

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Appeal from Order No. 761 / 2015
Alongwith
Civil Application No. 930 / 2015
in
Appeal from Order No. 761 / 2015

Smt. Parvatibai w/o Trimbak
Deshpande (Deceased) and Others. ... **Appellants**
[Original Plaintiffs]

Versus

Waman Anandrao Deshpande (Deceased)
His Legal Heirs and Others. ... **Respondents**
[Original Defendants]

Mr. G.H. Keluskar, Advocate for the Appellants.
Mr. Drupad S. Patil, Advocate for Respondents 1A to
1C, 3A to 3C, 3E to 3AM, 5A to 5.

CORAM : SANDEEP K. SHINDE, J.
RESERVED ON : 06th JANUARY, 2022.
PRONOUNCED ON : 03rd FEBRUARY, 2022.
[Through Video Conference]

ORDER :

1. This Appeal under Order 43 Rule-1(u) read with Section 104 of the Civil Procedure Code, challenges the order of remand dated 9th January, 2015 passed in Civil Appeal No. 748/2001 by the Ad-hoc District Judge - 6, Pune.

2. In brief, facts of the case are as follows:
Appellants-Plaintiffs, instituted Regular Civil Suit No. 2195/1980 in the Court of the learned Civil Judge, Junior Division, Pune in November, 1980, to seek decree of mandatory injunction; possession; cancellation of sale deed; and declaration that Defendant No.1 and 5 had no right in suit property described in Paragraph No.1 of the plaint. The learned trial Court partly decreed the suit on 30th June, 2001 in the following terms;

ORDER

- "1. The suit is partly decreed.
2. The plaintiffs being owners of property No.4 (as described in plaint para-1-A), they or any person on their behalf are entitled to execute decree for possession of this property from the possession of defendants or from any person on their behalf.
3. The defendants will have to vacate the partition of (plinth page) in case it is in the property No. 4 (as detailed described in plaint para-1-A).
4. The sale deed executed against the interest of the plaintiffs so far property No.4 (as referred in earlier) is not binding on the plaintiffs.
5. The plaintiffs or authorized person on their behalf are entitled to prefer proceeding for determination of mesne profits against the person found in possession of property No.4.
6. No order as to costs.
7. Prepare preliminary decree."

3. The Plaintiffs challenged the decree of the trial Court in Civil Appeal No. 748/2001.

4. The Appellate Court vide judgment and order dated 9th January, 2015 set aside the decree of the trial Court and remanded the matter to the 5th Joint Civil Judge, Junior Division, Pune with directions "to join the proposed Defendant Nos. 6 to 8 in the suit/plaint as per the application Exhibit-94 and decide the matter afresh by giving opportunity to both parties to lead evidence, if any."

5. Aggrieved by order of remand purportedly passed under Order-41 Rule-23A of the Code of Civil Procedure (CPC), Plaintiffs have preferred this appeal under Order-43 Rule-1(u) read with Section 104 of CPC.

6. I have perused the judgment of the trial Court; impugned judgment and order below Exhibit-94 (an application moved by the Plaintiffs under Order-1,

Rule-10(2) of the CPC), wherefrom following facts were emerging;

(i) Appellants instituted Regular Civil Suit No. 2195/1980 in November, 1980, seeking decree of mandatory injunction; declaration and cancellation of sale deed qua suit properties described 1(a) and 1(b) .

(ii) The Defendant Nos. 1, 2 and 4 had filed suit for partition bearing RCS No. 367/1962 against Trimbak Deshpande, (Predecessor in title of the Plaintiffs), wherein decree was passed and the suit property came to be allotted to the share of Defendant Nos. 1 and 2.

(iii) Whereafter Defendant Nos. 1 and 2 sold their share in the suit property to Defendant No.3 on 18th August, 1970.

(iv) After which, the Defendant No.3 sold the suit property to Defendant No.5 on 31st July, 1980.

(v) The Plaintiffs or their Predecessor in title, had filed Regular Civil Suit No. 360/1971 concerning

suit property but he withdrew the same.

(vi) The Defendants in the back drop of the facts aforesaid, contended that the suit in question i.e. RCS No. 2195/1980 was not maintainable.

(vii) Defendant Nos. 1 and 2 contended that the relief sought by the Plaintiffs qua sale deed dated 18th August, 1970, was 'barred by limitation'.

(viii) Pending suit the legal representatives of the Defendant No.3 and 5 sold the suit property or part of it to one Shankar Bajirao Dhonde vide sale deed dated 29th December, 1997.

(ix) Pending suit, Plaintiffs sold the suit property and such other two properties, on 15th March, 1983 to Jayawantrao Ganpatrao Shinde and Dattatraya Manohar Chandge.

(x) Although, the Plaintiffs had filed an application Exhibit-94 under Order-1 Rule-10(2) of the CPC to implead the Purchasers as a party Defendants, the application was rejected by the learned trial Court relying on the rule in the case

of Sarvinder Singh Vs. Dilip Singh and Others [1997
(1) Mh.L.J. 539].

. Regardless of these facts, neither the trial Court nor Appellate Court referred to judgments passed in the previous suits to ascertain, whether those suits were relating to the suit property and if answer was in affirmative then, whether the suit in question was maintainable. Moreover, the trial as well as the Appellate Courts have not looked into to the sale deeds executed by the parties in respect of suit property and examined its effects. Therefore, essentially proper issues were not framed. Likewise, the trial Court has not examined the issue as to whether alienation of the suit property or its part by the Plaintiffs, in favour of Jayawantrao Ganpatrao Shinde and Dattatraya Manohar Chandge, was legal and proper and in turn its effect. Besides, the trial Court has not examined the sustainability of transfer of the suit property/ or part of it, by the legal heirs of Defendant Nos. 3 and 5 to Shankar Bajirao Dhonde.

7. That being so, the proceedings before the Lower Court were irregular or defective and the points of essence have been ignored and not touched upon. Therefore it is a case to order retrial in the suit. Obvious reason is, not framing and answering, essential issue, which arose from pleadings of the parties, which has caused and resulted in failure of justice. I am conscious of the fact that remanding of a case though is discretion of the Appellate Court, but this discretion has very strict parameters. As a general rule, if Appellate Court can do complete justice on the basis of the record before it, the Appellate Court must not remand the case as it will entail more time and money of the litigants. Rather Appellate Court should decide matters finally instead of remanding the cases, unless there is a chance of miscarriage of justice. Therefore, Only those cases could be remanded which could not be decided on the bases of available material on record.

8. Thus, for the reasons ascribed, the judgments of

the Appellate and the trial Courts are set aside. The matter is remanded to the trial Court for retrial. Suit be readmitted under its original number in the Register of Civil Suit. For all purposes, this would be an order of remand under Order-41 Rule-23A of CPC.

9. The party shall appear before the learned trial Court on 4th March, 2022.

10. Appeal is disposed of in the aforesaid terms.

(SANDEEP K. SHINDE, J.)

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