

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

APPEAL FROM ORDER NO.76 OF 2018
WITH
CIVIL APPLICATION NO.14040 OF 2018
IN AO/76/2018

SHITAL DEVAPPA CHOUGULE
VERSUS
SANJAY DURGADAS GAVARE

...
Advocate for the Appellant : Shri Bora Satyajit S..
Advocate for the Respondent : Shri Katneshwarkar P.R..
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 18th December, 2018

Per Court:

1 I have heard the learned Advocates for the respective sides at length. With their assistance, I have gone through the judgment of the Trial Court dated 04.08.2015 in Special Civil Suit No.232/2011 and the impugned judgment of the Appellate Court dated 16.10.2018 thereby, allowing Regular Civil Appeal No.127/2015.

2 The Trial Court had framed the following issues :-

	मुद्दे	निष्कर्ष
१	प्रतिवादीने दिनांक १२.११. २००८ रोजी वादीस दावा मिळकत रक्कम रु.१७,००,०००/- (सतरा लाख) किंमतीला विकण्याचा सौदा केला होता, असे वादीने सिद्ध करतो काय ?	होय

२	वादीने प्रतिवादीस इसाराची रुपये ८,५०,०००/- (सतरा लाख) दिली होती, असे तो सिद्ध करतो काय?	होय
३	वादी त्याच्या करार पूर्ततेचा भाग पूर्ण करण्यास तयार व इच्छुक आहे, असे तो सिद्ध करतो काय ?	होय
४	वादी त्यांनी मागणी केल्या प्रमाणे करार पूर्ततेची दाद मिळण्यास पात्र आहे काय ?	नाही
५	वादी दावा मिळकतीचा ताबा मिळण्यास पात्र आहे काय ?	नाही
६	वादी त्याने मागणी केल्याप्रमाणे निरंतर मनाई हुकुमाच्या दादेस पात्र आहे काय?	नाही
७	आदेश व हुकूमनामा काय आहे ?	अंतिम आदेशा प्रमाणे

3 There is no dispute that the litigating sides were given an adequate opportunity of leading evidence. They have availed of the said opportunity and have led evidence and both sides have consciously closed their evidence. Finally, the Trial Court has partly decreed the suit by directing the Defendants to return the amount to the Plaintiff and the following order is passed :-

"(१) प्रतिवादीने वादीस इसाराची रक्कम रु. ८,५०,०००/- (आठ लाख पन्नास हजार) दावा दाखल तारखेपासून द. सा. द. से. ६% व्याजासह परत करावी.

(२) प्रतिवादीने वादीला प्रस्तुत दाव्याचा खर्च द्यावा व स्वतः चा सोसावा."

4 The Appellate Court, while considering the appeal preferred by the Plaintiff, has hardly considered the issues raised in the appeal, much less in details. Rather than deciding all the grounds raised and

considering as to what would be the impact of the answers of the Trial Court to the first three issues upon the fourth and fifth issues, the Appellate Court has concluded that the Trial Court appears to have got confused and hence, it would be appropriate to remand the matter to the Trial Court for permitting a fresh decision and by granting liberty to the parties to lead fresh evidence.

5 The operative part of the impugned order of the Appellate Court reads as under :-

- "1. *Appeal is allowed.*
2. *The impugned judgment and decree passed by the ld. III Jt. Civil Judge Senior Division, Nanded in Spl. Civil Suit No.232/2011 is quashed and set aside.*
3. *The matter is remanded to the ld. trial court for its decision a fresh by affording an opportunity to the parties to lead evidence.*
4. *The trial Court should decide the suit a fresh without being influenced by the observations made by this Court.*
5. *The order of injunction passed below Exh.14 shall continue till decision of the suit.*
6. *The trial Court should pass suitable orders about the investment of the amount of Rs.8,50,000/- during pendency of the suit and its disbursement along with interest at the time of judgment.*
7. *Parties to appear before the ld. trial Court on 15.11.2018.*
8. *Parties to bear their own costs.*
9. *Decree be drawn up accordingly.*
10. *R & P be sent to the trial Court."*

6 It is settled law that the court should normally refrain from remanding a matter unless it is unavoidable on account of something,

which was expected to be done in law and which has not been done by the court below. If it is purely a matter of interpretation on appreciation of the record and proceedings available before the first Appellate Court, it is expected that the Appellate Court would consider the record and proceedings. Since an appeal is a continuation of the suit, the first Appellate Court would consider the pleadings and contentions of the parties and arrive at a conclusion as is expected of the appellate court. If the Appellate Court is of the view that the Trial Court has got confused, it is under an obligation to clear the said confusion by applying its mind to the facts, the record and the circumstances of the case.

7 In view of the above, I find that rather than entertaining this Appeal from Order to assess as to why the Appellate Court has remanded the matter by passing a cryptic order, though it runs into 09 pages with reasons only in two paragraphs, it would be appropriate to remand the appeal back to the first Appellate Court to consider the same strictly in the light of Order 41 of the Code of Civil Procedure, which applies to the appeals from original decrees.

8 In view of the above, this Appeal from Order is partly allowed. The impugned judgment and order of the Appellate Court dated 16.10.2018 is quashed and set aside and Regular Civil Appeal No.127/2015 is remitted to the first Appellate Court with the following directions :-

- (a) The litigating sides would appear before the first Appellate Court on 10.01.2019. Formal notices need not be issued.
- (b) All contentions of the litigating sides would be considered by the Appellate Court and in the event, it finds that an element of recording of evidence emerges from their submissions, facts and circumstances of the case, it may assess the contentions of the parties in the light of Order 41 Rules 23, 23-A, 25, 26 and 26-A of the Code of Civil Procedure.
- (c) Needless to state, the Appellate Court would deliver a reasoned judgment after hearing all the sides and upon considering the record and proceedings of the case.

9 The pending Civil Application does not survive and therefore, stands disposed of.