

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 652 OF 2013

Kashinath @ Kashiram P. Bhoir
Age : 62 yrs. Occu. : Agriculture,
R/at – Bhoirwadi, Retibunder Road,
Dombivli West, Tal-Kalyan, Dist.-Thane. ... Appellant

vs.

- 1.** M/s. Nandu Developers
A Proprietary firm, through its Proprietor :
Shri. Umesh J. Nandu, Happy Home,
Mahatma Phule Road, Dombivli West,
Tal.-Kalyan, Dist. - Thane.
- 2.** Ram Jairam Bhoir
Age – 38 yrs., Occ. Agriculture,
R/at-Mothagaon, Thakurli,
Dombivli (W), Tal. Kalyan, Dist. Thane
- 3.** Madhukar Parshuram Bhoir
Age – 52 yrs., Occ. Agriculture,
R/at-Retibunder Road, Near “H” Division
Dombivli (W), Tal. Kalyan, Dist. Thane
(Since deceased through his L.R.)
- 3a.** Smt. Usha Madhukar Bhoir,
Age – 55 yrs. Occ. Housewife
- 3b.** Shri. Rajesh Madhukar Bhoir
Age – 38 yrs. Occ. Business
- 3c.** Miss. Vidya Madhukar Bhoir
Age – 34 yrs. Occ. Housewife
- 3d.** Miss. Himali Madhukar Bhoir

Age – 29 yrs. Occ. Housewife
All R/at-Retibunder Road, Near “H” Division
Dombivli (W), Tal. Kalyan, Dist. Thane

3e. Mrs. Jamala Giridhar Patil,
Age – 36 yrs. Occ. Housewife,
R/at. Balkum, Thane (W).

4. Kalyan-Dombivli Municipal Corporation
A Local-self Government established
As per B.P.M.C. Act.

5. The Municipal Commissioner,
Kalyan-Dombivli Municipal Corporation ... Respondents

Mr. Bhushan Walimbe, Advocate for the appellant.

Mr. K. K. Jadhav, Advocate for respondent no.1.

Mr. Prashant Kamble i/by A. S. Rao, Advocate for respondent
no.5.

Coram : Smt. R. P. SondurBaldota, J.

Date : 22nd March, 2016.

JUDGMENT :

1. The order impugned in this appeal is passed by the Ad-hoc District Judge-2, Kalyan under Order XXXXI Rule 23(A) Civil Procedure Code ('C.P.C.' for short) remanding the suit to the trial Court to determine issues of (i) pecuniary jurisdiction of the trial, (ii) jurisdiction to try the subject matter of the suit and (iii) the suit having become infructuous on occurrence of subsequent events. The order also directs the trial Court to

“grant opportunity to the parties to lead the evidence oral or documentary, enhance the argument on the point of law and facts and to re-determine the suit on merit.” Considering the nature of the impugned order the appeal is taken up for final hearing at the stage of admission.

2. The appellant is the original plaintiff and the respondents are original defendants no.1 to 5.

3. The appellant, respondent no.2 and one Madhukar, the predecessor of respondents no.3(a) to 3(e) were the joint owners of the land at Survey No.276 Hissa No.1 (New Survey No.83/1), admeasuring 63 ARE, having received the same in family partition. Later there was further oral partition between the three under which the appellant became entitled to the land admeasuring 19 ARE, respondent no.2 became entitled to 14 ARE and Madhukar to 15 ARE. The balance portion of 15 ARE was left common. Madhukar has constructed a building named Ganesh Krupa in the North-West corner of the land at Survey No.276 Hissa No.1 (hereinafter described as “the entire land”). The building consumes land of more than 2 ARE. Respondent no.2 and Madhukar entered into agreement with respondent no.1 for development of their portion of the land. At the same

time the appellant executed development agreement with one Tara Construction for development of his portion of the land.

4. The appellant alleges in the plaint that respondent no.1 was entitled under the development agreement to develop only land admeasuring 29 ARE which had fallen to the share of respondent no.2 and Madhukar. In that circumstance, it was necessary for respondent no.1 to seek subdivision of the entire land before proceeding for development. But respondent no.1 did not take any step towards the subdivision. Instead it submitted construction plans for approval of respondent no.4 by showing the area of the entire land of 63 ARE in the Area Statement accompanying the plan. It also did not disclose existing construction of the building of Ganesh Krupa, which covers the land of more than 2 ARE. Respondent no.1 was further, supposed to show the garden, road, open space and boundary margins of the development within the area of 29 ARE. Instead it showed the proposed garden, roads, existing structures within the land owned by the appellant and the common portion of 15 ARE. Resultantly the total FSI for construction calculated for respondent no.1 was on the basis of the entire 63 ARE of land and while constructing the building respondent no.1 has

exhausted the FSI available over the entire land. This has seriously prejudiced the rights and interest of the appellant.

5. The appellant also alleges that the building plans submitted by respondent no.1 and sanctioned by respondent no.4 were not as per the Development Control Regulations for Kalyan-Dombivli Municipal Corporation and that in the facts of the case respondents no.4 and 5 ought not to have sanctioned the building plans of respondent no.1 without subdivision of the entire land and without ensuring that the same were as prescribed by the Development Control Regulations. The appellant, therefore, filed suit against the respondents seeking inter alia a declaration that the plans sanctioned by respondent no.4 for the construction by respondent no.1 be declared illegal and to restrain respondent no.1 from erecting any construction upon the land admeasuring 29 ARE unless the area was subdivided. He also sought a declaration that respondents no.4 and 5 have intentionally not utilized their authority under the Development Control Regulations against respondent no.1.

6. The suit was contested by respondent no.1 alone on behalf of itself and as the constituted attorney of Madhukar, defendant no.5 to the suit. The other respondents though

appeared before the Court did not file any written statement. They also did not participate in the trial. Thus, the specific allegations made against these respondents remained uncontroverted.

7. Respondent no.1 did not dispute that the development agreement in it's favour was limited to develop the land admesuring 29 ARE that had fallen into share of respondent no.2 and Madhukar. It defended the suit contending that in view of Section 149 of the Bombay Provincial Municipal Corporation Act ("BPMC Act", for short) the appellant was not entitled to challenge the order of sanction of plans by the Municipal Corporation. It also contended that the appellant was not entitled to challenge the order and the map prepared by Taluka Inspector of Land Records (T.I.L.R.), Kalyan as there is a separate remedy of appeal available to the appellant under the Maharashtra Regional Town Planning Act ('MRTP Act', for short). Therefore, the Civil Court had not jurisdiction to entertain the suit in respect of the reliefs relating to the sanction of plans. As regards the subdivision of the property, respondent no.1 claimed that once the Collector granted permission for non-agricultural use of the property, it was not under any obligation to get Pot-

Hissa of the land made. Lastly, it was contended by respondent no.1 that since the construction of the building was already complete, the relief claimed by the appellant had become infructuous.

8. The trial Court by it's exhaustive judgment and order dated 2nd September, 2009 decreed the suit and declared that the building construction permission granted by respondent no.4 to respondent no.1 was in contravention of the provisions of the Maharashtra Regional and Town Planning Act, 1966 and hence void-ab-initio. It further declared that respondent no.1 is not entitled to carry out development of the undivided share of respondent no.2 and Madhukar without subdivision of the property. It issued perpetual injunction against respondent no.1 from carrying out any construction related activity on the suit property except of taking any corrective measures after proceeding for subdivision of the entire land. Respondents no.4 and 5 were directed by a mandatory order to reconsider the building permission in view of the entitlement of the share of the appellant and in accordance with the provisions of the Development Control Regulations for Kalyan-Dombivli Municipal Corporation r/w the Maharashtra Regional and Town Planning

Act, 1966 within a period of two months from the date of the decree.

9. Being aggrieved by the judgment and decree respondent no.1 preferred civil appeal for itself and as the constituted attorney of respondent no.2 and respondents no.3(a) to 3(e) since Madhukar had expired by then, being Civil Appeal No.163 of 2009. By the impugned judgment and order the District Court has remanded the case to the trial Court for fresh decision in the suit.

10. Mr. Walimbe, the learned advocate for the appellant submits that the impugned order is patently erroneous and impermissible in law. It is his argument that though order is purportedly under Order XXXXI Rule 23(A) C.P.C., the same does not conform to the provision. The lower Appellate Court has remanded the matter for deciding only the preliminary issues without reversing the decree on other issues arising out of merits of the case. It is also his contention that, in fact, retrial of the case was not necessary as the evidence on record was sufficient to decide the three preliminary issues referred to in the impugned order. Mr. Walimbe next submits that it has been the consistent view of the Apex Court that the power of remand

should be sparingly used by the Courts in deserving cases. An unwarranted order of remand gives the litigation an undeserved lease of life and therefore must be avoided. In this connection he relies upon decision of the Apex Court in ***P. Purushottam Reddy vs. Pratap Steels Limited reported in 2002 (2) SCC page 686.***

11. The trial Court had framed 8 issues on merits of the matter and dealt with the same, exceptionally exhaustively in its judgment and decree. It had also framed issues no. 8A and 8B on the objections to the valuation of the suit and consequential pecuniary jurisdiction of the trial Court to entertain the suit. Issues no.9 and 10 were on the entitlement of the appellant to the reliefs as prayed. These issues are discussed at paras 122 to 143 of the judgment and decree. In these 22 paras the trial Court has considered the objections to the jurisdiction of the civil Court as raised by respondent no.1 based on the provisions of MRTP Act and BPMC Act.

12. The impugned order is seen to be a short and cryptic order. The first four paras thereof narrate the history of the case. Para 5 records the single point for determination drawn by

the Lower Appellate Court i.e. whether it was necessary to remand the matter for deciding preliminary issues. The reasons for remand are stated at paras 6 to 11. Paras 6 and 7 of the impugned order take note of the evidence that has come on record during trial on valuation of the appellant's share of 19 ARE and valuation of the entire land of 63 ARE. The Lower Appellate Court then holds :

“Irrespective of the fact plaintiff intentionally not valued the suit properly. So there is necessity to direct learned trial court to ascertain the valuation of the suit property by giving opportunity to both parties to lead evidence to that effect. After ascertaining the valuation it is necessary to give opportunity to plaintiff to amend his plaint accordingly and to value the suit properly.”

13. Paras 8 and 9 of the order deal with the jurisdiction of the Civil Court in deciding the subject matter of the dispute. Para 8 refers to the pleadings of the parties. At para 9 the Lower Appellate Court opines that considering the reliefs claimed by the appellant in the plaint and in view of Section 45 of MRTP Act and Section 149 of BPMC Act, the order passed by the concerned authority had reached finality and there was a specific remedy available to the parties for putting up their grievance. It is also observed that in the matters of passing of

N.A. order, the Collector is a competent authority and jurisdiction of Civil Court is barred. Thereafter for considering the remand, the lower appellate court observes as follows:

“So prima facie it shows that, without framing the issue regarding the jurisdiction of the Civil Court to entertain the present suit, learned trial court has decided the suit and granted relief of declaration that the building construction permission granted by KDMC is in contravention of provisions of MRTTP Act, 1966. It is also declared that defendant no.2 cannot entitle to carry out the development upon divided and in separated share unless sub-division of the suit property is made. So I am of the opinion that, there is necessity to frame the issue regarding jurisdiction and to decide the same by granting opportunity to both the parties,”

14. At para 10, the lower appellate court notes that it has come in the cross-examination that respondent no.1 has completed construction of the work of the disputed portion and even allotted the flats to the purchasers. In the circumstances, the main prayer made by the appellant and the other reliefs claimed by him have become infructuous. Thereafter at para 11, the directions for remand of the case under Order XXXXI, Rule 23(A) C.P.C. have been stated.

15. Before advertng to the direct decision of the Apex Court relied upon by Mr. Walimbe, it would be convenient to take note of the provision of Order XXXXI Rule 23(A) C.P.C. The

same reads as follows :

“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.

From the plain reading of the provision it is seen that for exercise of the power of remand thereunder there must be satisfaction of four conditions. They are (i) the decree impugned must be a decree passed on merits, (ii) there must be non-consideration of some preliminary objection, (iii) the decree must be reversed in appeal and (iv) retrial is necessary. This very aspect has been considered by the Apex Court in the decision cited by Mr. Walimbe.

16. In that decision the Apex Court has extensively considered the power of the Appellate Court of remand including the inherent powers under Section 151 C.P.C. It took note that prior to the insertion of Rule 23-A in Order XXXXI of C.P.C. by the C.P.C. Amendment Act, 1976, there were only two provisions contemplating remand by Court of Appeal in Order XXXXI CPC. The provisions were Rule 23 and Rule 25. Rule 23 applies when

the trial Court disposes of the entire suit by recording its finding on a preliminary issue without deciding other issues and the finding of the preliminary issue is reversed in appeal. Rule 25 applies when the Appellate Court notices an omission on the part of the trial Court to frame or try any issue or to determine any question of fact, which in the opinion of the Appellate Court is essential for the right decision of the suit upon its merit. This remand is limited remand. The subordinate Court, on such remand can try only the issues referred to it in the order of remand for trial. Having done so, it has to return its findings and reasons on trial of those issues to the Appellate Court. Apart from the above two provisions, Court could in appropriate cases exercise inherent jurisdiction under Section 151 C.P.C. to order a remand if it was considered preeminently necessary in order to do justice. The situation however changed after the amendment of C.P.C. in the year 1976 with insertion of Rule 23-A all cases of wholesale remand got covered by Rules 23 and 23-A and recourse to the inherent powers can be only in exceptional cases. As regards Rule 23-A, it holds that remand thereunder can be only on satisfaction of the conditions therein of the trial Court disposing off the case otherwise than on a preliminary

point and the decree is reversed in appeal and a retrial is considered necessary.

17. In the case on hand, the trial Court did not dispose off the suit upon a preliminary point. The suit is decided on merit as well as on two preliminary points i.e. the preliminary objection to the jurisdiction of the Court based on the subject matter of the dispute and the suit having become infructuous. The trial Court did not frame specific issues on these two objections but has extensively dealt with the same in as many as 22 paras of the judgment and decree. It raised issues on the objections to the valuation of the suit and the pecuniary jurisdiction of the Court but has not dealt with the same.

18. The Lower Appellate Court finds fault with the trial court in not framing specific issue as regards the jurisdiction of the Court based on the subject matter of the dispute. Mr. Walimbe however rightly points out that the only objection raised in written statement by respondent no.1 was to the pecuniary jurisdiction of the trial court to entertain the suit. There was no objection raised to jurisdiction either in view of Section 45 of the MRTP Act or Section 149 of the BPMC Act. In the circumstances, no fault could found with the trial Court for

not framing the issues. In any case, these contentions have already been dealt with by the trial Court. As regards consideration of the objections to the pecuniary jurisdiction of the court, in view of Section 21 C.P.C. it was necessary for the respondents to establish the consequent failure of justice without which the objection cannot be considered.

19. In any case for the remand to be valid under Rule 23-A it was necessary for the Lower Appellate Court to consider the case on merit and reverse the decree in appeal and then give a finding with reasons that retrial was necessary. This exercise is not done by the Lower Appellate Court. Further there is nothing to indicate that for deciding any of the questions raised by the Lower Appellate court any further evidence is required to be led by the parties. Thus, the order impugned in the appeal cannot be justified and sustained. Hence, the appeal from order is allowed. The order dated 25th June, 2012 passed by the Ad-hoc District Judge-2, Kalyan is set aside and the matter is remanded to the Lower Appellate Court for complete consideration of the appeal.

[Smt. R. P. SondurBaldota, J.]