtained under Right to Information Act, 2005.

14. The order of Appellate Court records the submission on behalf of Defendants that the original Plaintiff being a registered society, which was converted into private limited company, there should have been some resolution or authority letter in favour of signatory of plaint, amended plaint and evidence affidavit, which is absent.

15. The Appellate Court confirmed the findings of the Trial Court on

the issue of Plaintiff's ownership, encroachment by the Defendants and on the issue of adverse possession. On the issue of limitation, the Appellate Court held that a suit for possession based on title is governed by Article 65 of the Limitation Act and can be barred by limitation only when Defendant succeeds in proving their plea of prescription of title by adverse possession. It noted that the Trial Court, on one hand, held that the Defendants could not prove prescription of title by adverse possession and, at the same time, held the suit to be barred by limitation.

16. The Appellate Court thereafter proceeded to examine the issue of validity of authority to institute the suit. The Appellate Court noted the non framing of the issue and the absence of evidence on the issue of authorization to file the suit. It opined that an opportunity needs to be given to lead evidence after framing the said issue, without which final decision in the suit cannot be rendered.

17. The Appellate Court noted the contention of Defendants that the removal of encroachment is a subsequent event during the pendency of the Appeal and without the same being proved and the Defendants being still in possession, the suit for simpliciter injunction would not lie. It framed the additional issue as to whether the Plaintiff is entitled to a decree for perpetual injunction in light of the withdrawal of the relief of possession in Appeal due to subsequent developments.

18. The Appellate Court partly allowed the Appeal and cross objection and remanded the suit to the Trial Court under Order XLI, Rule 23-A of the Code of Civil Procedure, 1908 (for short “**CPC**”) by framing two additional issues. Noting the application filed by the Plaintiff for temporary injunction in view of the subsequent event of demolition and accepting the Plaintiff’s contention of Defendant’s attempt to encroach the suit property, the Appellate Court restrained the Defendants from interfering with the peaceful possession of the suit property till final disposal of the suit.

SUBMISSIONS :

19. Mr. Dewal, learned counsel for the Appellant would point out the suit property described in the plaint as tomb and other structures being part and parcel of survey no. 46. He submits that the Plaintiff claimed to be in possession of balance portion of Survey No 46 except the suit property, whereas the Defendants claimed possession of entire survey no. 46. He has taken this Court through the findings of the Trial Court dismissing the suit as barred by limitation and findings against the Defendants on adverse possession, as against which cross objection was filed.

20. He would submit that in the Writ Petition , the relief was sought by the Plaintiff against the Corporation to initiate action against unauthorised illegal encroachment, which structures came to be

demolished. He submits that in the Writ Petition there was a reference to the pending suit. He would further point out that by order dated 10th March, 2025 passed by the Hon'ble Division Bench of this Court reproducing the prayers in the Petition as regards the unauthorised, illegal extended encroachment made in the year 2023. He submits that the Trial Court in its judgment dated 5th April, 2025 took note of the orders passed by the Division Bench of this Court in the Writ Petition and held that the further encroachment by illegal construction was the subject matter of that Writ Petition. He submits that the Plaintiff had also filed a subsequent Suit, being RCS No. 592 of 2023, which pertained to the extended encroachment. He submits that the demolition ordered was only in respect of the extended encroachment, which was the subject matter of the Writ Petition filed before the Division Bench.

21. He would further point out that during the pendency of the Appeal, on 28th April, 2026, a pursis was filed by the Plaintiff in view of the orders passed by this Court giving up relief of possession and praying simpliciter for injunction. He submits that once the prayer for possession was given up, a suit simpliciter for injunction was not maintainable, as even though, the structures were demolished, the Defendants remained in possession of the vacant land.

22. He would further submit that the Appellate Court erred in restraining the Defendants from interfering with the Plaintiff's

possession of the suit property and from creating encroachments thereon until the final disposal of the suit by placing reliance on the orders of the Division Bench, which was only in respect of the extended encroachment.

23. He submits that the Appellate Court was required to consider whether the suit for injunction was maintainable. He submits that for the purpose of framing of issues, the proper course required to be adopted was under Order XLI, Rule 25 of the CPC.

24. He submits that during the trial court proceedings an application for interim injunction was filed and vide order dated 16th February, 2005, the Defendants were restrained from creating any obstructions to the Plaintiff's possession of survey no. 46, while enjoying their occupation on a piece of land on which the dargah stands. He submits that by passing the injunction order, the Appellate Court modified the original injunction and enjoined the Defendants from entire survey no. 46 until final disposal.

25. He submits that in an application filed by the Defendants seeking a stay of the judgment and order passed by the Appellate Court, the Appellate Court rejected the application holding that preventive temporary injunction has been in existence even in the Trial Court which indicates that the Appellate Court could not have granted an injunction against the entire property. In support he relies upon the following

decision :

(i) P. Purushottam Reddy And Another vs Pratap Steels Limited¹

26. Per contra, Mr. Shah, learned counsel for the Respondent No. 1 submits that the Appeal is filed under Order XLIII, Rule 1(u) of CPC, which is to be heard only on the substantial questions of law and not on questions of fact, drawing support from the decision of the Hon'ble Apex Court in the case of ***Narayanan vs Kumaran And Others²***.

27. He submits that RCS No. 151 of 2001, filed by the Defendants against the original owner, was dismissed for default in 2009. He submits that since the order of the Hon'ble Division Bench of this Court ordered demolition and directed the handover of possession to the Petitioner, a pursis was filed restricting the claim solely for the purpose of injunction.

28. He submits that the Appellate Court has reversed the finding on the aspect of limitation and suit was remanded by framing two additional issues, and would point out the discussion in that context in the impugned order. He submits that the Hon'ble Division Bench rightly noted the substantial prayers in the Writ Petition, which sought the demolition of unauthorised and illegal encroachment located near the western boundary on land bearing survey no. 46. The interim relief

1 (2002) 2 SCC 686

2 (2004) 4 SCC 26

sought was the issuance of a show cause notice to the Defendants to explain why the unauthorised illegal extended encroachment made in 2023 should not be demolished and to take suitable action.

29. He would further point out the order dated 30th April, 2025 passed by the Hon'ble Division Bench, where the Plaintiff pointed out that the entire structure had not been demolished and that the Defendants continued to carry out repairs around the unauthorised structure. He further points out that the Hon'ble Division Bench took cognizance of the additional affidavit filed by the Commissioner of the Brihanmumbai Municipal Corporation on 29th April, 2025 disclosing that the structure was much larger structure admeasuring 17,610.02 square feet and no permission was granted. He would further point out that the Hon'ble Division Bench noted that the Defendant started with the construction of 160 square feet at the inception, which expanded to approximately 20,000 square feet, and demolition was directed of around 3,500 square feet. He submits that subsequently the entire structure came to be demolished.

30. He submits that the Hon'ble Division Bench considering the application filed by the Defendants in the Writ Petition noted the submissions that by reason of dismissal of the Plaintiff's suit by the Trial Court, the directions passed by the Hon'ble Division Bench stands vitiated. He points out that the Hon'ble Division Bench held that the

suppression of the dismissal of the suit had no bearing on the illegality of the Defendant's structure and also points out that the finding that the dismissal of the suit does not prove that the land belongs to the Defendants or that they were the owners of the said structure. He submits that the finding of the Hon'ble Division Bench is that by virtue of the dismissal of the suit, there is no confirmation of any right of the Defendant either on the structure or on the land and that the Defendants must independently prove their right to the structure as well as the land. He further points out that the Hon'ble Division Bench concluded that Defendants have encroached upon the suit land, and the Plaintiffs have established ownership of the suit land.

31. He further points out that the Hon'ble Division Bench has noted the contentions of the Defendants as recorded in the judgment of the Trial Court that the present Writ Petition was in respect of the different property and not the same as dargah and that implies an admission on behalf of the Defendant that the dargah is on a different property and not on the property for which the Writ Petition was filed and orders were passed.

32. He submits that the findings of Hon'ble Division Bench conclusively establishes the ownership right of the Plaintiff and by reason of demolition of the structures as the possession of entire survey no. 46 came to the Plaintiff, there was no requirement of seeking

the relief of recovery of possession. He would further point out that the Trial Court's findings of ownership and possession were in favour of the Plaintiff and the remand was necessitated by reason of the issues being framed of maintainability for want of authority and whether the subsequent developments of demolition would entitle the Plaintiff to a decree of perpetual injunction.

33. In rejoinder, Mr. Dewal would submit that the Appellate Court relied on the temporary injunction which was in existence till the disposal of the suit as the basis for restraining the Defendants from interfering with the peaceful possession. He submits that the injunction was only in respect of the another portion of the property and not in respect of the suit property and the Appellate Court could not have enjoined the Defendants pending the disposal of the suit upon remand.

34. Rival contentions now fall for determination:

35. The Appeal has been filed under Order XLIII, Rule 1 (u) of the CPC, being aggrieved by the order of remand by the Appellate Court. For challenging the impugned judgment on merits, the remedy is to file First Appeal. In captioned Appeal from Order, the inquiry is confined to the legality and propriety of the remand order made by the First Appellate Court.

36. The power of remand conferred on the Appellate Court finds place in Order XLI governing Appeals from original decree. Rules 23, 23-

A, 24, 25 and 27 of Order XLI sets out the statutory provisions governing the final determination of Appeals and reads as under :

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.

[23A. 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.

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].

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.

37. The statutory hierarchy demands final determination, when the evidence on record is sufficient for the Appellate Court to finally determine the Appeal. In cases where the Trial Court has omitted to frame the essential issues or determine essential question of fact, Order XLI Rule 25 enables the Appellate Court to frame the issues and refer it to the trial court for taking additional evidence. In such eventuality, the trial court proceeds to try the issues and returns the evidence to the Appellate Court together with its findings and reasons therefor, which forms part of record of the suit and the Appellate Court then determines the Appeal. Order XLI Rule 27 confers power on the Appellate Court to permit production of additional evidence before the Appeal Court.

38. The emphasis is thus on the final determination by the Appellate Court itself either on the basis of available evidence or by directing additional evidence whenever necessary. The power of remand is to be exercised sparingly in cases where the suit is disposed of upon a preliminary point and upon reversal of decree, the Appellate Court

remands the case with directions as to the issues to be tried and in other cases where re-trial is considered necessary.

39. The Honorable Apex Court in the case of **Arvind Kumar Jaiswal vs Devendra Prasad Jaiswal Varun**³ has held as under :

“An order of remand prolongs and delays the litigation and hence, should not be passed unless the Appellate Court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account. Where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential. The first appellate court, if required, can also direct the Trial Court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court. (Emphasis supplied)”

40. The distinction between the provisions contained under Order XLI Rule 23, 23-A and 25, was explained by the Hon’ble Apex Court in the case of **J. Balaji Singh vs Diwakar Cole And Others**⁴ as under:-

“There are three provisions in the Code which deal with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order XLI Rules 23, 23-A, and 25.

14.1. So far as Order XLI Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.

14.2. So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.

14.3. So far as Rule 25 is concerned, it enables the Appellate Court to

3 2023 SCC Online SC 112

4 AIR 2017 SC 2402

frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself."

22. In the present case, the matter was not disposed off on the preliminary issue. Thus, Order XLI Rule 23 is not attracted. Since the Lower Appellate Court remanded the matter back after framing additional issue, the power invoked is relatable to Order XLI Rule 25.

41. In the present facts, the Appellate Court sets aside the judgment of Trial Court and reverses the decree of dismissal, permits amendment of plaint, frames issues, permits leading of evidence and directs Trial Court to record findings and deliver judgment based on the findings on the additional issues and findings of the Appellate Court.

42. The finding of the Appellate Court in paragraph 39 of the impugned judgment reads as under:

"Point No.10: In view of the findings to points No.1 to 9, although findings to the issues framed by the learned Trial Court, barring two of the said issues, have been recorded, as the decision cannot be completely rendered on the basis of the issues so far framed and evidence on record in absence of the above-mentioned two issues, and as plaintiff needs to amend his pleadings for bringing on record the post decree events occurred and as this recourse require the trial of two important issues by recording the sumptuous evidence, the adoption of recourse to which, in the appellate court itself would deprive the parties of their right to prefer first appeal in the District Court, the circumstances justify an order of remand instead of trying the unframed issues in the appellate court itself so as to make out a rare case necessitating exercise of power under Order XLI, Rule 23-A of the Code of Civil Procedure, 1908. The learned Trial Court, therefore, needs to frame the following issues after giving opportunity to plaintiff to amend its pleadings for bringing off record the post decree events as stated in pursis Exh.53:

(i) Whether the suit is maintainable for the want of authority to institute the suit?

(ii) Whether plaintiff is entitled to the decree for perpetual injunction in the light of statement of facts and abandonment of claim to recovery of

possession made in pursis Exh.53 ?”

43. The Appellate Court has opined that decision cannot be completely rendered on the basis of issues framed in absence of determination of the two additional issues, which findings should have led to an order under Order XLI Rule 25, while retaining the Appeal with itself. The Appellate Court was mindful of the fact that parties would have been deprived of their right to prefer appeal in the District Court, without noticing that the finality of the issues determined by the Appellate Court, which would form part of the judgment of the Trial Court decided afresh would have the same effect.

44. The Appellate Court has remanded the suit for determination of two issues (a) validity of authority to institute the suit and (b) entitlement of plaintiff to decree for perpetual injunction in light of withdrawal of relief of possession in appeal.

45. As to the validity of authority, it is not demonstrated to this Court that any such objection was taken in the written statement. For the first time before the Appeal Court, the objection was taken and as the Appellate Court has itself recorded that the issue is mixed question of fact and law, in the absence of any pleading, the issue was rightly not framed. The Appellate Court did not render a finding that it was unable to decide the issue of maintainability, for want of authority on the basis of existing material. If it was of the opinion that the suit must fail for

want of authority, the Appellate Court could have rendered such a finding. If the Appellate Court was of the opinion that the issue was required to be framed, which was essential to the right decision of the suit upon merits, the course which was required to be adopted by the Appellate Court was under Order XLI, Rule 25, directing the Trial Court to take additional evidence and return the evidence to the Appellate Court. The purpose of remand is not to fill in the lacuna in the evidence. The Appellate Court has held in paragraph 32 and 33 as under:

"[32] The learned Trial Judge, although, refers to the suit having been brought without authority of the Chairman of the society basing its opinion on the lack of Board Resolution or minutes of meeting or other documents showing that the decision to institute the suit was that of society, there being no issue framed prior to the trial and the parties not having been accorded any opportunity to adduce evidence and be heard on such an issue, the learned Trial Judge has declined to record any finding thereof, which is failure to exercise jurisdiction by the court. The learned Trial Judge has recorded finding to the issue as to requirement of statutory pre-suit notice/permission under the Maharashtra Co-operative Societies Act, 1966; but she ought to have paid heed also to this unresolved important issue as to the authority to institute the suit. This unresolved issue requiring recording of evidence cannot, for the first time, be dealt with in the appeal, particularly, when this important issue has never been framed prior to the trial, when it was very much germane to the adjudication of the suit.

[33] Perhaps, the non-framing of issue misled both of plaintiff or defendants, who, otherwise, would have had an opportunity to adduce respective evidence on this issue. The want of resolution of the society or the Board Resolution of the Company and the effect of ratification could not have been appreciated without the proper framing of the issue and collecting evidence in that behalf for being appreciated, of course, after putting the parties to the notice of the framework of the said issue. The learned advocate for defendant have vehemently argued that, for the want of authority, the suit must fail, for which sake, he has relied upon various judgments. However, no finding to this issue can be recorded without there being framing of issue in order to put parties to the notice of specific issue and the requirement of leading evidence in that behalf, particularly when, the issue happens to be a mixed question of facts and law, with more colour of factual aspects. Such an issue, therefore, needs to be directed to be framed and an opportunity needs to be extended to the parties to lead evidence on the issue and of being heard thereupon,

without which, no finding to this issue and the final decision in the suit can be rendered. Accordingly, the finding to point No.7 is recorded.”

46. The Appellate Court has held that there is omission to frame an essential issue of fact in which case the appropriate course to be adopted was under Order XLI Rule 25 of CPC or Rule 27 and 28 of CPC.

47. In so far as the second issue is concerned, the impugned judgment records that the Plaintiff has filed an application under Order XLI Rule 27 for leading additional evidence for producing the copies of orders of the High Court. There is no adjudication of the said application and the Appellate Court holds in paragraph 37 as under:

“[37] The learned Advocate for defendants has pointed out that the contention of plaintiff that the encroachment on the suit property has been removed by virtue of execution of the order of Hon'ble High Court connotes the fact subsequent to the passing of the decree in the suit and pending the appeal, so that the said fact needs to be pleaded by way of amendment so as to be responded to by the defendants before adjudicating the claim. He has pointed out that, if this subsequent fact pleaded does not come to be proved and defendants still happen to be in possession of the suit property, in such an eventuality, the relief of perpetual injunction cannot be granted as the same happens to be without "efficacious remedy" of removal of encroachment or recovery of possession so as to disentitle plaintiff to decree of perpetual injunction. The submission of learned Advocate for defendants indeed commands significance in as much as the plaintiff is harping only on the relief of injunction simplicitor without there being relief of possession, which needs to be scanned for the applicability or inapplicability of Section 41(h) of the Specific Relief Act, 1963, for which sake, plaintiff needs to amend the suit for bringing on record the subsequent facts post decree and pending the appeal justifying the abandonment relief of possession and the claim to simplicitor injunction. The opportunity needs to be given to the adversary to controvert the subsequently pleaded facts and evidence also needs to be recorded so as to find out whether plaintiff would be entitled to perpetual injunction without claiming recovery of possession, which is an exercise, in the circumstances, inexpedient to be got accomplished in the appellate court as the parties would lose the opportunity of first appeal in the District Court. Even otherwise, as there is one more issue, erstwhile referred to, which was omitted to be framed and is required to be tried by the Trial Court, in the overall circumstances of the case, this issue also needs to be framed and tried by the learned Trial Judge. The issue, therefore, needs to be directed to be framed by

the Trial Court for being tried and adjudicated afresh upon plaintiffs requisite amendment in the pleadings for incorporation of the subsequent events. Accordingly, the finding to point No.8 is recorded."

48. The application was filed under Order XLI Rule 27 precisely for bringing the subsequent events on record. The Appellate Court ought to have adjudicated the application and if the application is allowed, the route of Rule 28 of Order XLI ought to have been followed and in event of dismissal ought to have proceeded to determine the maintainability of simpliciter suit for injunction. The entire inquiry to be conducted is whether the evidence was essential to enable the Appellate Court to pronounce the judgment or for any other substantial cause. The Appellate Court has opined that as one issue is already framed, this issue can also be framed and tried by the Trial Court. It is trite that remand cannot be ordered as a matter of course as it has the effect of prolonging the litigation.

49. By the impugned judgment, the Appellate Court passed the following order :

1. Appeal and Cross-Objection are partly allowed by setting aside the judgment and decree of dismissal of suit under Appeal with the following order of remand vide Order XLI, Rule 23-A of the Code of Civil Procedure, 1908:

(a) Suit shall stand restored to its original number and plaintiff would be permitted to amend his pleadings for bringing on record the post decree events proposed in pursis Exh.53.

(b) Trial Court shall frame the following issues and extend opportunity to the parties to lead evidence and of being heard on these issues :

(i) Whether the suit is maintainable for the want of authority to institute the suit ?

(ii) Whether plaintiff is entitled to the decree for perpetual injunction in the light of statement of facts and abandonment of claim to recovery of

possession made in pursis Exh.53 ?

(c) Trial Court shall record the findings to the aforesaid two issues, and in consideration of the findings so recorded upon trial of these issues with the findings to other issues recorded by this court, the learned Trial Judge shall deliver the judgment after hearing the parties.

(d) In consequence of the allowing of the application Exh.22, defendants are temporarily restrained from interfering into possession of plaintiff as to suit property and from creating encroachment thereupon, till final disposal of the suit.

(e) The learned Trial Judge shall adjudicate the costs of Exh.23 with the costs in cause, for the belated production of documents.

(f) The learned Trial Judge is expected to dispose of the suit with the pronouncement of judgment so directed as expeditiously as possible.

(g) Parties shall appears in the Trial Court on 15/06/2026.

2. Decree be drawn up accordingly.

3. Record and proceedings be sent to the Trial Court.

50. The framing of additional two issues and directing evidence to be led, is an exercise of powers under Order XLI, Rule 25 of CPC and the Appellate Court ought to have retained the Appeal with itself to be finally determined after the evidence and findings are sent by the Trial Court. The error occurred by the order of remand under Order XLI Rule 23A, which remand was permissible where re-trial is considered necessary. The consequence of the impugned judgment is that the findings of the Appellate Court on the issues determined has attained finality *qua* the Trial Court and the Trial Court was directed to decide the two additional issues, record evidence and deliver judgment. An anomaly is created as though the Trial Court would render judgment afresh, the Appellate Court's findings on the issues would form part of

the findings and could not be appealed again before the Appellate Court, whilst the findings of the Trial Court on the additional two issues could form subject matter of appeal before the Appellate Court.

51. It is precisely to avoid such a situation, that the provisions of Order XLI Rule 25 sets out the course to be adopted where there is omission to frame essential issues by the Trial Court. The appropriate course to be adopted was to frame the additional issues and either take the evidence itself or direct the Trial Court to take evidence and to remit the evidence to the Appellate Court, which shall then determine the Appeal finally. The impugned judgment is an exercise of amalgamation of powers under Rule 23A and Rule 25 of Order XLI, which is unsustainable.

52. The Appellate Court opined that the final determination of the Appeal requires findings on the additional issues framed. Framing of the additional issues does not, by itself, justify remand and the appropriate course was to adopt the route under Order XLI, Rule 25 of CPC.

53. By the impugned judgment, the Appellate Court has allowed Exhibit "22", filed by the Plaintiffs for grant of temporary injunction and has restrained the Defendants from interfering with the possession of Plaintiff as to the suit property and from creating encroachment thereupon till final disposal of the suit.

54. The Appellate Court has noted the Plaintiff's contention based

on the subsequent events of demolition pursuant to the order of the High Court and the attempted encroachments by the Defendants. It held that the Plaintiff has made out *prima facie* case in view of what has been recorded by the High Court in Writ Petition No. 6607/2024 and the compliance Affidavit filed by Thane Municipal Corporation. It noted that barring the two additional issues, all the issues covering the main controversy have been recorded in favour of plaintiff. It held that balance of convenience is in favour of the Plaintiff and it would suffer irreparable loss if injunction is refused, as there were repeated police complaints by the Defendants even after the order of the High Court claiming rights in the suit property on the basis of dismissal of the suit

55. The Appellate Court has conducted fresh adjudication of the application for temporary injunction and not merely continued with the injunction by the Trial Court. The application for temporary injunction was premised on the basis of the subsequent events leading to demolition of the structures on Survey No 46. The Appellate Court has granted injunction after a finding on *prima facie* case, balance of convenience and irreparable loss and injury.

56. The submissions of Mr. Dewal concentrated on the restraint order against the Defendants. He has taken this Court through the pleadings and the orders passed during the pendency of trial to contend that the Plaintiff's possession was accepted in respect of the balance portion of

survey no. 46, excluding the suit property. He would also emphasize the prayers sought in the Writ Petition filed before this Court, that the demolition was sought of the extended illegal encroachment and not for the suit property described in the plaint.

57. There is no dispute as to the fact that the demolition of all structures on survey no. 46 has taken place, and the affidavit of the official of Thane Municipal Corporation states that survey no. 46 is now a barren land.

58. The Hon'ble Division Bench of this Court, in its order dated 9th July, 2025 specifically held that the Defendants must independently prove their right to both the structure and the land in order for the Court to direct the protection of the structure. The Trial Court and the Appellate Court have rendered concurrent findings on the Plaintiff's ownership of Survey No. 46. The fact that the Defendants have taken a plea of adverse possession amounts to a clear admission on their part of the Plaintiff's ownership of the entire Survey No. 46.

59. Before the Appellate Court, the application for injunction was premised on the subsequent event of demolition of all the structures on Survey No 46 and the attempted encroachments by the Defendants, which found favour with the Appellate Court. The factual position about Survey No 46 changed by reason of the demolition order passed by the Hon'ble Division Bench of this Court and the orders passed during the

pendency of the trial were immaterial to decide the application below Exhibit "22". The Appellate Court has rendered specific findings in favour of the Plaintiff noting the existence of *prima facie* case. It has further noted that the Defendants are filing repeated police complaints even after the order of the High Court claiming right in the suit property. To support the grant of injunction, it noted the grant of injunction during the pendency of trial. The observation does not place any embargo on the Appellate Court to decide the application of temporary injunction on the basis of subsequent event of demolition *qua* the entire property.

60. The purpose of grant of injunction is to preserve the status quo of the subject property. The Appellate Court has rendered findings of ownership in favour of the Plaintiff and has rejected the plea of adverse possession. As the ownership issue is decided in favour of the Plaintiff and the Defendant's structures already stands demolished as unauthorised *prima facie* the Defendants cannot claim any right in the subject property. The apprehension of the Plaintiffs about being dispossessed and attempts of encroachments have found favour with the Appellate Court and there are no submissions canvassed to assail the said findings. The Appellate Court has therefore rightly adjudicated the application for grant of temporary injunction.

61. In light of the discussion above, the following order is passed:

ORDER

(a) The direction of remand of the Suit to the Trial Court under Order XLI Rule 23-A of CPC contained in paragraph 1(a) in the impugned judgment and order dated 7th May, 2026 is hereby quashed and set aside.

(b) Regular Civil Appeal No 124/2025 is restored to file of the District Judge, Thane at Thane.

(c) The Appellate Court is directed to adjudicate the interim application filed under Order XLI Rule 27 by the Plaintiff for leading additional evidence and if the application is allowed, either to take such evidence or direct the Trial Court to take such evidence and send it to the Appellate Court.

(d) The Appellate Court to examine whether the Appeal can be finally determined on the basis of the existing record after hearing the parties.

(e) In event, the Appellate Court comes to a conclusion that the two issues framed by the impugned judgment are essential for final determination of the Appeal, the Appellate Court to follow the course of Order XLI Rule 25 of CPC, and retain the Appeal with itself until the evidence together with the findings and reasons are sent by the Trial Court. Resultantly, Clause 1(c), (e), and (f) of the impugned judgment

are quashed and set aside.

(f) Clause 1(d) of the impugned judgment and order remains undisturbed.

62. The Appeal from Order is allowed in the above terms.

63. Interim applications do not survive for consideration and stand disposed of.

(SHARMILA U. DESHMUKH, J.)