

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

**APPEAL FROM ORDER NO.4 OF 2021 WITH
CIVIL APPLICATION NO.3965 OF 2021**

Gurumeetsing @ Bittu Darshansing Mandan ... **APPELLANT**

VERSUS

Pranil Bhaskaran Puttanpure ... **RESPONDENT**

.....
Shri Anand P. Bhandari, Advocate for appellant
Shri Y.G. Gujarathi, Advocate for respondent
.....

CORAM : R. G. AVACHAT, J.

DATE : 14th September, 2021

ORDER :

Heard learned counsel for the parties. The challenge in this Appeal from Order is to the order dated 20/2/2020, passed by District Judge-6, Dhule in Regular Civil Appeal No.140/2017. By the impugned order, the judgment and decree passed in Regular Civil Suit No.18/2006 has been set aside, remanding the suit back to the Trial Court for afresh trial.

2. Shri Anand P. Bhandari, learned counsel for the the appellant would submit that, Order 43 Rule 23 of the Civil

Procedure Code was not applicable in the facts and circumstances of the case since the trial Court had not disposed of the suit on a preliminary issue. According to him, for application of Order 41 Rule 23-A of the Civil Procedure Code, the appellate Court has to arrive at a finding that a decree is liable to be reversed and retrial is necessary. Learned counsel has relied on the following authorities :-

- (1) Municipal Corporation, Hyderabad Vs. Sunder Singh [AIR 2008 SC 2579]
- (1) Mahadeorao s/o Damduji Satawne Vs. Nagpur Improvement Trust [AIR 2015 (NOCO 1133 (BOM)]
- (2) Shri Vishnu Dashrath Chavan Vs. Shri Pundalik Dashrath Chavan [2017 (5) Mh.L.J. 163]

3. Shri Y.G. Gujarathi, learned counsel for the respondent would, on the other hand, support the impugned order. In my view, the appellate Court was, in the facts and circumstances of the case, justified in passing the impugned order. Admittedly, there were two suits between the same parties. The parties to the suit held the same character i.e. the plaintiff in both the suits is one and the same person, who is respondent herein. Both the suits were filed for recovery of possession of the premises under the Rent Act. It appears that, the respondent/ plaintiff produced evidence of affidavit of himself and his witnesses. Mistakenly, the respondent/

plaintiff filed the affidavit in later suit which should have been filed in earlier one and vice-versa. The Trial Court, therefore, dismissed the suit, Regular Civil Suit no.140/2017, observing that the evidence is inconsistent with the pleadings. It is reiterated that, it was sheer mistake on the part of Advocate appearing for the respondent/ plaintiff.

4. The Appellate Court, while allowing the appeal and remanding the suit back to the trial Court, has observed thus :-

“15. It is an admitted position that R.C.S. No.18/2006 (impugned decree) and R.C.S. No.19/2006 were pending before the learned Court of 2nd Joint Civil Judge, J.D. Dhule. Both the suits were in between same parties. The properties are different i.e. in R.C.S. No.18/2006 the property is a plot situated within the limits of village Awadhan Tahsil and District Dhule and in R.C.S. No.19/2006 a residential bungalow on Plot No.114 in the area of Municipal Corporation Dhule.

16. In view of this situation, I have carefully gone through the evidence tendered by the plaintiff, defendant and the judgment delivered by the learned trial Court. The affidavit in lieu of examination-in-chief which was filed below Exh.49 of Pranil Bhaskaran Puttanpure, witness No.2 below Exh.118 Mushtak Ahmed Latif Shaikh and of witness No.3 Vilas Sharad Sangle below Exh.121. In all 3 affidavits in lieu of examination-in-chief, the description of property is Final Plot No.114, a residential bungalow

namely ‘Rimjhim’. The entire contents of the affidavits in lieu of examination-in-chief of those witnesses are relating to Rimjhim bungalow and not the alleged garage premises situates within the limits of Awadhan Tahsil and District Dhule. These witnesses were cross-examined thoroughly. Thereafter, the defendant No.2 had tendered his affidavit in lieu of examination-in-chief below Exh.125.

17. The judgment delivered by learned trial Judge, findings given to the issue Nos.1 to 11 show that, he has emphasized on the inconsistency of the evidence tendered by the plaintiff and witnesses with the pleadings. In my opinion, the evidence was certainly inconsistent with the pleadings because, the evidence which ought to have been tendered in R.C.S. No.18/2006 was tendered in R.C.S. No.19/2006 and which ought to have been tendered in R.C.S. No.19/2006 was tendered in R.C.S. No.18/2006. Since both the properties in the suits are altogether different including its nature, use and location, there was no question that such evidence would be consistent with the pleadings. Considering the overall situation, I am of the considered opinion that it was nothing but a typographical error while drafting affidavits in lieu of examination-in-chief in R.C.S. No.18/2006 and 19/2006. It is clear case of an error. It ought to have been noticed by the Advocate representing the plaintiff before learned trial Court or at least learned trial Judge while dealing with final arguments and judgment. But unfortunately, the situation is not so. The learned trial Judge has decided the matter on the basis of evidence, which actually was not an evidence of the suit.”

5. It, however, appears that, the learned Judge has relied on Order 41 Rule 33 of the Code of Civil Procedure to

remand the matter back to the trial Court. This Court does not propose to go into the question as to whether invoking Rule 33 of Order 41 was correct or not. Suffice it to say that, in the facts and circumstances of the case, the appellate Court was justified in passing the impugned order.

6. Order 41 Rule 23-A of the Code of Civil Procedure reads thus :-

“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.”

7. In case of **P. Purushottam Reddy & anr. Vs. M/s Pratap Steels Ltd., [AIR 2002 SC 771]**, it has been observed by the Apex Court that, it is only in exceptional cases where the Court may now exercise the power of remand dehors the Rules 23 and 23A. In view of this Court, therefore, the order impugned in this appeal could be treated as one passed under Section 151 of the Code of Civil Procedure.

8. It is reiterated that, the learned District Judge, in the facts and circumstances of the case, was justified in

passing the impugned order. No interference therewith is, therefore, warranted. The Appeal fails. Same is, therefore, dismissed. Consequently, Civil Application is dismissed.

(R. G. AVACHAT)
JUDGE

fmp/-