

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 94 OF 2015

WITH

CIVIL APPLICATION NO. 14264 OF 2015

1. Pandurang Sitaram Choudhari (Borse)
Age : 76 years, occ : Nil
R/o Mangalmurti Medical and General
Stores, Below Mangalmurti Hospital,
Goral Part No.1, Borivali (W),
Mumbai – 91.
2. Vitthal Sitaram Choudhari (Borse)
(Died) through LRs
- 2A Saroj Vitthal Borse
Age : 71 years, occ : household
R/o B-703, Tulip Building,
Yashwant Nagar, Virar (W).
- 2B. Anil Vitthal Borse
Age : 50 years, occ : private service
R/o B-703, Tulip Building,
Yashwant Nagar, Virar (W).
- 2C. Dinesh Vitthal Borse
Age : 46 years, occ : private service
R/o 502, Herambha Heights Co-op.
Housing Society, Dattawadi,
Kharegaon Naka, Kharegaon,
Thane (W).
- 2D. Sangita Rajaram Choudhari
Age : 47 years, occ : household
R/o Shindewadi (Shirval), Taluka
Khandala, District Satara.
- 2E. Sunita Vitthal Borse
Age : 43 years, occ : household
R/o C/o Pramod Tikaram Choudhari
Flat No.6, Sankalp Apartment, Plot
No. 10/11, Siddhatek Nagar,
Kartikeya Nagar, Kamathwade,
Nashik.

Appellants

Versus

1. Sunil Pralhad Choudhari
Age : 46 years, occ : business
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
2. Jitendra Pralhad Choudhari
(died) through LRs
- 2A. Pratibha Jitendra Choudhari
Age : 36 years, occ : household
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
- 2B. Prashant Jitendra Choudhari
Age : 17 years, occ : education
Minor through his natural
guardian mother Pratibha
Jitendra Choudhari
Age : 36 years, occ : household
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
- 2C. Payal Jitendra Choudhari
Age : 8 years, occ : education
Minor through his natural
guardian mother Pratibha
Jitendra Choudhari
Age : 36 years, occ : household
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
3. Pralhad Sitaram Choudhari
Deceased through his LRs
- 3A. Sunil Pralhad Choudhari
Age : 46 years, occ : business
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
- 3B. Jitendra Pralhad Choudhari
(Died) through LRs as above.

- 3C. Motibai Prakash Patil
Age : 39 years, occ : household
R/o C/o Rajendra Pralhad
Choudhari, Behind Hotel
Sadanand, Choudhari Wada,
Chalisgaon, Dist. Jalgaon.
- 3D. Madhuri Rajendra Choudhari
Age : 43 years, occ : household
R/o C/o Rajendra Pralhad
Choudhari, Behind Hotel
Sadanand, Choudhari Wada,
Chalisgaon, Dist. Jalgaon.
- 3E. Sumanbai Pralhad Choudhari
Age : 64 years, occ : household
R/o Hanuman Flour Mill,
Athwade Bazar, Zilla Peth,
Jalgaon.
4. District Inspector of Land Records
and City Survey Officer No.1,
Jalgaon.
5. Shantabai Sitaram Choudhari
Deceased, through LR's
- 5A. Sunil Pralhad Choudhari
Age : 46 years, occ : business
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
- 5B. Jitendra Pralhad Choudhari
(Died) through LR's as above.
- 5C. Maltibai Prakash Patil (Choudhari)
Age : 39 years, occ : household
R/o Plot No.17, Mohadi Road,
Mohan Nagar, Jalgaon.
- 5D. Madhuri Rajendra Choudhari
Age : 43 years, occ : household
R/o C/o Rajendra Pralhad
Choudhari, Behind Hotel
Sadanand, Choudhari Wada,
Chalisgaon, Dist. Jalgaon.

WITH
APPEAL FROM ORDER NO. 95 OF 2015
WITH
CIVIL APPLICATION NO. 14265 OF 2015

1. Pandurang Sitaram Choudhari
Age : 76 years, occ : Nil
R/o Mangalmurti Medical and General
Stores, Below Mangalmurti Hospital,
Goral Part No.1, Borivali (W),
Mumbai – 91.
2. Vitthal Sitaram Choudhari (Borse)
(Died) through LRs
- 2A Saroj Vitthal Borse
Age : 71 years, occ : household
R/o B-703, Tulip Building,
Yashwant Nagar, Virar (W).
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Age : 50 years, occ : private service
R/o B-703, Tulip Building,
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- 2C. Dinesh Vitthal Borse
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- 2D. Sangita Rajaram Choudhari
Age : 47 years, occ : household
R/o Shindewadi (Shirval), Taluka
Khandala, District Satara.
- 2E. Sunita Vitthal Borse
Age : 43 years, occ : household
R/o C/o Pramod Tikaram Choudhari
Flat No.6, Sankalp Apartment, Plot
No. 10/11, Siddhatek Nagar,
Kartikeya Nagar, Kamathwade,
Nashik.

Appellants

Versus

1. Pralhad Sitaram Choudhari
Deceased, through LRs.
- 1A. Sumanbai Pralhad Choudhari
Age : 64 years, occ : household
R/o Hanuman Flour Mill,
Athwade Bazar, Zilla Peth,
Jalgaon.
- 1B. Sunil Pralhad Choudhari
Age : 46 years, occ : business
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
- 1C. Jitendra Pralhad Choudhari
(Died) through LRs as above.
- 1D. Maltibai Prakash Patil (Choudhari)
Age : 39 years, occ : household
R/o Plot No.17, Mohadi Road,
Mohan Nagar, Jalgaon.
- 1E. Madhuri Rajendra Choudhari
Age : 43 years, occ : household
R/o C/o Rajendra Pralhad
Choudhari, Behind Hotel
Sadanand, Choudhari Wada,
Chalisgaon, Dist. Jalgaon.
2. Shantabai Sitaram Chaudhari
Deceased, through LRs.
- 2A. Sunil Pralhad Choudhari
Age : 46 years, occ : business
R/o Hanuman Flour Mill,
Athawade Bazar, Zilla Peth,
Jalgaon.
- 2B. Jitendra Pralhad Choudhari
(died) through LRs as above.

Respondents

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Mr. Girish Rane, Advocate for the appellants.

Mr. G.V. Wani, Advocate for respondent Nos. 2A, 3A to 3E, 3-BA, 5BA in AO No. 94 of 2015 and for respondent No. 5, 1A to 1E and 1-CA in AO No. 95 of 2015.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 16.09.2022

Judgment pronounced on : 07.10.2022

Judgment :

1. The appellants in both these appeals have challenged the common judgment and order dated 18.09.2015 passed by the learned Principal District Judge, Jalgaon (hereinafter referred to as “the learned lower Court”) in Regular Civil Appeal No. 27/2002 arising out of judgment and decree dated 23.11.2001 passed by the learned 4th Joint Civil Judge (Senior Division), Jalgaon in Regular Civil Suit No.62/1990 and Regular Civil Appeal No. 137 of 2014 arising out of judgment and decree dated 28.06.1995 passed by the learned Civil Judge (Senior Division), Jalgaon in Special Civil Suit No. 159/1990. Under the impugned common judgment, the learned lower Court has remanded both the aforesaid civil suits for deciding afresh by common judgment to the Court of Civil Judge (Senior Division), Jalgaon.

2. The background facts leading to these appeals are as under :

One Pralhad had filed Misc. Civil Application No.102/1987 and sought permission from the concerned

Court to sue as an indigent person. The application was allowed and his suit was registered as Special Civil Suit No.159/1990. In the said suit, Pralhad had claimed relief of partition and separate possession in respect of the suit property i.e. CTS No. 2680/B2 admeasuring 25 ft east-west and 65 ft south-north, alongwith a flour mill thereon, with two electric meters. Pralhad had made his father Sitaram, mother Shantabai and brothers Pandurang and Vitthal as party defendants. According to Pralhad, the suit property was joint family property since his father Sitaram, after disposing the agricultural land and houses situated at Kingaon which came to his share in family partition among his brothers, purchased the same on 29.06.1971 for consideration of Rs. 11,200/-. Pralhad had claimed one-fifth share in the suit property as he was driven out from the house by Sitatam.

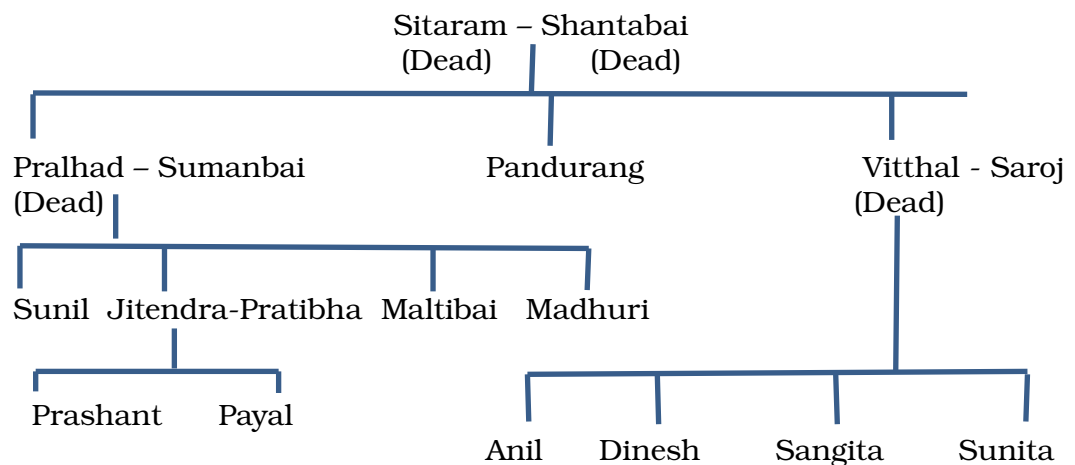
3. During the pendency of the aforesaid suit, Sitaram died, but defendant Nos.3 and 4 Pandurang and Vitthal, brothers of Pralhad admitted the suit claim. However, defendant No.2 Shantabai i.e. the mother of Pralhad resisted the suit by contending that the suit property was self acquired property of her deceased husband Sitaram. The

trial Court, after framing the issues and after the parties led evidence, held that the suit property was joint family property and accordingly determined one-fourth share of plaintiff Pralhad in it. The said judgment and decree dated 28.06.1995 was challenged by original defendant No.2 Shantabai, by filing First Appeal No. 97 of 1996 before this Court, but on account of enhanced pecuniary jurisdiction, the appeal was transferred to the lower Court under a new number as Regular Civil Appeal No. 137/2014.

4. During the pendency of the aforesaid suit, Sunil and Jitendra, who are the sons of Pralhad, had also filed separate suit bearing Regular Civil Suit No. 62/1990 on 03.02.1990 against their father Pralhad, paternal uncles Pandurang and Vitthal and grandmother Shantabai for declaration that they be declared as owner of the suit property by virtue of Will dated 24.05.1988 purportedly executed by their grandfather Sitaram. According to them, since Sitaram had bequeathed the suit property to them being his self acquired property, their names ought to have been entered in the record of rights of the suit property as owners. Pralhad and his brothers Pandurang and Vitthal had resisted the said suit by contending that the suit property

was joint family property, and therefore, Sitaram was not having any right to bequeath the same to Sunil and Jitendra under a Will. The concerned trial Court, after framing the issues and giving opportunity to contesting parties to lead evidence, dismissed the suit by observing that the suit property was joint family property, and therefore, Sitaram was not having any right to bequeath the same to Jitendra and Sunil under a Will. Thus, Sunil, Jitendra and Shantabai had filed the aforesaid Regular Civil Appeals. The learned lower Court, after hearing the appeals, has passed common order in those appeals and thereby remanded the concerned civil suits to the court of Civil Judge (Senior Division), Jalgaon for deciding the same afresh by common judgment, after consolidating the same. Hence, these appeals.

5. Learned Counsel for the appellants has given genealogy, which is not in dispute, as under :



Learned Counsel for the appellants strongly submitted that both the civil suits were in fact decided by the concerned trial Courts on merit and after giving full opportunity to the rival parties of leading evidence. He further submits that the vital issue in both the suits in respect of the nature of suit property, whether joint family property or self acquired property, has been decided on merit in both the suits. Though the concerned trial Court relied upon the observation in suit filed by Pralhad while deciding the suit of Sunil and Jitendra that nature of the suit property was joint family property, but full opportunity of leading evidence was given to Sunil and Jitendra and the concerned trial Court had also independently assessed the nature of the suit property being joint family property on the basis of independent evidence. He pointed out that when the appellate Court i.e. the lower Court was seized of both the appeals arising out of the suits which were decided on merit, it could have disposed of the appeals on merit instead of remanding the same back to the concerned trial Court. He also pointed out the concerned Orders and Rules of the Code of Civil Procedure (for short, "the C.P.C.") as to how the remand order passed by the learned lower Court was erroneous. He placed reliance on the following judgments :

- (i) Balkrishna Dattatraya Butte vs Dattatraya Shankar Mohite and others, 1997 (0) BCI 53*
- (ii) P. Purushottam Reddy and another vs M/s Pratap Steels Ltd., AIR 2002 SC 772*
- (iii) Ashwinkumar K. Patel vs. Upendra J. Patel & others AIR 1999 SC 1125*
- (iv) Vishnu Dashrath Chavan vs Pundalik Dashrath Chavan 2017 (5) Mh.L.J. 163*

6. On the contrary, learned Counsel for the contesting respondents strongly opposed the submissions made on behalf of the appellants. He submits that the lower Court has rightly remanded both the civil suits for deciding afresh by consolidating the same and by common judgment. He pointed out that Sunil and Jitendra were not party to the Special Civil Suit No. 159/1990 filed by their father Pralhad and since a common question was involved in respect of the nature of suit property in both the suits, the trial Courts ought to have consolidated both the suits together for disposal by common judgment. He, therefore, submitted that the lower Court rightly remanded the matter back to the trial Court.

7. With the able assistance from the respective learned Counsel of the contesting parties, I have gone through the impugned judgment as well as documents on

record. I have also gone through the judgments cited by the learned Counsel for the appellants in both these appeals.

8. It is extremely important to note that the concerned trial Courts have decided both the civil suits namely Special Civil Suit No. 159/1990 and Regular Civil Suit No. 62/1990 on its own merits and by giving full opportunity to the parties concerned of leading the evidence. Admittedly, Special Civil Suit No. 159/1990 was filed by Pralhad against his father for claiming partition and separate possession in respect of the suit property i.e. the portion of land and a flour mill thereon. Further, the another suit filed by Sunil and Jitendra against their father Pralhad and others was for declaring them as owners of the suit property since it was allegedly bequeathed to them by Sitaram i.e. their grandfather. As such, it can be seen that the vital question in both these suits was definitely the nature of suit property. According to Pralhad, the suit property was joint family property and as per Sunil and Jitendra, it was self acquired property of Sitaram. It is further important to note that the concerned trial Courts, in both the suits, have given finding as regards the nature of suit property by considering the evidence independently and held that the suit property is

joint family property of the rival parties.

9. On going through the impugned judgment, it is evident that the learned lower Court, by considering the object of Section 10 of the C.P.C. and to prevent the multiplicity of the proceedings, has opined that to avoid conflicting decisions both the suits should have been consolidated at the trial stage itself. It is for that purpose only the lower Court appears to have remanded both the suits for deciding afresh by consolidating the same. However, it appears that the learned lower Court has not construed the object of Section 10 in proper perspective. The stage of Section 10 of the C.P.C. is not properly considered by the learned lower Court since the consolidation, as ordered by the lower court, could have been done at the trial stage only and not after the trial, when the concerned trial Courts had decided both the suits on merits and by considering the evidence on record in each suit. Moreover, the judgments of the trial Courts in those suits clearly indicate that the trial Courts have framed necessary issues and given clear-cut findings on each issue based on the evidence on record. As such, when the trial of those suits was over and judgments were passed on merits, then it was not proper on the part of

the learned lower Court to remand those suits for fresh decision by consolidating the same.

10. Learned Counsel for the appellants in both the appeals has heavily relied upon the judgments as mentioned above, wherein this Court as well as the Hon'ble Apex Court have considered the relevant Order and Rules of the C.P.C. considering the scope of remand. The learned Counsel for the appellants strenuously submitted that when sufficient material was already there before the learned lower Court, then it could have decided the appeals on merits on the basis of entire available material on record. He pointed out that it was not the case that the concerned trial Courts had left out certain issue to be decided or skipped certain material evidence or had decided the suits only on preliminary issue. In the backdrop of such submission of learned Counsel for the appellants, the observations of this Court as well as Hon'ble Apex Court on the aspect of remand order, must be vital.

11. In the case of ***Balkrishna Dattatraya Butte vs Dattatraya Shankar Mohite*** (supra), this Court has made the following observation :

“Despite this fact situation the Appellate Court observed that by the purshis filed by the learned Counsel for defendant No. 1 he did not want to lead any oral evidence but its was not purshis in respect of the documentary evidence. Documents were already produced including the Will and the defendant No. 1 stated before the trial Court that no further evidence was required to be led. I am afraid, on the basis of these glaring facts no justification can be traced in the order of remand made by the Appellate Court. The order of remand is never passed as a matter of routine or for mere asking. Once the trial Court has examined the case on the basis of the available evidence and has reached conclusion, unless a clear case for remand was made out, the Appellate Court ought not to have remanded the matter. An order of remand under Order 41 Rule 23A cannot be made without considering the merits of the findings recorded by the trial Court. Not only that the merits of the findings recorded by the trial Court are required to be seen but has to be reversed and set aside and if the appellate Court finds that retrial was necessary, a case for remand could be made out. Prior to the year 1976 even where amended provision of Order 41 Rule 23A CPC was not there it was consistently held by the Court that an order of remand can be made only if the findings of the lower court is reversed in appeal. The legal position is now clarified by amending Order 41 Rule 23A which empowers the Appellate Court to remand the matter where the decree is challenged in appeal having been passed in a suit otherwise on a preliminary point and the decree reversed in appeal and retrial is considered necessary. Obviously, therefore, whenever a remand is made under Order 41 Rule 23A the findings recorded by the trial Court have to be examined and reversed in appeal and then retrial, if considered necessary may be ordered. In the present case the Appellate Court has exercised its power of remand under Section 41 Rule 23A when pre-requisite conditions for remand-were not made out”.

12. Further, in the case of P. **Purushottam Reddy vs M/s Pratap Steels Ltd** (supra), the Honble Apex Court has made following observation :

*“10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of **Rule 23-A in Order 41 of the Code of Civil Procedure by the CPC Amendment Act, 1976**, there were only two provisions contemplating remand by a court of appeal in **Order 41 CPC. Rule 23** applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefor of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before the 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 CPC to order a remand if such a remand was considered pre-eminently necessary *ex debito justitiae*, though not covered by any specific provision of Order 41 CPC. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent*

powers to make a remand because, as held in [Mahendra Manilal Nanavati v. . Sushila Mahendra Nanavati AIR 1965 SC 364 \(AIR at p. 399\)](#), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand dehors Rules 23 and 23-A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23-A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to [clause \(e\) of Section 16 of the Specific Relief Act, 1963](#) is concerned, the

pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not — in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision”.

13. The Hon’ble Apex Court, in the case of ***Ashwinkumar K. Patel vs Upendra J. Patel*** (supra) has observed as follows :

“6. The point for consideration is whether the order of the High Court in remitting the matter to the trial Court was necessary? Question also is whether this court should remand the case to the High Court in the event of this Court holding that the remand by the High Court was not called for? If not, whether the order of the trial Court is to be sustained?

7. In our view, the High Court should not ordinarily remand a case under Order 41 Rule 23 CPC to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and

affidavits and decided about the prima-facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.

8. *We have also considered whether, on that account, we should send back the matter to the High Court for consideration of the appeal. We are of the view that, on the facts of this case, this Court can decide whether the temporary injunction granted by the trial Court should be confirmed or not. We are, therefore, not remitting the matter to the High Court because a further remand would lead to delay and perhaps one more special leave petition to this Court”.*

14. Further, this Court, in the case of ***Vishnu Dashrath Chavan vs Pundalik Dashrath Chavan*** (supra), has elaborately discussed the scope of Order 41 Rule 23, 23-A and 25, as below :

“9. In order to decide the correctness or legality of the impugned decision of remand, it is necessary to consider the scope of jurisdiction of the Appellate Court in the matter of remand. In this regard it is relevant to refer to the provisions of Rules 23, 23A and 25 of Order 41 of Civil Procedure Code (for short CPC), which confer power of remand on the Appellate Court. The said rules read thus:

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, which 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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

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

10. A plain reading of the aforesaid provisions make it abundantly clear that the appellate court can invoke the powers under Rule 23 of Order 41 when the trial Court has disposed of the suit on a preliminary point and when the Appellate Court reverses such decree and considers it fit to remand the case for fresh disposal. Order 41 Rule 23A, which has been inserted in the Code by Act No. 104 of 1976, empowers the Appellate Court to remand the suit to the trial Court, when the suit is disposed of otherwise than on a preliminary point and the decree is reversed in appeal and retrial is considered necessary.

11. Order 41 Rule 25 of the Code empowers the Appellate Court to frame issues and refer them for trial to the Court from whose decree the appeal is preferred. The powers under Rule 25 can be invoked by the Appellate Court when the Court that passed the decree has omitted to frame or try any issue, or to determine any question of fact, essential to decide the suit upon the merits. While remitting the issues, the Appellate Court may direct the trial Court to take additional evidence on such issues. When issues are remitted in exercise of powers under Order 41 Rule 25 of the Court, the Appellate Court continues to be in seisin of the matter. In such case, the trial Court has to try the issues referred by the Appellate Court and return the evidence to the Appellate Court together with its findings and reasons thereon. The Appellate Court thereafter has to decide the appeal on the additional evidence and additional findings recorded by the trial court”.

15. Thus, on going through all the aforesaid observations, the position emerges that the order of remand can be made only if the trial Court skips finding on certain issue or decides the suit only on preliminary issue by leaving open the vital issue in respect of the real controversy between the parties. Further, it has been made clear that no remand can be made if the trial Court has decided the suit by considering the entire evidence on record and when the appellate Court, in view of the said material, is able to re-assess the evidence to ascertain whether the findings given by the trial Court are sustainable or not. It is also obligatory on the part of appellate Court to reverse the finding of trial Court while making order of remand. In the instant case, it appears

that the concerned trial Courts have decided both the suits on merit and after giving full opportunity to the rival parties to lead the evidence. Further, it is not the case of anybody that they were denied opportunity of adducing evidence. As such and in view of the observation by this Court as well as by the Hon'ble Apex Court as mentioned earlier, I found that the learned lower Court i.e. the Principal District Judge, Jalgaon, especially when seized of both the appeals, could have decided the same on merits by reassessing the evidence on record. In view of the same the remand order passed by the learned lower Court appears fully erroneous since it would definitely delay the matter for indefinite period. Hence, I find substance in the submissions of the learned Counsel for the appellants that the impugned judgment and order passed by the learned lower Court is totally illegal and needs to be set aside.

16. In the result, I pass the following order.

ORDER

- (i) Both the appeals are hereby allowed.
- (ii) The impugned common judgment and order dated 18.09.2015 passed by the learned Principal District Judge, Jalgaon in Regular Civil Appeal No. 27/2002 and Regular Civil

Appeal No. 137/2014, is hereby quashed and set aside.

- (iii) Since the proceedings before the lower Court were stayed during the pendency of these appeals, the Principal District Judge, Jalgaon is directed to decide both the appeals expeditiously and as far as possible, within a period of one year from the date of this order.
- (iv) Record and proceedings, if called, be sent to the District Court, Jalgaon forthwith.
- (v) No order as to costs.

Both the appeals and pending civil applications are disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)