

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**47 APEAL FROM ORDER NO.53 OF 2019
WITH CA/12430/2019 IN AO/53/2019**

M/s. Mandar Industries, **...APPELLANT**
Regd. Office, 8-Dwarka Complex, Mahesh Nagar,
Opp. SFS High School, Jalna Road, Aurangabad
through its partner,
Sachin S/o. Nivrutti Shirwar,
Age-40 years, Occu-Business,
R/o. Plot No. 27, N-6, CIDCO, Aurangabad

VERSUS

M/s. Indsur Gear Ltd. **...RESPONDENT**
Through Its Director:
Ankur Lodha,
Age-Major, Occu-Business,
R/o. 31-P, MIDC, Chikalthana, Aurangabad

Mr. Shrikant Kulkarni, Advocate for the appellant
Mr. D. K. Kulkarni, Advocate for the respondent

CORAM : VINAY JOSHI, J.

DATE : 24-01-2022

JUDGMENT :

. Heard finally by consent of both the sides.

2. This appeal arises out of order of remand dated 01-07-2019 passed in RCA No. 160 of 2016 by

the learned Additional Sessions Judge, Aurangabad.

3. The facts, in brief, are as such that, the appellants M/s Mandar Industries has filed Special Civil Suit No.140 of 2014 for recovery of sum of Rs. 5,05,668.12/- from the defendant. On the basis of rival pleadings, the trial court has framed as many as five issues. After considering the oral as well as documentary evidence, the trial court passed money decree vide its judgment and order dated 23-02-2016. Being aggrieved by said decision, the defendant has filed appeal No. 160 of 2016 in the court of District Judge, Aurangabad.

4. After hearing both sides the first appellate court vide impugned order has set aside money decree and remanded the matter back to the trial court for fresh adjudication. The said order of remand is impugned herein.

5. The learned counsel appearing for the appellant/plaintiff has pointed to the para No.1 of the plaint, wherein the appellant has stated that it is a partnership firm as well as company registered under the provisions of the Companies Act. He also

took me through para No. 1 of the written statement in which, the defendant has not disputed the said fact. Since there was no dispute about plaintiff's entity whether it is partnership firm or company, the trial court has not framed such issue touching to the maintainability of the suit. Rest of the issues were came to be decided.

6. It reveals that in the first appeal the defendant has first time raised grievance about the maintainability of suit by pointing that if the plaintiff was partnership firm then for want of registration suit is not maintainable and if it is a company, the civil court has no jurisdiction. Since the said point was raised first time in the appeal, the appellate court found it fit to give opportunity to both the sides to lead evidence on the point of maintainability and accordingly matter was remanded for fresh adjudication.

7. It requires to be noted that the trial court has already framed issues regarding plaintiff's entitlement for due amount alongwith interest. Evidence was recorded on those issues and finding was recorded by the trial court holding that

the plaintiff is entitled for money decree. The same is under challenge in the appeal. It reveals that only on the point of maintainability of the suit, the first appellate court has remanded the matter. In fact, by exercising the powers of Order-41 Rule-25 of the Code of Civil Procedure the first appellate court ought to have framed specific issue about maintainability and sent it to the trial court for its adjudication. Whole exercise of again leading evidence on other issues and recording finding against them is unwarranted. Of course in first appeal the merits about the finding on another issues including the plaintiff's entitlement for money decree and rate of interest would be decided. In view of that following order:

ORDER

- i. The appeal stands partly allowed.
- ii. The impugned judgment and order dated 01-07-2019 passed in RCA No. 160 of 2016 is hereby quashed and set aside.

iii. The Appellate Court is directed to frame a specific issue regarding maintainability of the suit and refer the same to the trial court only to the extent of recording finding on the said issue.

iv. It is clarified that the appeal shall be kept pending till receipt of the finding on the issue of maintainability of the suit.

v. The First Appellate court in its discretion direct the trial court to grant liberty to both the sides to advance pleadings only to the extent of maintainability of the suit and lead the evidence to that extent only.

vi. After receipt of finding on referred issue, appeal be heard and decided on its own merits.

vii. The Appeal From Order stands disposed of in above terms.

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viii. All the pending civil applications, if any, are disposed of.

[VINAY JOSHI, J.]

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