

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

**APPEAL FROM ORDER NO.64 OF 2017
WITH CA/14929/2017 IN AO/64/2017**

**SUNIL RAMCHANDRA KINGAONKAR
VERSUS
RAJKUMAR TRIMBAKRAO SAWANT AND OTHERS**

Mr. S. B. Bhapkar, Advocate for the appellant

**CORAM : R. M. JOSHI, J.
DATE : 28th APRIL, 2023**

P.C. :-

1. Heard learned counsel for the appellant/original plaintiff.
None present for the respondents.

2. Plaintiff takes exception to the judgment dated 17/08/2017 passed in RCA No. 97/2012 whereby the judgment and decree passed in RCS No. 326/2012 (Old No. Special Civil Suit No. 257/2014) was set aside and the suit was remanded back to the Trial Court under Order 41 Rule 23 read with 23-A of Code of Civil Procedure for retrial.

3. Learned counsel for the plaintiff submits that there is error on the part of the First Appellate Court not to record the findings on the merit of the case before passing order of remand. Only after it is found that any issue was not framed by the Trial Court then under Order 41

Rule 25 such issue could have been relegated back to the Trial Court for its determination. It is further pointed out that the recasted issues by the First Appellate Court in fact were framed and decided by the Trial Court. By referring to order of Trial Court, it is stated that the discussion therein clearly shows that the issue with regard to the licensor and licensee relationship as well as its termination has been dealt with by the Trial Court. Thus, according to him this order of relegating back the suit for retrial cannot sustain.

4. Order 41 Rule 23 read with 23-A of CPC deals with remand of the case by Appellate Court to the Trial Court. Precondition for the relegation is that the First Appellate Court first reverses decree and when it is found that retrial is necessary may direct so by recording reasons. Similarly when it comes to the conclusion that there is an issue which ought to have been framed and decided by the Trial Court which has not been done so, Appellate Court may invoke Rule 25 of Order 41. With regard to the recasting of the issues as sought to be done by the First Appellate Court, it is pertinent to note that the issues recasted in para 26 of the judgment of the First Appellate Court indicate that the issue No. 4 framed and answered elaborately by the Trial Court has not been considered. Issue No. 4 squarely covers the issue with regard to the valid service of notice. The First Appellate Court without recording any finding

about the correctness of the impugned judgment and decree ought not to have recasted issue and relegated suit for retrial. Even otherwise, recasting of the issues is erroneous as it is in ignorance of relevant issues already framed and answered by the Trial Court.

5. In any event, issue which had remained to be framed and decided by the Trial Court, as contemplated by Order 41 Rule 25 the First Appellate Court only would have framed the issue and relegated back the matter to the Trial Court for its decision on the same by retaining the appeal with it for decision on merit. The course adopted by the First Appellate Court herein this case is contrary to the provision of Order 41 Rule 23 read with 23-A and 25 of CPC.

6. In the circumstances the impugned judgment cannot sustain. Hence the same is set aside. The First Appellate Court is directed to decide Regular Civil Appeal No. 97 of 2012 afresh. Considering the fact that the appeal is more than 10 years old, it be decided within a period of six (06) months from the date of receipt of this order.

7. Pending civil application, if any, stand disposed of.

(R. M. JOSHI, J.)

ssp