

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

APPEAL FROM ORDER NO. 17 OF 2021

**WITH
CIVIL APPLICATION NO. 5707 OF 2021
IN
APPEAL FROM ORDER NO. 17 OF 2021.**

Balkrishna Padmakar Joshi, ... **Appellant**
Age 72 Years, Occu: Pujari
R/o Patna Devi Temple, Patna
Tq. Chalasgaon, Dist. Jalgaon

VERSUS

1. Superintending Archeologist,
On behalf of Director General,
Archaeological Survey of India,
Aurangabad Circle, Bibi Ka Makbara,
Aurangabad.

2. The Union of India, ... **Respondents**
Through its Secretary,
Archaeological Survey of India,
Janapath, New Delhi

Mr S. P. Brahme and Mr. M.S. Kulkarni, Advocate for the appellant
Mr. S. G. Talhar, A.S.G. for the respondents

CORAM : SHRIKANT D. KULKARNI, J.

DATE : 26TH JULY, 2021

ORAL JUDGMENT

1. With the consent of both sides, this appeal is taken up
for final disposal at admission stage.

Factual matrix:

2. Being dissatisfied by the judgment and decree passed in Regular Civil Appeal No. 143 of 2015 by the learned District Judge-5, Jalgaon, dated 25.02.2021, thereby remanded Regular Civil Suit No.377 of 2005 to the trial Court for fresh decision, the appellant/original plaintiff has preferred this appeal.

3. The subject matter is a residential block consisting of two rooms with toilet and bathroom, situated at a distance of 30 feet away from the ancient monument of Chandikadevi Temple at Patnadevi, Tq. Chalisgaon, District Jalgaon. According to the appellant, the suit house is in existence since 19th century. Forefathers of the appellant has received the suit house by way of *Sanad*, issued by the Collector, Khandesh in the year 1861. The appellant is performing Archana and services to the deity and looking after the management of the suit premises and getting yearly allowances for the same. Respondent No.1 had issued notification under section 3 of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (hereinafter referred to as 'the Act' for the sake of convenience).

4. According to the respondents, the suit property is situated within the protected zone of the monument. The respondents issued notice to the appellant dated 27.09.2005 and called upon the appellant to remove the suit house since it is within the protected and/or prohibited area. The appellant challenged the notice by filing suit with two fold reliefs declaration and injunction.

5. The respondents had contested the suit. Both the parties have produced oral as well as documentary piece of evidence in support of their stand. The learned trial judge was pleased to decree the suit and declared that the notice issued by the respondents is invalid.

6. Being aggrieved by the judgment and decree passed by the trial Court, 3rd Jt. Civil Judge, Senior Division, Jalgaon in Regular Civil Suit No. 377/2005, the respondents have preferred an appeal bearing Regular Civil Appeal No.143/2015 before the District Court, Jalgaon. After considering the arguments advanced on behalf of both sides, the learned District Judge was pleased to allow the appeal partly and remanded the suit to the

trial court for decision afresh with direction to frame one additional issue regarding validity of the notice.

7. In the above background, the appellant/original plaintiff is before this Court.

8. Heard Mr. S.P. Brahme, the learned counsel for the appellant and Mr. A. G. Talhar, learned Assistant Solicitor General for the respondents. Perused the judgment and decree passed in Regular Civil Appeal No.143/2015 by the learned District Judge-5, Jalgaon, as well as judgment and decree passed in Regular Civil Suit No. 377/2005 by the learned 3rd Jt. Civil Judge, Senior Division, Jalgaon.

Submissions of learned Advocate for the Appellant:-

9. Mr. S. P. Brahme, the learned Advocate for the appellant submitted that the order passed by the District Judge, Jalgaon remanding the suit to the trial court for decision afresh is contrary to the settled legal position. He submitted that the suit cannot be remanded for fresh decision to the trial court only because one issue on the point of validity of the notice is not framed. The District Court, being the first appellate court and

last fact finding Court, could have framed the issue on the point of notice and answered the same on the basis of evidence available on record. The learned counsel submitted that both parties have produced their oral and documentary piece of evidence before the trial Court. The trial court has framed issues. Both the parties were aware about the issues framed by the trial Court. The respondents did not apply for recasting of issues. The suit went on for trial and it came to be decreed.

10. Mr Brahme, the learned counsel submitted that in view of the provisions of Order 41 Rule 24 of the Civil Procedure Code, when evidence on record is sufficient, the appellate Court may determine the case finally even after resettling the issues, if necessary. The District Court has exceeded its jurisdiction by overlooking the import of Order 41 Rule 24 of the C.P.C. He submitted that the respondents have not raised the plea as one of the grounds in the appeal memo of not framing proper issues. The respondents even did not raise plea before the District Court to remand the suit to the trial court for fresh decision by framing one additional issue on the point of validity of the notice. Mr. Brahme, the learned Advocate

further submitted that the first appellate Court has committed jurisdictional error in remanding the suit to the trial court for fresh decision.

11. Mr. Brahme, the learned counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of **Syeda Rahimunnisa Vs. Malan Bi (Dead) By L.Rs. and another**, reported in 2016 AIR (SC) 4653.

Submission of learned Assistant Solicitor General for the respondents:

12. Mr. A.G. Talhar, the learned A.S.G. for the respondents supported the judgment and decree passed by the District Judge in Regular Civil Appeal No. 143/2015. He submitted that the learned trial court has committed an error in not framing the issue on the point of validity of notice issued by the Archaeological Survey Department which is a moot question. The learned District Judge has rightly held that the trial Court ought to have framed the issue on the point of validity of the notice and should have recorded finding. The learned District Judge has rightly exercised its jurisdiction vested with it under

Order 41 Rule 23 of the C.P.C. The order passed by the learned District Judge is perfectly legal in the eyes of law.

13. Having regard to the submissions of Mr. S. P. Brahme, learned Advocate for the appellant and Mr. A.G. Talhar, learned A.S.G. for the respondents, perused Order 41 Rules 23, 24 and 25 of the C.P.C.

Discussion:

14. It is undisputed position that the learned trial Judge has framed issues on the basis of rival pleadings of both sides and the suit went on for trial. Both the parties were aware about the issues framed by the learned trial Judge. Both the parties have produced their oral and documentary piece of evidence in order to prove their respective case, keeping in mind the issues framed by the learned trial Judge. The suit came to be decreed. The trial Judge has held that the notice issued by the Archaeological Survey of India is illegal and *void ab initio* and pleased to grant perpetual injunction against the respondents in the background of apprehension of demolition of the suit house/suit property.

Legal Position:

15. Order 41 Rule 23, 23-A, 24, 25 and 26 of the C.P.C. deals with remand of cases by the appellate Court. The power of the appellate Court/District Judge to remand the suit to the trial court for fresh decision on merits can be exercised only when the appellate court, in the interest of justice, feels that remand is just and proper. The appellate court should arrive at finding on the material available on record that the judgment of the trial court is erroneous and is liable to be reversed or set aside. This is the condition precedent before passing the order of remand under Order 41 Rule 23 of the C.P.C.

16. The order of remand should not be passed as a matter of routine. The power of remand should be sparingly exercised. There should be always an endeavour to dispose of the case by the appellate Court itself when commissions and omissions made by the trial court can be corrected by the appellate Court.

17. If the provision of Order 41 Rule 23 of the C.P.C. is studied carefully, then the legal position regarding remand of case under Rule 23 would be crystal clear. If the lower Appellate

Court /District Court felt that the proper issues are not framed by the trial Court, it is open for the Lower Appellate Court/District Court to frame necessary issues and decide the matter there itself instead of asking the parties again to go before the trial Court. In fact, such exercise of remanding the matter second time to the trial Court that too when the lower appellate Court itself was competent to decide the issue which falls for its consideration was unnecessary delaying the matter and thereby causing injustice to the parties.

18. Order 41 Rule 24 of the C.P.C. provides that where the evidence on record is sufficient to enable the Appellate Court/District Court to pronounce judgment, the Appellate Court/District Court may, after resetting 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.

Reasons for Conclusion

19. It is noticed that the first appellate Court felt that the Trial Court ought to have framed the issue on the point of

validity of the notice in the background of Section 19 of the Act of 1958. The lower appellate court felt that the issue on the point of validity of the notice, though important, was not framed by the learned trial Judge and solely on that ground, remanded the suit for decision afresh by giving direction to the trial court to frame issue on the point of validity of the notice. The approach of the first appellate Court while remanding the suit to the trial Court for afresh decision appears to be very much erroneous. None of the parties prayed for remand of the suit to the trial court for afresh decision.

20. The appellants before the District Court did not raise ground for framing the additional issue on the point of validity of notice and even not prayed for remand of the suit on that ground. Even then, the District Court/lower appellate Court has remanded the suit to the trial court for afresh decision on the point of validity of the notice. The lower appellate Court has completely overlooked the provisions of Order 41 Rule 24 of the C.P.C. Both the parties have produced their oral and documentary piece of evidence according to their respective stand. If it appears to the lower appellate Court that any fact

essential for decision in the suit i.e. validity of the notice was to be determined, the lower appellate Court could have framed an issue on the point of validity of the notice by way of resettling the issues and recorded finding on that particular issue coupled with other issues after examining the evidence on record. There was no need for the lower appellate Court to remand the suit to the trial Court for decision afresh only for framing additional issue on point of validity of the notice when the lower appellate court itself clothed with powers of resettling of issues as a lower appellate Court and last fact finding court. The order of remand should not have been passed in this case. The lower appellate Court has the power to analyse the factual position and can decide the issue and also the additional issues, if any. To support my aforesaid view, I refer to a citation in the case of **Bachahan Devi and another Vs. Nagar Nigam, Gorakhpur and others**, reported in 2008 AIR 1282 (SC).

21. In case of **Sayedra 5Rahimunnisa (supra)**, it is held by the Hon'ble Supreme Court in para 35 as under:

"35. It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and

then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court."

22. In view of the above scenario, the order of remand to the trial court in this case is not warranted. In the facts of the case in hand, the order of remand will merely prolong the proceedings between the parties. The suit is of the year 2005. It was decided on 16.02.2015, practically after 10 years. The proceedings of Regular Civil Appeal No. 143/2015 came to be disposed of on 25.02.2021. It would be causing injustice to the

parties asking them again to go back to the trial Court and have afresh decision simply by framing one additional issue.

23. For the aforesaid reasons, the impugned judgment and order passed by the lower appellate court is liable to be quashed and set aside. The appeal needs to be decided by the Principal District Judge, Jalgaon. With this, I proceed to pass following order:

O R D E R

- i. The appeal is allowed.
- ii. The impugned judgment and decree passed in Regular Civil Appeal No. 143 of 2015 by the learned District Judge-5, Jalgaon, dated 25.02.2021 is hereby quashed and set aside.
- iii. The proceedings of Regular Civil Appeal No. 143/2015 is restored to the file of District Court at Jalgaon and it is assigned to the learned Principal District Judge, Jalgaon.
- iv. The learned Principal District Judge, Jalgaon shall decide the proceedings of Regular Civil Appeal No.143/2015 afresh on its own merits, even after resettling the issues, including the issue of validity of notice, if necessary, preferably within six months from the date of receipt of this order.

- v. The appeal stands disposed of in the above terms. No order as to costs.
- vi. Civil application also stands disposed of.
- vii. Registry to inform the learned Principal District Judge, Jalgaon accordingly.

(SHRIKANT D. KULKARNI, J.)

JPC