

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO. 53 OF 2022
WITH CA/12375/2022 IN AO/53/2022

BANSILAL RATAN THAKARE AND ANOTHER
VERSUS
RATAN SHIVRAM THAKARE AND OTHERS

...

Advocate for Petitioners : Mr. Girish S. Rane
Advocate for Respondent Nos. 1, 3 to 5 : Mr. Bharat R. Waramaa

CORAM : R.M. JOSHI, J.
DATE : 19th April, 2023

PER COURT :

1. Heard.

2. Impugned order dated 23.06.2022, shows that the First Appellate Court has remanded back the suit for re-trial without recording findings on the points for determination. The only reason given for the remand is that an application Exh. 58 moved by Kamlakar claiming himself to be the legal representative of deceased defendant no. 2 and as an enquiry was required to be made into the said claim, the said application was directed to be heard by Trial Court. There is further observation made by First Appellate Court about occurrence of various contingencies on decision of Exh. 58, in respect of joining Kamlakar as legal representative of deceased defendant no.2

and hence, direction was issued to decide suit afresh. This, however, is done without deciding points for determination and without holding that the judgment impugned needs interference or not.

3. Order 22 of the Code of Civil Procedure, deals with Death, Marriage and insolvency of parties. Rule 1 provides that Death of plaintiff or defendant shall not cause abatement if the right to sue survives. Procedure is laid down to bring legal representatives of deceased on record. Rule 5 states that where a question arises as to whether any person is or is not legal representative of deceased plaintiff or defendant, such question shall be determined by the Court. Proviso there to applies to the case where such issue is raised before Appellate Court. It provides that an Appellate Court may before determining the question direct any sub-ordinate Court to by question and to return the record with evidence, if any, recorded and its findings and reasons, therefore, and the same can be taken into consideration for determination of the question.

4. Thus, when question arises as to the legal representation of deceased defendant no. 2 it is open for First Appellate Court either to conduct enquiry itself or to direct Trial Court to conduct enquiry

into it and return the record with findings to the Appellate Court. Thus it is not open for the First Appellate Court to set aside the judgment impugned for that purpose and relegate suit for retrial.

5. Impugned order shows that without recording any findings on the points for determination before it, order of remand is passed, which is not permissible in view of provision of Order XLI Rule 23 and 23 – A. The power of remitting is resorted when Trial Court has omitted to try any material issue or question of fact. In such case, as contemplated by Rule 25, the proper procedure would be to retain file and to call upon Trial Court only to determine such question and that entire case cannot be remanded for retrial.

6. In facts of case and having regard to aforestated relevant provisions of CPC, the impugned order cannot sustain. The only course remains open for this Court is to relegate back the Appeal to the First Appellate Court to decide the same in accordance with law.

7. Hence, appeal stands allowed. The impugned judgment is set aside. First Appellate Court to decide RCA No. 42 of 2016 in accordance with law.

8. Parties to appear before the First Appellate Court on 04.05.2023. The First Appellate Court shall not issue any separate notices to the parties for their appearance.

9. Pending Civil Application stands disposed of.

[R.M. JOSHI, J.]

SPChauhan