

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 377 OF 2018
WITH
CIVIL APPLICATION NO. 490 OF 2018

Sanjay Balaso Jakhalekar (Patil)
and Ors.

...Petitioner

V/s.

Kaka Vitthal Chavarekar (Decd.)
thr. Lrs.

..Respondents

Mr. S.A. Rajeshirke, for the Appellant.

Mr. Ranjeeth Patil, for Respondents No.1 A to 1 D.

CORAM : SANDEEP V. MARNE, J.

Dated : 1 September 2023.

P.C. :

1. **Admit.** With the consent of the parties, the Appeal is taken up for hearing forthwith.

2. By this Appeal, the Appellant challenges judgment and order dated 20 September 2017 passed by the District Judge-1, Islampur setting aside the judgment and decree dated 24 April 2012 passed by the Trial Court in Regular Civil Suit No.29/2004 and remanding the suit for fresh trial before the Trial Court.

3. Plaintiffs have filed Regular Civil Suit No.29/2004, *inter-alia* for a declaration that the suit property is sold by the

Defendants to Plaintiffs by Sale Deed dated 16 January 1985. A relief is also sought for correction of description of the property in the sale-deed dated 16 January 1985. Plaintiff's suit came to be decreed by the Trial Court by judgment and order dated 24 April 2012.

4. Aggrieved by the judgment and decree dated 24 April 2012, the Appellants herein filed Regular Civil Appeal No.82/2012 before the District Judge. Instead of deciding the Appeal on merits and determining the correctness of the judgment and decree passed by the Trial Court, the Appellate Court has proceeded to remand the suit for retrial. Appellants are aggrieved by the decision of the Appellate Court in remanding the suit for retrial.

5. It must be observed at the outset that it is Plaintiffs' decree which has been reversed by the first Appellate Court. However, the Plaintiffs are not aggrieved by the decision of the first Appellate Court and though the Defendants have succeeded in getting the decree dated 24 April 2012 set aside, they are aggrieved by the decision of the first Appellate Court to the extent of remand of the suit.

6. I have heard the learned Counsels appearing for the Appellants and Respondents. I have considered their submissions.

7. After going through the judgment of the Appellate Court, it is seen that the main reason recorded by the Appellate Court for remanding the suit is failure on the part of the Plaintiffs to lead evidence in support of his contention that he noticed the deed at Exhibit-42 in the year 2003. The Appellate Court has held that if the Plaintiffs' contention that the deed at Exhibit-42 was noticed in the year 2003 is correct, the suit would be within limitation. The Appellate Court has therefore held that Plaintiffs need to be given opportunity to lead evidence in support of their assertion.

8. The Appellate Court has also held that the Plaintiffs also need to be given an opportunity to lead evidence with regard to the contents of the deed. Thus, by recording a finding that Plaintiffs need to be given opportunity to lead further evidence, the decree is upset in the Appeal filed by Defendants.

9. Thus in an appeal instituted by Defendants, Plaintiffs have secured an opportunity to better their case by leading additional evidence. This appears to be the reason why Plaintiffs are not aggrieved by the Appellate Court's order though it has set aside the decree granted in Plaintiff's favour. And despite succeeding in setting aside the decree, Defendants are in appeal before me.

10. Recently, this Court has deal with the issue of scope of remand of a suit for a retrial by Appellate Court in **Vasant Bhaskar**

Thakur Vs. Sitaram Waman Thakur, AO No. 609 of 2022 decided on 29 August 2023. This Court held:

“10. Powers of the Appellate Court while deciding Appeals are governed by the provisions of Rules 23, 23A, 24, 27 and 33 of Order 41 of the Code of Civil Procedure, which 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 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. Where evidence on record sufficient, Appellate Court may determine case finally.-Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds.

27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission.

33. Power of Court of Appeal.

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

11. Thus while deciding an Appeal, the Appellate Court is required to pronounce judgment when the evidence on record is insufficient for enabling it to decide the Appeal. While doing so, the Appellate Court is empowered to resettle the issues. The Appellate Court is also empowered under the provisions of Rule 27 of Order 41 to permit parties to produce additional evidence, whether oral or documentary where it is found that the trial Court has refused to admit evidence which ought to have been admitted or where any party makes out a case of lack of knowledge or inability to produce such evidence before the Trial Court or where the Appellate Court itself requires a document to be produced or witness to be examined for effective decision of the Appeal.

12. No doubt, the Appellate Court is empowered under the provisions of Rules 23 and 23A of Order 41 of the Code to remand the suit to the Trial Court. Rule 23 provides for remand by the Appellate Court where the suit is disposed of upon a preliminary point. Rule-23A deals with remand in cases where the suit is disposed of otherwise than on a preliminary point. Under Rule 23A, remand can be made only in the event the decree is reversed in appeal and retrial is considered necessary.

12. The scope of power of Appellate Court to remand a suit has been a subject matter of various decisions of the Apex Court. It may be apposite to refer to a recent judgment of the Apex Court in ***Sirajudheen V/s. Zeenath and Others*** 2023 SCCOnline 196 (Civil Appeal No. 1491/2023 decided on 27 February 2023). The Apex Court took note of its past decisions and held in pars-25, 29, 30 and 31 as under:

“25. In the case of *Sanjay Kumar Singh* (supra) relied upon by the learned counsel for the respondent No. 1, this Court has observed as under: -

“7. It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.

8. As observed and held by this Court in A. Andisamy Chettiar v. A. Subburaj Chettiar [(2015) 17 SCC 713], the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.”

29. After having taken note of the salient features of the impugned judgment as also the significant omissions therein, if we refer to the provisions empowering the Appellate Court to make an order of remand, it is difficult to find any justification for remand by the High Court in the present case. **As noticed, the scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point. The remand in the present case could only be correlated with Rule 23-A of Order XLI CPC and for its applicability, the necessary requirements are that “*the decree is reversed in appeal and a re-trial is considered necessary*”.** As noticed hereinabove, there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court. Obviously, the reversal has to be based on cogent reasons and for that matter, adverting to and dealing with the reasons that had prevailed with the Trial Court remains a *sine qua non*. Thus, remand in the present case cannot be held justified even in terms of Rule 23-A of Order XLI CPC.”

30. On the facts of the present case and the nature of order passed by the High Court, the enunciations and observations in the case of *Sanjay Kumar*

1 September 2023.

Singh (supra) are of no application whatsoever as none of the parties have sought any permission to adduce evidence nor the High Court has specified as to what specific evidence was considered necessary to enable it to pronounce judgment or for any substantial cause. Moreover, it does not appear from the judgment of the High Court if the plaintiff- respondent No. 1 (appellant before the High Court), ever projected that the Trial Court did not allow her to produce any evidence that was sought to be produced. It is also not borne out if any of the parties at all made out any case for production of additional documents or oral evidence with reference to the applicable principles. Hence, the general observations of the High Court cannot be correlated with Rule 27(1) either. With respect, we are constrained to apply the observations of this Court in *Municipal Corporation, Hyderabad* (supra) to say that the present order of remand has been passed only on *ipse dixit* of High Court sans any reason or justification.

31. It gets perforce reiterated that in the suit filed by respondent No. 1, the Trial Court had indeed returned its findings on the basis of evidence on record. Whether those findings are sustainable or not is a matter entirely different and the High Court may examine the same but merely because the High Court could not reach to a conclusion on preponderance of probabilities, the evidence on record could not have been treated as insufficient so as to not pronounce the judgment in terms of Rule 24 of Order XLI CPC.”

(emphasis supplied)

13. It is also well settled that the power of remand of a suit cannot be exercised by an appellate court in a routine manner. In *Shivkumar and Others V/ s. Sharanabasappa and Ors.* (2021) 11 SCC 277, a three Judge Bench of the Apex Court has expounded the law on scope of remand of suit by Appellate Court and has held in para-26.4 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 XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial 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.”

14. After considering the relevant provisions of the Code and sound exposition of law in the above decisions, it is clear that the appellate court is expected to decide the appeal by determining correctness of the findings recorded by the trial court with reference to the evidence on record and applicable law. Merely failure of the Trial Court to consider or inappropriateness in considering evidence on record cannot be a ground for remanding the suit to the trial court. Also, power of remand of suit for fresh trial is to be exercised in exceptional circumstances by the Appellate Court. It cannot be exercised in a routine manner. when it reverses the decree and arrives at a finding that a retrial is necessary. Retrial cannot be ordered just because the Appellate Court finds fault in the findings recorded by the trial Court. The Appellate Court is also vested with power of framing additional issues and permitting the parties to lead additional evidence if it has formed an opinion that the subject matter of dispute cannot be effectively decided without framing of such additional issues or leading additional evidence. However, power to remand the suit for trial cannot be exercised in a casual manner just because the Appellate Court does not agree with the findings recorded by the Trial Court. Unnecessary remand of a suit results in elongation of litigation, which should ordinarily be avoided by the appellate court.

11. It is thus a settled law that the Appellate Court cannot remand a suit for retrial in a routine manner. The Appellate Court, while setting aside the decree, must arrive at a finding that retrial is necessary. Otherwise, the Appellate Court is required to determine the correctness of the findings recorded by the Trial Court based on the material produced before it. The Code of Civil Procedure confers sufficient power on the Appellate Court to permit leading of additional evidence as well as to frame additional issues. Having vested with the necessary powers while deciding the Appeal, the suit cannot be remanded for a retrial in a routine manner by recording a finding that the Trial Court did not properly appreciate the evidence.

12. In the present case, a specific issue has been framed by the Trial Court as to whether the suit was within limitation. The issue has been answered in favour of the Plaintiffs by the Trial Court. It is for the Appellate Court to decide whether the said finding recorded by the Trial Court is correct or not. For deciding this issue, leading of further evidence by the Plaintiffs is unwarranted.

13. I am therefore of the view that the order of the Appellate Court remanding the suit for a retrial is not sustainable. Accordingly, the present Appeal deserves to be allowed.

14. The judgment and order dated 20 September 2017 passed by the first Appellate Court i.e. District Judge-1, Islampur is set aside. Regular Civil Appeal No. 82/2012 is restored on the file of District Judge-1, Islampur. The First Appellate Court shall decide the Appeal on merits without being influenced by any observations made in its judgment dated 20 September 2017 or in the present Appeal. The Appeal is **allowed** and **disposed of**.

15. With disposal of the Appeal, Civil Application therein does not survive. The same is disposed of as having become infructuous.

SANDEEP V. MARNE, J.