

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

APPEAL FROM ORDER NO. 14 of 2016
with
CIVIL APPLICATION NO. 20 OF 2016

Shri Vishnu Dashrath Chavan ..Appellant

v/s.

Shri Pundalik Dashrath Chavan ..Respondents

Mr. S.M.Gorwadkar, Sr. Advocate a/w. Mr. Nirtanjan Mogre for the Appellant
Mr. Sameer N. Tendulkar for the Respondent.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 3rd JULY, 2017.**

JUDGMENT.

1. Admit.
2. With the consent of the learned Counsel for the respective parties, the appeal is taken up for final hearing at the stage of admission.
3. The appellant herein has challenged the judgment and order dated 3rd May, 2014, whereby the Adhoc District Judge-I, Vasai has set aside and quashed the judgment and decree dt.28.2.2013 and remanded the suit with

direction - “to allow the plaintiff and the defendant to establish their respective claims so that the dispute should be resolved in proper legal manner following the observations made in the judgment, but not swaying away with it”.

4. Heard Mr. Gorwadkar, the learned Counsel for the Petitioner and Mr. Tendulkar, the learned Counsel for the respondent. I have perused the impugned judgment, the pleadings and I have considered the submissions advanced by the learned Counsel for the respective parties.

5. The appellant herein claims to be the owner of the suit flat no. 13, B Wing, in Gitanjali Co-operative Housing Society. It is the case of the appellant that he had allowed his brother i.e. the respondent herein to occupy the suit flat. The respondent refused to vacate the suit flat, and this resulted in filing the suit for recovery of possession of the suit flat.

6. The respondent denied that the appellant herein was the sole owner of the suit flat and that the appellant had permitted him to reside in the suit flat. The defence of the respondent was that the suit flat was purchased

from the retirement benefits of his father. He claimed that there was an understanding/family arrangement that he would occupy the suit flat and the appellant would occupy the flat at Borivali. Accordingly he is occupying the suit flat and the appellant is occupying the flat at Borivali. The respondent therefore claimed that the appellant was not entitled to recover possession in respect of the suit flat.

7. The learned trial Judge, after appreciating the evidence adduced by the respective parties decreed the suit and directed the respondent to hand over vacant possession of the suit flat in favour of the appellant. The respondent challenged the said order in Appeal No.21 of 2013. The learned Adhoc District Judge, Vasai allowed the appeal, and quashed and set aside the order of the trial Court, and remanded the suit with directions as quoted above.

8. The short question which is falling for consideration is whether the appellate court was justified in remanding the suit for re-trial and decision afresh on merits.

9. In order to decide the correctness or legality of the impugned decision of remand, it is necessary to consider the scope of jurisdiction of the Appellate Court in the matter of remand. In this regard it is relevant to refer to the provisions of Rules 23, 23A and 25 of Order 41 of Civil Procedure Code (for short CPC), which confer power of remand on the Appellate Court. The said rules read thus:

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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

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 there for within such time as may be fixed by the Appellate Court or extended by it from time to time.

10. A plain reading of the aforesaid provisions make it abundantly clear that the appellate court can invoke the powers under Rule 23 of Order 41 when the trial Court has disposed of the suit on a preliminary point and when the Appellate Court reverses such decree and considers it fit to remand the case for fresh disposal. Order 41 Rule 23A, which has been inserted in the Code by Act No. 104 of 1976, empowers the Appellate Court to remand the suit to the trial Court, when the suit is disposed of otherwise than on a preliminary point and the decree is reversed in appeal and retrial is considered necessary.

11. Order 41 Rule 25 of the Code empowers the Appellate Court to frame issues and refer them for trial to the Court from whose decree the appeal is preferred. The powers under Rule 25 can be invoked by the Appellate Court when the Court that passed the decree has omitted to frame

or try any issue, or to determine any question of fact, essential to decide the suit upon the merits. While remitting the issues, the Appellate Court may direct the trial Court to take additional evidence on such issues. When issues are remitted in exercise of powers under Order 41 Rule 25 of the Court, the Appellate Court continues to be in seisin of the matter. In such case, the trial Court has to try the issues referred by the Appellate Court and return the evidence to the Appellate Court together with its findings and reasons thereon. The Appellate Court thereafter has to decide the appeal on the additional evidence and additional findings recorded by the trial court.

12. In the instant case, the trial Court had not disposed of the suit on a preliminary issue, but had disposed of the same on merits. Hence, the provisions of Order 41 Rule 23 were not attracted. Similarly, the Appellate Court had not taken recourse to Order 41 Rule 25 of CPC, but had set aside the judgment and decree passed by the trial Court and directed the trial Court to decide the matter afresh by giving an opportunity to the respective parties to establish their case. It is thus evident that the order passed by the Appellate Court was in exercise of powers under Order 41 Rule 23A of

the Code.

13. The question, which therefore falls for consideration, is about the legality and propriety of the order of remand under Order 41 Rule 23A of CPC. As stated earlier, recourse to this provision can be taken when the decree is reversed in the appeal and the circumstances warrant retrial. In the instant case, a perusal of the impugned judgment reveals that the Appellate Court has ordered re-trial mainly on the ground that the evidence adduced by the Appellant as well as the respondent was not sufficient to establish their respective claims. As stated earlier, the appellant had sought recovery of the suit flat alleging that the said flat was purchased by him from his own income. He had claimed that the respondent was to get married and being his brother, he had permitted the respondent to reside in the said flat temporarily with a clear understanding that he would vacate the suit flat after purchasing his own flat. Per contra, the respondent had claimed that the suit flat was purchased from the retirement benefits of their father. The respondent had claimed that in terms of the family arrangement between them and their parents, he has been occupying the suit flat and that the appellant has been occupying the flat at Borivali. Based on these pleadings,

the learned Judge had framed the relevant issues. Both the parties had adduced evidence, knowing fully well the case pleaded by them and the issues involved in the suit. None of the parties had claimed before the appellate court that they were unable to or precluded from adducing either oral evidence or documentary evidence before the trial Court and had not made any request to adduce any additional evidence before the Appellate Court. It was also not a case of discovery of fresh evidence subsequent to the decision of the trial court. Under such circumstances, the learned Judge was not justified in remanding the case and directing re-trial, but was required to decide the appeal based on the evidence adduced by the respective parties. Even otherwise, if the appellate court was of the view that additional evidence was indeed required for just decision of the appeal, the appellate court was fully competent to take recourse to Rule 27, 28 and 29 of Order 41 CPC but was certainly not justified in quashing the judgment and ordering retrial.

14. It is well settled that the Appellate Court should be circumspect in ordering a remand as it is well known that unwarranted order of remand results in a prolonged litigation and consequent manifest injustice to the

litigants. In this regard, it would be advantageous to refer to the decision of the Apex Court, in ***Municipal Corporation, Hyderabad vs. Sundersingh***¹, wherein it is held that :

11. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.

15. In the instant case, the facts and circumstances did not warrant retrial and the exercise of jurisdiction under Order 41 R 23A of the Code was totally erroneous. Consequently, the impugned judgment and decree cannot be sustained.

16. In the result, the appeal is allowed. The impugned judgment dated 3rd May, 2014 is quashed and set aside. The learned Adhoc District Judge-I, Vasai is directed to decide the Appeal No.21 of 2013 on merits after hearing both the parties and without being influenced by the observations made in the earlier judgment.

1 [2008] 8 SCC 485

17. Both the parties to appear before the Adhoc District Judge-I, Vasai on 24th July, 2017.

12. In view of disposal of appeal, civil application does not survive and the same is disposed of.

(ANUJA PRABHUDESSAI, J.)