

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 609 OF 2022
WITH
INTERIM APPLICATION NO. 3713 OF 2022**

1. Vasant Bhaskar Thakur, [since
deceased through legal heirs]

1a. Vandana Vasant Thakur, Age : 66
yrs, Occ : Agriculture (since
deceased)

1b. Premanand Vasant Thakur, Age :
39 yrs, Occ: Agriculture

1c. Chitra Devendra Puro, Age : 37
yrs, Occ : Agriculture

1d. Jitendra Vasant Thakur, All R/at :
Mhatroli, Post.Saral, Tal: Alibag,
Dist.- Raigad.

**....Appellants
[Original Plaintiff]**

V E R S U S

Sitaram Waman Thakur, Age : 65
yrs, Occ. Agriculture,
R/at.Mhatroli, Post. Saral, Tal-
Alibaug, Dist.-Raigad

**...Respondent
[Original Defendant]**

Mr. G.S. Godbole Senior Advocate i/by. Mr. Drupad S. Patil, for
the Appellants.

Mr. Sameer Tendulkar, for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Resd. On : 23 August 2023.

Pron. On : 29 August 2023.

JUDGMENT :

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

2. Power of an Appellate Court to remand a suit for retrial under Order 41 Rule 23A of the Code of Civil Procedure 1908 is an issue that has attracted attention of this Court in the present appeal. The issue arises in the light of Appellant's challenge to the judgment and order dated 22 March 2022 passed by the District Judge, Raigad by which the judgment and decree dated 22 April 2017 passed by the Joint Civil Judge Junior Division, Alibaug in Regular Civil Suit No.147/2011 is set aside and the suit is remanded for fresh hearing after adding necessary parties and after framing additional issues.

3. For better understanding of the controversy involved, narration of few basic facts of the case would be necessary. Appellant-Plaintiff has pleaded in his plaint that various properties were jointly owned and possessed by Waman Nathu Thakur and Bhaskar Rama Thakur. There was an oral partition

on 1 June 1950 between the duo in accordance with which, Mutation Entry No. 1187 was effected. Land bearing Survey No.100 at Village-Saral, Taluka-Alibaug, District-Raigad was subject matter of partition. In accordance with the partition, the land bearing old Survey No.100/3/A was allotted to the share of Waman Nathu Thakur effecting Mutation Entry No. 2090 on 15 August 1975, whereas the land bearing Survey No.100/3/B was allotted to the share of Bhaskar Rama Thakur. It appears that the said land bearing Survey No.100 falling in Village-Saral became part of Village-Mathroli and was given Survey No.9 in the year 1975. Accordingly, land bearing old Survey No.100/3/A falling to the share of Waman Nathu Thakur was re-numbered as Survey No. 9/3/A whereas land bearing old Survey No.100/3/B falling in the share of Bhaskar Rama Thakur was re-numbered as Survey No.9/3/B. Plaintiff further pleaded that after implementation of the Consolidation Scheme, the land bearing Survey No.9/3/B was given Gat No.36, whereas land bearing Survey No.9/3/A was given Gat No.34.

4. Plaintiff-Vasant is the son of Bhaskar Rama Thakur and claims ownership in land bearing Gat no.36. Defendant-Sitaram is the son of Waman Nathu Thakur and according to Plaintiff, he and his legal heirs are entitled to the land bearing Gat no.34. It is Plaintiff's case that, legal heirs of Waman Nathu Thakur including Sitaram do not have any right, title or interest

in land bearing Gat no.36. On 31 May 2011, Plaintiff published public notice in respect of suit property bearing Gat no.36 admeasuring 0 Hectares 36.4 Ares. The defendant-Sitaram objected to the public notice on 3 June 2011 and claimed a share in land bearing Gat no.36. It is plaintiff's case that Defendant's objection to the public notice gave rise to cause of action for filing Regular Civil Suit No. 147/2011 seeking a declaration that Plaintiff-Vasant Bhaskar Thakur is the owner of land bearing Gat no.36 (old Survey no.100/3/B and old Survey no.9/3/B) and that Defendant has no right, title or interest therein. Plaintiff also sought injunction restraining Defendant from disturbing his possession in suit property bearing Gat no.36.

5. Defendant appeared in the suit and filed his Written Statement and raised a plea that Gat no.36 was formed by clubbing old Survey nos. 9/3/A and 9/3/B, on account of which, the land which had fallen to the share of Waman Nathu Thakur, in partition bearing Survey no.9/3/A got subsumed in Gat no.36. That therefore Plaintiff cannot be the sole owner or possessor of the entire land forming part of Gat no.36. It was further pleaded by the Defendant that land bearing Gat no.36 is in two parts which is divided by a bund and that the portion on eastern side is cultivated by Plaintiff, whereas, the portion on western side is being cultivated by Defendant and his nephews. In his Written Statement, the Defendant also disclosed the factum of filing

Regular Civil Suit No.147/2011 seeking a declaration that he is the owner of half portion of the land bearing Gat no.36 and that the suit was pending.

6. On the above pleadings, the Trial Court framed issues and after leading evidence, the Trial Court was pleased to decree the suit by its judgment and order dated 22 April 2017 declaring Plaintiff as owner of the suit property bearing Gat no.36 (old survey no.100/3/B before 1975 and old Survey no. 9/3/B after 1975). The Court also issued injunction restraining defendants from disturbing plaintiff's possession of the suit property.

7. Aggrieved by the judgment and order dated 22 April 2017, Defendant filed Regular Civil Appeal No.58/2017 before the District Court, Alibaug. It appears that in his Appeal, Defendant moved an application for framing of additional issues. By judgment and order dated 22 March 2022, the District Court was pleased to partly allow the Appeal and set aside the judgment and order dated 22 April 2017 passed by the Trial Court. The District Court remanded Regular Civil Suit No.147/2011 to the Trial Court for fresh hearing directing it to add necessary parties, as well as re-cast/add issues. Parties were granted opportunity to lead evidence. Aggrieved by the judgment and order dated 22 March 2022 passed by the District Judge, the Plaintiff has filed the present Appeal.

8. Mr. Godbole, the learned Senior Advocate appearing for the appellant would submit that the Appellate Court was not justified in remanding the suit for fresh trial. That the Trial Court had answered each of the issues based on the material before it and therefore no case was made out for remanding the suit for fresh trial. That the suit property has been allotted Gat no.36 in Consolidation Scheme, which attained finality on account of non-objection to the same by the Defendant. That in absence of challenge to the Consolidation Scheme, it was no longer open for the Defendant to contend that any portion of his land got subsumed in Gat no.36. He would invite my attention to the provisions of Section 36A of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (**Act of 1947**) under which jurisdiction of the Civil Court is barred in respect of finalised Consolidation Scheme. He would also rely upon the provisions of Section 29 of the Act of 1947 which has the effect of transfer of holding by virtue of issuance of Certificate by the Consolidation Officer. He would rely upon the consolidation extract produced alongwith Interim Application No. 3713 of 2022.

9. *Per-contra*, Mr. Tendulkar, the learned Counsel appearing for Respondent would oppose the petition and support the order passed by the lower Appellate Court. He would submit

that Plaintiff prayed for relief of injunction which was premised on assertion of possession of the suit property exclusively by the plaintiff. That for deciding the said issue, it was incumbent for the Trial Court to frame issue regarding possession, which was not done. That Defendant had specifically pleaded cultivation of half portion of the suit property and therefore the issue with regard to possession of the suit property ought to have been framed and answered by the trial Court. He would further submit that Plaintiff selectively filed suit against the Defendant despite knowledge of the fact that several other legal heirs of Waman Nathu Thakur are entitled to right, title and interest in the suit property bearing Gat no.36. That the lower Appellate court has rightly come to the conclusion that issue relating to possession was required to be framed and necessary parties were required to be impleaded for effective decision of the suit. He would further submit that the trial Court had failed to appreciate factual position that Defendant has 50% share in the land bearing Gat no.36 as the land bearing old Survey No.9/3/A was subsumed in Gat no.36. That the lower Appellate Court has correctly appreciated changes that took place by various mutations of the suit land while allotting different survey/gat numbers to it. That this aspect was not taken into consideration by the trial Court while decreeing the suit. That therefore the lower Appellate Court has not committed any error in remanding the suit for fresh trial.

10. I have considered the submissions canvassed by the learned counsels for the parties and have gone through the judgments of the Trial Court and the lower Appellate Court, pleadings of the parties and documents placed on record.

11. The issue involved in the present Appeal is about the correctness of the decision of the lower Appellate Court in remanding the suit for fresh trial. Even though the learned Counsels appearing for both the sides have made detailed submissions on the merits of the case, the real question that arises for determination in the present Appeal is whether the lower Appellate Court was justified in remanding the suit for fresh trial. Therefore, it would be necessary to take note of the relevant provisions in the Code of Civil Procedure as well as judgments of the Apex Court in the light of which the issue can be answered.

12. 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 to 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 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

13. 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.

14. 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.

15. 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 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)

16. It is also well settled that the power to remand 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.”

17. 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 to remand suit for fresh trial is to be exercised in exceptional circumstances by the Appellate Court. It cannot be exercised in a routine manner. 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.

18. Having considered the provisions of the Code and the law expounded by the Apex Court, now I proceed to examine whether the remand of the suit by the Appellate Court in the present case was warranted. It is common ground that the suit has not been decided by the Trial Court on preliminary point. Therefore, provisions of Rule-23 of Order 41 of the Code are not attracted. What is applicable to the present case are the provisions of Rule 23A Order 41 of the Code.

19. On the basis of the pleadings filed by the parties, the Trial Court framed following issues :

1. Does plaintiff proves his ownership over the suit property ?
2. Whether the suit is barred by principle of non-joinder of necessary parties ?
3. Does plaintiff prove that defendant has made unlawful obstruction to the peaceful possession of plaintiff over the suit property ?
4. Whether the plaintiff is entitled for declaration and perpetual injunction as prayed ?
5. What order and decree ?

20. The Trial Court thereafter has answered each of the issues while decreeing the suit. The Appellate Court has found fault with the judgment and decree of the Trial Court on three grounds. Firstly, the Appellate Court felt that the issue with regard to possession was not framed. Secondly, necessary parties were not joined to the suit and thirdly the trial Court did not properly appreciate the background in which various mutations were effected while deciding the issue of title over the suit property.

21. So far as the first ground of failure to frame issue relating to possession of the property is concerned, it cannot be said that the lower Appellate Court is absolutely wrong in expecting the Trial Court to frame a specific issue relating to

possession. Plaintiff claimed injunction against the Defendant from disturbing his possession. Defendant claimed in the Written Statement that he was cultivating half portion of the suit property bearing Gat no.36. In the light of these pleadings regarding possession, ideally the Trial Court ought to have framed a separate issue as to who was in possession of the property. The Trial Court has however answered the issue regarding possession while answering Issue No. 3 which was as follows: “*Does plaintiff prove that defendant has made unlawful obstruction to the peaceful possession of plaintiff over the suit property?*”. Thus though the issue regarding possession was not specifically framed, the Trial Court has held Plaintiff to be in possession of the suit property while answering Issue Nos. 3, 4 and 5. Whether these findings are correct or not is something which was required to be decided by the Appellate Court while deciding the Appeal. In these circumstances, mere failure on the part of the Trial Court in not framing a separate issue regarding possession could not have been a ground for the Appellate Court to remand the suit for fresh trial. If the Appellate Court felt that a separate issue as to possession was necessary, the Appellate Court is empowered to frame such additional issue. I therefore find that the first ground of failure in framing issue relating to possession was not a ground fit enough to order retrial of the suit.

22. Coming to the second ground for ordering a retrial on failure to join necessary parties, I find that the Trial Court had framed Issue no.2 regarding non-joinder of parties and had recorded following findings :

“21. The defendant in his written statement vide para no.3 has contended that the suit is bad for non-joinder of necessary parties. According to the defendant deceased Dattatreya and Mrs. Malati Pandurang Puro (maiden name Malati Waman Thakur) have right in the suit property. Hence, they ought to have been impleaded as defendant in the present suit. The learned advocate for the plaintiff submitted that the defendant has no concern with the suit property. Also the siblings of the defendant have no concern with the suit property. Hence, he submitted that there is no necessity to implead the brother of the defendant deceased Dattatreya and sister Mrs. Malati Pandurang Puro as defendant in the present suit. The defendant has failed to prove that he along with his siblings have share in the suit property. Hence there is no need to make them party to the suit. Hence, the suit is not bad for non-joinder of necessary parties. Hence, I answer issue no.2 in negative.

23. Whether the Trial Court was justified in holding that suit is not bad for non-joinder of necessary parties is something which the lower Appellate Court is expected to determine while deciding the Appeal. The lower Appellate Court has recorded following findings on the issue on non-joinder :

“24] The defendant has contended that the brother of the defendant namely Dattatray and sister Malati are not made party to the suit and, therefore it is bad for non-joinder of necessary parties. Undisputedly, the defendant is claiming right in the suit property

through his father Waman. The defendant has come with the case that he has having one brother and sister. Needless to mention that they are having right to say in the present suit. Without making them party to the suit, the trial court has wrongly observed that they are not having right in the suit property and, they are not necessary party to the suit. It is also insignificant to note that the 7x12 extract produced on record of Gat No.34 which allegedly allotted to Waman is having name of seven person in the column of ownership. However, they are not made parties to the suit. It seems that these persons are necessary parties to the suit. Their presence is necessary to have effectual and complete adjudication upon all the questions involved in the suit. Hence, it is concluded that the trial court has made mistake in deciding the suit without making necessary parties to the suit. The trial court ought to have exercised jurisdiction under Order 1 Rule 10 of the Code of the Civil Procedure and arrayed all above necessary parties in the suit. The suit needs to be remanded back to the trial court on this point for fresh hearing. Accordingly, point No.4 is answered.”

24. While I do not wish to delve any deeper into the correctness of the findings recorded by the Trial Court or the lower Appellate Court on the issue of non-joinder, I would only record submissions advanced by Mr. Godbole in this regard. In his Written Statement, Defendant pleaded that his other brothers and sisters were not impleaded as parties to the suit and that his brother, Late Dattatray and Sister- Malati Pandurang Puro have shares in the property. *Prima-facie*, the findings recorded by the lower Appellate Court seek to indicate that persons having share in land bearing Gat no.34 have not been impleaded as parties to the suit. Mr. Godbole has contended that land bearing Gat no.34 is not the subject matter of suit and therefore owners thereof

cannot be necessary parties while deciding the issue of ownership in Gat no.36. I do not wish to record any finding on this aspect as the same would affect the mind of the Appellate Court. However, the submissions of Mr. Godbole are only recorded for the purpose of arriving at a finding that there is sufficient material available on record for the Appellate Court to decide the issue of non-joinder of necessary parties. If the lower Appellate Court arrives at a conclusion that the suit is bad for non-joinder of necessary parties, it can allow the Appeal and reverse the decree. However merely because the lower Appellate Court formed an opinion that there some more parties that are required to be heard while deciding the suit, the same could not have been a ground for remanding the suit for fresh trial. If non-joinder of parties, by itself is considered as a fit ground for remand of a suit for retrial, then in every case where the Appellate Court does not agree with the Trial Court on the issue of non-joinder, remand of suit for fresh trial would be warranted. This would lead to chaotic situation where there would be no finality to litigation. The second ground cited by the lower Appellate Court for remanding the suit for fresh trial is therefore unsustainable.

25. Turning to the third ground for remand of the suit, the lower Appellate Court has discussed the entire history with regard to various mutations that took place with regard to the two properties, which were earlier numbered as Survey Nos.100/3/A

and 100/3/B (prior to 1975) and Survey Nos.9/3/A and 9/3/B (after 1975) and finally Gat nos. 34 and 36 after implementation of the Consolidation Scheme. The lower Appellate Court has devoted substantial portion of its judgment in making an effort of determining correctness of Defendant's contention about subsuming of his land bearing old survey No.100/3/A into Gat no.36. However, after considering the entire history of mutations, instead of recording a positive finding about correctness of assertion of defendant, the Appellate Court has diverted its attention in para-24 of its judgment and held that the trial Court failed to decide the issue of title over the suit property in the background of those mutations. After discussing the entire history of mutations, the Appellate Court has recorded following findings in para-22 :

“22] As stated earlier, Mutation entries in respect of S. No.100/3A and 100/3B are not showing correct picture in respect of measurement of said lands. Said mutations are not made correctly by the revenue authorities. There is nothing on record to show as to how area of S.No.100/3A and 100/3B was increased. Mutation Entry No.2090 is based on Mutation entry No.1873 and it is not produced on record. The trial court has not considered Mutation Entry No.1787 by which S. No.100/3A was divided into two survey numbers i.e. S.No.3A/1 admeasuring 17.75 Gunthe and S.No.3A/2 admeasuring 31 Gunthas. An issue of title over the suit property ought to have been decided in the background of these mutations. Moreover, an issue of necessary parties which shall be discussed later on, is material while deciding the title of the suit property. It seems that the trial court has not considered all these issues properly. An issue of title

over the suit property needs to be discussed in the background of all these observations. Accordingly, point No.1 is answered.”

26. The lower Appellate Court has considered rival assertions of Plaintiff and Defendant before it. While Plaintiff came up with the theory that two sets of properties bearing old Survey No.100/3/B which became Gat no.36 is entirely different and distinct from the other property bearing old Survey No.100/3/A ultimately becoming Gat no.34, the Defendant set up a different theory to the effect that his land bearing Old Survey No.100/3/A got subsumed in Gat No.36 (100/3/A and 100/3/B altogether became Gat no.36). The Trial Court rejected the theory of the Defendant and declared Plaintiff as the exclusive owner of Gat no.36. Based on the evidence available on record, the Appellate Court was expected to decide whether the finding of the Trial Court is correct or not. However, instead of doing so, the lower Appellate Court has erroneously remanded the suit for fresh trial. The third ground for making an order of remand is thus again unsustainable.

27. Coming back to the provisions of Rule 23A of Order 41 of the Code, there is no cogent reason recorded by the Appellate Court as to why retrial in the case was necessary. The order of remand appears to have been made by the Appellate Court in a routine manner essentially on the ground that the Trial Court did not properly appreciate mutations effected in the past.

This could be a reason to set aside the order of the Trial Court and the Appellate Court could have recorded its own finding based on these mutations.

28. Considering the overall conspectus of the case, I am of the view that the impugned judgment of the lower Appellate Court is indefensible and the same is liable to be set aside. Mr. Godbole did attempt to suggest that upon order of the lower appellate court being set aside, the decree must revive and attain finality. I am unable to agree. Since order of remand is being set aside, the appeal would revive and will have to be decided on merits. The lower appellate court must be permitted to decide the appeal by exercising all powers vested in it, except that of a remand.

29. I accordingly proceed to pass the following order :

ORDER

- (i) Judgment and order dated 22 March 2022 passed by the Ad-Hoc District Judge-1, Raigad, Alibaug in Regular Civil Appeal No.58/2017 is set aside and Regular Civil Appeal No.58/2017 is restored on the file of Ad-Hoc District Judge-1, Raigad, Alibaug for being decided afresh.

- (ii) While deciding the Appeal, the District Judge shall not be influenced by any of the observations made in the judgment and order dated 22 March 2022 or in the present judgment. The Appeal shall be decided on its own merits. All contentions raised by the parties on merits of the matter are left open.
- (iii) The Appellate Court, while deciding the Appeal, would be at liberty to exercise such powers as are conferred upon it in the Code.

30. With the above observations, the Appeal is allowed. There shall be no orders as to costs.

SANDEEP V. MARNE, J.