

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

5 APPEAL FROM ORDER NO. 20 OF 2017
WITH CA/3003/2017 IN AO/20/2017

Taher Ahmed s/o Salim Ahmed
Age: 53 years, Occu.: Business,
R/o.C/o.Sayed (Shaikh) Ali Khan
Plot No.22, Maulana Azad Co-operative
Housing Society, Sector-A, N-13, CIDCO,
Aurangabad. ..Appellant

VERSUS

Mrs.Sandhya w/o Girish Badge
Age: 53 years, Occu.: Business & Household,
R/o.Nath Prangan, Garkheda Parisar,
Aurangabad.
Through General Power of Attorney,
Shri Girish Badge. ..Respondent

...

Advocate for Appellant : Mr.Thole V.I.
Advocate for Respondent : Mr.Vaidya A.R.

...

WITH

APPEAL FROM ORDER NO.21/2017
WITH CA/3004/2017 IN AO/21/2017

...

CORAM : M.S.SONAK, J.
DATE : 29.1.2018

ORAL JUDGMENT:-

1) The learned counsel for the parties agreed that both

these Appeal from Orders can be disposed of by a common Judgment and order, since, the orders impugned in these two appeals are virtually identical.

2) Admitted. With the consent and request of the learned counsel for the parties, these appeals are disposed of finally today itself.

3) The main challenge in these appeals is to the orders by which the Appeal Court has remanded the matters to the Trial Court virtually for fresh adjudication in the light of certain issues, which have been suggested by the Appeal Court.

4) Mr.V.I.Thole learned counsel for the appellant submits that none of the parameters or Rules 23, 23-A, 26 of Order 41 of Code of Civil Procedure were satisfied so as to justify a remand. He submits that the application under Order 41 Rule 22 taken out by the respondent at the

highest makes reference to the respondent making out a Demand Draft for payment of consideration to the appellant. He points out that such evidence has already been considered by the Trial Court, which has held that such a unilateral action on the part of the respondent is of no avail in the matter. He submits that there is ample evidence on record, on the basis of which the Appeal Court could have decided the matter itself, without necessity of remand. He submits that when the issues which have been suggested by the Appeal Court as to maintainability of counter claim or the necessity of joinder of plaintiff's husband as a party to the counter claim, are basically issues of law, which could have been and ought to have been decided by the Appeal Court itself on the basis of material available on record. He points out that the issues which have been framed by the Trial Court infact encompass the issues now framed by the Appeal Court and clearly this was not a case for remand. On this basis, Mr.Thole submits that the impugned order

to the extent of remand be set aside and direction be issued to the Appeal Court to dispose of the appeal on merits and in accordance with law.

5) Mr.A.R.Vaidya learned counsel for the respondent submits that there is no infirmity in the order of remand. He submits that adequate evidence was looked into by the Appeal Court and it is only with the view to afford adequate opportunity to all the parties that the remand is ordered. He submits that the issue now proposed by the Appeal Court are mixed issues of law and facts and therefore, there is nothing wrong if the Appeal Court chose to remand the matter with a view to afford all parties equal and adequate opportunity to make good their respective points before the Trial Court. He points out that there is no prejudice to the appellant since all the contentions have been kept open. Mr.Vaidya learned counsel relied upon *Narayanan vs. Kumaran and others [(2004) 4 Supreme Court Cases, 26]* to submit that

these appeals are not maintainable because the appellant has not demonstrated the existence of any substantial question of law for their entertainment. On all these grounds Mr.Vaidya submits that these appeals are liable to be dismissed.

6) Rival contentions now fall for determination.

7) **Narayanan** (supra) holds that in view under Rule 1(u) of Order 43(1) of the Code of Civil Procedure, appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as decree and not a mere order. In these circumstances, it is quite safe to adopt that a appeal under Order 43 Rule 1(u) should be heard only on

the ground enumerated in Section 100. The appellant under an appeal under Order 43 Rule 1(u) is not entitled to agitate questions of facts. In an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate Court.

8) Keeping in view the aforesaid caveat, this Court will have to focus only on such facts, conclusions and decision, which have bearing on the order of remand and will not canvass any findings and facts arrived at by the lower Appeal Court. The decision in **Narayanan** (supra) does not mean that this appeal is not maintainable in the absence of framing of any substantial question of law, but ruling mean that in case this Court is inclined to entertain the appeal on merits i.e. on facts, conclusions as have been recorded by the First Appeal Court, then

there is necessity for satisfaction of the parameters recorded in Section 100 of the Code of Civil Procedure. In this case, since it is proposed to focus only on the grounds, which have been prompted the First Appeal Court to remand the matter to the Trial Court, the appeal as instituted is maintainable and is entertained.

9) The Appeal Court has given broadly three reasons for ordering the remand and the same are as follows:-

(a) The entertainment of application under Order 41 Rule 27 of the Code of Civil Procedure with regard to additional evidence as to the making of Demand Draft or for payment of consideration to the appellant. This also includes reference to Income Tax Return in which such payment was stated to be reflected.

(b) The framing of additional issue as to maintainability of the counter claim by the

appellant.

(c) The maintainability of the counter claim in the absence of joinder of the husband of the plaintiff as a party.

10) From the first issue, it is not clear if there is no evidence on record on basis of which the Appeal Court was precluded from giving a finding one way or the other. Trial Court has already held that on the basis of evidence on record, all these at the highest indicate some unilateral acts on the part of the plaintiff. Whether such finding is right or wrong could have always been decided by the Appeal Court and there was absolutely no necessity of a remand for the said purpose.

11) The issue as to whether the counter claim is maintainable or the issue as to whether counter claim is required to be dismissed on the ground of non-joinder of

any necessary party are again issues, which could have been very well decided by the Appeal Court itself. If the original issues of the Trial Court are perused, the same are wide enough to include the issues of maintainability of counter claim and maintainability of the counter claim on the ground of non-joinder of necessary party. In any case, these are issues of law, which ought to have been decided by the Appeal Court without remanding the matter to the lower Court.

12) It is settled position in law that orders of remand are not to be lightly made. This is not a case where the Trial Court had only decided the matter on the basis of preliminary point and since such preliminary point has reversed by the Appeal Court, a remand was necessary.

13) In *Balasubramania Iyer Vs. Subbiah Thevar and another* [**AIR 1965 Madras 417**], it is held that power of remand should not be lightly exercised and where the

Trial Court has disposed of Suit on merits, the Appeal Court must dispose of appeal on merits and cannot avoid its duty unless the Judgment and decree of the Trial Court is wholly unintelligible.

14) In *K.Krishna Reddy Vs. Special Deputy Collector, Land Acquisition Unit 2, LMD Karimnagar, Andhra Pradesh [(1988) 4 SCC, 163]*, the Supreme Court also held that an order of remand should not be taken to a matter of course. The power of remand should be sparingly exercised. There should always be an endeavour to dispose of the case by Appellate Court itself on merits.

15) Applying the aforesaid principles to the facts of the present case, the impugned orders of remand are set aside. The two appeals are restored to the file of the Appeal Court and the Appeal Court is directed to dispose of the appeals itself on their own merits and in accordance with law.

16) It is made clear that this Court has not adverted to the merits of the case and therefore, all contentions of all parties on merits of the matter are kept open for adjudication by the Appeal Court in accordance with law.

17) These two Appeal from Orders are accordingly allowed. The impugned orders are set aside with the aforesaid directions.

18) The parties to appear before the Appeal Court on 28.2.2018 at 11:00 a.m. and produce authenticated copy of this order.

19) The Appeal Court is requested to dispose of the Appeals as expeditiously as possible and in any case within a period of six months from production of authenticated copy of this order.

20) As the appeals are disposed of, pending civil applications do not survive and the same are also disposed of.

[M.S.SONAK, J.]