

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

APPEAL AGAINST ORDER NO. 16 OF 2018

Tikamdas s/o Sukhdevdas Vaishnao,
Aged about 74 years, Occ. : Engineer &
Contractor, r/o Achalpur Camp,
Achalpur, Tq. Achalpur, Distt. Amravati.

.... APPELLANT

// **VERSUS** //

1. The State of Maharashtra,
through Collector, Amravati,
Tq. And Distt. Amaravati.
2. The Executive Engineer, Public
Works Department, Achalpur Camp,
Tq. Achalpur, Dist. Amravati.

....RESPONDENTS

Shri P.R. Agrawal, Advocate for Appellant.
Shri M.A. Kadu, A.G.P for respondent nos. 1 & 2

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED FOR JUDGMENT : 15/01/2021.
DATE OF PRONOUNCEMENT : 08/03/2021.

JUDGMENT :

ADMIT. Heard finally by consent of both the parties.

2. The Appellant herein has filed this appeal under Order

XLIII Rule 1(u) of the Code of Civil Procedure to assail the judgment and decree dated 04.01.2018 passed by the learned District Judge-2, Achalpur in Regular Civil Suit No.67 of 2012. By the impugned judgment, learned District Judge set aside the decree passed by the Civil Judge, Senior Division in Special Civil Suit No.37 of 1994 and remanded the matter to the Trial Court with direction to decide the issue of limitation and to decide entire suit afresh by giving an opportunity to the parties to lead evidence, if they so desire.

3. For the sake of convenience, the Appellant herein shall be hereinafter referred to as ‘the Plaintiff’ and the Respondents shall be referred to as ‘the Defendants’.

4. The Defendants entrusted to the Plaintiff, who is an Engineer and registered Contractor, the construction of Cottage Hospital at Achalpur. The Plaintiff claimed that he had completed the construction by end of July, 1990. The Plaintiff claimed that the Defendants had withheld the payment without any justifiable reasons. The Plaintiff therefore filed a suit for recovery of an amount of Rs.5,27,421/-, as per the claim specified in paragraph 6 of the Plaint.

5. The Defendants denied that it is liable to pay any money to

the Plaintiff. The Defendants claimed that there was delay in construction of the work and claimed that they were not responsible for the delay. The Defendants further stated that the payment was withheld for recovery of outstanding dues.

6. Upon considering the evidence adduced by both the parties, the Trial Court partly decreed the suit by judgment and decree dated 21.06.2002 and directed the Defendants to pay to the Plaintiff an amount of Rs.4,12,306/- with interest at the rate of 6% per annum.

7. The Defendants challenged the said judgment in First Appeal No. 675 of 2002. By judgment dated 15.12.2010, this Court set aside the judgment and decree and remanded the matter to the Trial Court for deciding the suit afresh after giving an opportunity to the parties to tender their arguments.

8. Pursuant to the order of remand, learned Civil Judge, Senior Division, heard the matter afresh and by judgment and order dated 28.08.2011, partly decreed the suit and directed the Defendants to pay to the Plaintiff a sum of Rs.5,786/- with interest at the rate of 18% per annum, from the date of the suit till realization. Learned Judge also directed the Defendants to pay interest on certain other

amount specified in Clause 3 to 7 of the impugned judgment.

9. Being aggrieved by this judgment, the Plaintiff filed an appeal before this Court, which was subsequently transferred to the Court of Civil Judge, Senior Division, Achalpur in view of change in pecuniary jurisdiction.

10. Learned District Judge has disposed of the appeal by the impugned judgment dated 04.01.2018. Learned District Judge observed that the Trial Court had not framed issues in respect of each of claim raised by the Plaintiff. Nevertheless, learned District Judge held that since both the parties had led evidence, the Appellate Court can frame necessary points and decide the appeal on merits. Having thus observed, learned District Judge proceeded to record a finding that though the Defendants had not raised a plea of limitation, it was for the Court to satisfy itself that the suit claim is within limitation. Learned District Judge, therefore, felt it necessary to frame the issue on the point of limitation and to give an opportunity to the parties to lead evidence on the said issue. With these findings, the District Judge framed an issue on the point of limitation and remanded the matter to the Trial Court with direction to decide the entire suit afresh after giving an opportunity to the parties to lead evidence, if they so desire.

This judgment is under challenge in the present Appeal.

11. Before advertng to the facts of the case, it would be advantageous to refer the decision in the case of ***Shivkumar and ors. vs. Sharanabasappa and ors. AIR 2020 SC 3102*** wherein the Apex Court has considered the provisions under Order XXI Rule 23 to 25 relating to remand of case by Appellate Court and has held thus :

“25.....

25.1.....

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, with 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. Where evidence on record sufficient, Appellate Court may determine case finally.- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling 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.

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

25.2. Rule 23A came to be inserted in Order XLI CPC by way of the Code of [Civil Procedure \(Amendment\) Act](#), 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the Appellate Court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23A in Order XLI by the [Amending Act](#) of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the Appellate Court shall have the power of remand, if a re-trial is considered necessary.

25.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without reference to the provision contained in Rule 24 of Order XLI that enables the Appellate Court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the Appellate Court proceeds on a ground entirely different from that on which the Trial Court had proceeded.

25.4. A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the

First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

12. It is also relevant to refer the decision in the case of ***Municipal Corporation of Hyderabad vs. Sunder Singh (2008) 8 SCC 485*** wherein the Apex Court has held thus :

“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.”

13. In ***Leela wd/o Purushottam Kshirsagar and ors. vs. Mandabai wd/o Bapuraoji Kshirsagar and ors. 2018 (3) Mh.L.J. 240***, the learned Single Judge of this Court (Manish Pitale, J.) has held that where it is found that no prejudice has been caused to the parties due to not framing of specific issues, order of remand is not justified.

14. The validity of the impugned order of remand has to be tested on the touch stone of the relevant provisions and the above stated well settled principles governing power of remand.

15. It is not in dispute that in the instant case, the provisions of Order XXLI Rule 23 are not attracted. The Appellate Court has also not taken recourse to Order XXLI Rule 25 of the code of Civil Procedure, but has exercised powers of remand under Rule 23-A which empowers the Appellate Court to remand the suit to the Trial Court, when the suit is disposed of otherwise on the preliminary point and the decree is reversed in Appeal and retrial is considered necessary. Learned District Judge has felt it necessary to reverse the decree and remand the case for retrial, for the reason that the issue of limitation, though not raised by the Defendants, goes to the root of the matter. Learned District Judge has therefore, framed the issue on the point of limitation and reversed the decree and ordered retrial. It is pertinent to note that though the Defendants had not raised the issue of limitation, in the first round of litigation, the Civil Judge, Senior Division, had considered the question of limitation while answering Issue no.2. After hearing the respective parties, learned Judge had recorded a finding that the suit was within limitation and that the suit claim was not barred by limitation. The Defendants had no questioned the correctness of this findings in First Appeal No.675 of 2002. The challenge was restricted to the finding recorded in respect of the claim raised by the Plaintiff and decree for payment of money in respect of the entire claim.

16. While considering the question whether the Trial Court was justified in decreeing the entire claim of the Plaintiff, this Court held that the Trial Court had not recorded reasons for allowing the entire claim. It was held that it was the duty of the Trial Court to have decided the suit after considering the relevant evidence on each of the items of the claim and render findings on the same after giving cogent reasons. This Court observed that the Trial Court had not recorded any findings in regard to the individual items of claim. It was observed that Trial Court had recorded findings on a couple of individual claims and had thereafter abruptly recorded finding that the Plaintiff is entitled to a decree as sought by him without considering and discussing the material on record. It was observed that the Trial Court being the first fact finding Court, ought to have scanned the evidence and recorded it's finding on each of the individual claims. Since this was not done, the matter was remanded with directions to decide the suit on the basis of evidence tendered by the parties.

17. It is to be noted that this Court had not permitted the parties to adduce fresh evidence, but had directed the Trial Court to consider the evidence on record and record the findings on each individual claim. It is well settled principle that when the Appellate Court remands the matter back to the Trial Court, limiting the scope of

a suit, the Trial Court is bound to follow the directions contained in the order of remand and cannot extend the scope of remand. This proposition is based on the need of giving finality to judicial decisions. Furthermore the District Judge was also not justified in ordering fresh trial when this Court had directed the Trial Court to decide the matter on the basis of evidence on record, without permitting either parties to adduce any further evidence.

18. In the instant case, the Defendants had not raised the plea of limitation. Nevertheless, the question of limitation was considered by the Trial Court in the first round of litigation. Thus, there was no question of prejudice being caused to the Defendants. The Defendants had not challenged the finding rendered by the Trial Court on the question of limitation. Resultantly, the findings had attained finality. This being the case, the issue of limitation could not have been re-agitated at the subsequent stage. This is the principle of *Res Judicata*, which also includes constructive *Res Judicata*. In my considered view, the Appellate Court has acted illegally and with material irregularity in re-opining the issue of limitation, which was already decided by the Trial Court in the earlier round of the litigation. The First Appellate Court has also exceeded its jurisdiction by permitting the parties to lead evidence, despite the directions of this Court to decide the matter

based on the evidence on record. The facts and circumstances did not warrant remand or retrial. The Appellate Court has remanded the matter ignoring the relevant provisions relating to remand and has thus subjected the parties to a long drawn and unwinding litigation. The exercise of jurisdiction under Order 41 Rule 23-A of the Code of Civil Procedure is totally erroneous. Consequently, the order of remand cannot be sustained. Hence, the following order :

- (a) The Appeal is allowed.
- (b) The impugned order dated 04.01.2018 is hereby quashed and set aside.
- (c) The Regular Civil Appeal No.67 of 2012 stands restored to the file of learned District Judge and same shall be decided afresh after hearing the respective parties.
- (d) Both the parties shall appear before the learned District Judge on 05.04.2021.

It is made clear that this Court has only considered the legality of remand order and has not expressed opinion on merits of the issues involved in the suit or appeal. The District Judge shall therefore, decide the appeal on its own merit.

JUDGE

Trupti