

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

APPEAL AGAINST ORDER NO.28 OF 2019

Tukaram S/o Jagoba Thakre,
 Aged about : 63 years,
 Occu : Service, R/o Plot
 No.43B & 44B, Santoshi Nagar,
 Pipla Road, Nagpur.

..... APPELLANT
 (Ori.Plaintiff on RA)

...V E R S U S...

1. Sumitra W/o Deoraoji Kale,
 Aged about 79 years, Occu:Nil,
 R/o C/o Babarao More,
 Santoshi Nagar, Plot No.23,
 Ward No.20, Nagpur. (Ori.Deft.No.3 on RA)
2. Gunwant S/o Sitaramji Sayre,
 Aged about 71 years, Occu: Retired,
 R/o Plot No.35, Shilpa Society,
 Narendra Nagar, Nagpur. (Ori.Deft.No.4 on RA)
3. Babarao More,
 Aged about 71 years,
 Occu: Retired, R/o Plot No.23,
 Santoshi Nagar, Pipla Road,
 Ward No.20, Nagpur. (Ori.Deft.No.2 on RA)
4. Vidarbha Housing Construction
 Workers Association, Nagpur 516,
 Anandnagar, Nagpur through its
 Ex-Managing Director,
 Member Shri Rammurthi Govindprasad
 Pande, Aged about 61 years,
 Occu : Legal Practitioner,
 R/o Saiprasad, Barai Building,
 2nd Floor, Reshimbag Chowk,
 Umrer Road, Nagpur. (Ori.Deft.No.1 on RA)
- 4-a) Smt. Kamlabai W/o Govindprasad
 Pande (Dead).
- 4-b) Rammurthi S/o Govindprasad Pande,
 Aged about 65 years, R/o Anand
 Nagar, Azamshah Layout,
 Nagpur.

4-c) Sanjay S/o Govindprasad Pande,
Aged about 55 years,
R/o Anand Nagar, Azamshah
Layout, Nagpur.

4-d) Shakuntala Mishra,
Aged about 61 years,
R/o Santoshi Nagar,
Pipla Road, Ward No.10,
Nagpur.

... **RESPONDENTS**

Shri R. L. Khapre, Senior Advocate assisted by Shri Anand P. Thakare, Advocate
for the appellant.

Shri G. N. Khanzode, Advocate for respondent Nos.1 and 2.

CORAM :- AMIT B. BORKAR, J.

DATED :- 15.07.2022

ORAL JUDGMENT :

1. Heard.

2. **Admit.**

3. The following substantial question of law arises in the present
appeal for consideration:-

"Whether the Appellate Court was justified in remanding
the proceedings back to the trial court to decide the issue
of the identity of the property and to decide the issue of
his readiness and willingness in view of the fact that
necessary evidence in support of his readiness and
willingness is already on record and the evidence is
sufficient to identify the property ?"

4. The facts giving rise to the present appeal are as under:-

a] The appellant is the original plaintiff and has filed Regular Civil
Suit No.743/1997 for specific performance of the agreement. According

to the plaintiff, full consideration has been paid, and in furtherance of the agreement to sale, the plaintiff has been put in possession of the suit property. According to him, the suit is based on Section 53-A of the Transfer of Property Act. According to the plaintiff, the necessary evidence in support of his case has been led before the trial Court.

b] Learned trial Court by Judgment and order dated 20/06/2013 decreed the suit. Defendants, aggrieved by the same, filed Regular Civil Appeal No.300/2013. The Appellate Court, by the impugned Judgment and decree, has held that there is a serious dispute about the identity of the property. Therefore, it is necessary to lead evidence to decide the location of the suit property.

5. Shri R. L. Khapre, learned Senior Advocate appearing for the appellant – original plaintiff, states that the evidence on record is sufficient to identify the property in dispute. According to him, even defendants have adduced necessary evidence in support of their objection that the description of the suit property is insufficient. Therefore, it is not necessary to remand the proceedings to the trial Court.

6. The next issue concerns the plaintiff's readiness and willingness.

7. According to the plaintiff, the entire amount is paid. Plaintiff has been put in possession in furtherance of the agreement to sale. Nothing

remains for the performance of the plaintiff. He has accordingly pleaded his readiness and willingness as required under Section 16 of the Specific Relief Act and has led necessary evidence. If that be so, it was a mandatory duty on the part of the Lower Appellate Court to decide the suit on the basis of evidence adduced before the Court.

8. In a recent Judgment, the Hon'ble Apex Court in the case of *Shivakumar v. Sharanabasappa*, (2021) 11 SCC 277 has laid down the parameters of the Appellate Court to remand the matter under Order 41 Rule 23-A of the Code of Civil Procedure. The Apex Court, in Paragraph 26.4, held as under :

"26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 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 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial 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."

9. The findings and reasons given by the Appellate Court do not fall within the parameters laid down by the Hon'ble Apex Court. Therefore, in my opinion, in view of the undisputed fact, the parties were aware of both the issues directed to be framed by the Lower Appellate Court and had led their evidence in support of their case. Accordingly, no case for remand is made out. Therefore, it is the duty of the Lower Appellate Court to decide the appeal on the merits.

10. Learned Trial Court has recast issues and has framed 10 issues. According to the plaintiff, the plaintiff has already led oral evidence in support of the issues which recast. According to him, parties were aware of the said issues while proceeding with the trial of the suit. If that be so, it is not necessary to remand the matter to the trial Court. It is not a case where the material of vital importance which would have an ultimate effect was not considered. It is only in such cases where the decree in the challenge can be reversed in appeal, and a retrial is considered necessary. It is settled law that an order of remand is not to be passed in a routine manner because an unnecessary order of remand prolongs the life of the litigation without serving the cause of justice. In my view, in the facts and circumstances of the present case, the Appellate Court was not justified in remanding the matter to the trial

court but should have decided the appeal on merits after considering the evidence adduced before the trial court.

11. I, therefore, pass the following order :-

I] The impugned Judgment and decree passed in Regular Civil Appeal No.300/2013 dated 08/05/2018 by the District Judge-9, Nagpur is quashed and set aside.

II] The District Judge-9, Nagpur, shall decide Regular Civil Appeal No.300/2013 on the basis of evidence led by the parties before the trial Court.

III] It is made clear that the appeal shall be decided on its own merits uninfluenced by the observations made by this Court in the present order.

IV] Considering that the suit is of the year 1997, learned District Judge-9, Nagpur is requested to decide the appeal within six months from the appearance of the parties.

V] The parties shall appear before the District Judge-9, Nagpur on 01/08/2022 at 11.00 a.m.

12. Appeal Against Order stands disposed of in the above terms.

Pending application(s), if any, stand(s) disposed of.

(AMIT B. BORKAR, J.)

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