

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

**APPEAL FROM ORDER NO. 472 OF 2023  
WITH  
INTERIM APPLICATION NO. - 12866 OF 2023**

M/s. Fiza Construction through its Prop. ...Appellant  
Shri. G. R. Mujawar

**Vs.**

Smt. Jayram Gopal Thakur through LRs ...Respondents  
Shri. Mangesh Jayram Thakur and Others

Mr. R. A. Thorat, Senior Counsel a/w Ms. Pratibha Shelke  
i/b Mr. Nitin B. Patil, for Appellant.

Mr. Vaibhav Parshurani i/b Vallari J., for Respondent Nos.  
1 and 2.

**CORAM:- N. J. JAMADAR, J.**

**DATED:- 5<sup>th</sup> JULY, 2023**

**P.C.:-**

**1)** This Appeal is directed against a judgment and order dated 28<sup>th</sup> March, 2023, passed by the Adhoc District Judge-1, Panvel, Raigad in RCS No. 376 of 2019, whereby the learned District Judge was persuaded to allow the Appeal and set aside the judgment and decree passed by the learned Civil Judge in Special Civil Suit No. 643 of 2010, dated 24<sup>th</sup> September, 2012, and remand the matter back for retrial to the trial Court invoking the provisions contained in Order XLI Rule 23A of the Code of Civil Procedure.

**2)** The appellants are the original plaintiffs in whose favour the learned Civil Judge Senior Division had passed a decree for specific performance in Special Civil Suit No. 643 of 2010.

**3)** The principal reason, which weighed with the learned District Judge was that the defendant Nos. 1 and 2 had not had an effective opportunity to cross-examine the plaintiffs witnesses and adduce the evidence.

**4)** Dr. Thorat, the learned Counsel for the appellant submitted that the learned District Judge committed a jurisdictional error in not delving into the merits of the matter and remanding the Appeal only upon consideration as to whether the defendant Nos.1 and 2 had an effective opportunity of hearing. It was submitted that the record of the trial Court would indicate that the defendant Nos. 1 and 2 were, in fact, provided an efficacious opportunity.

**5)** I have perused the impugned judgment. It seems that the trial Court had issued notice to the defendant Nos. 1 and 2 as the Advocate who represented the defendant Nos. 1 and 2 had sought discharge and despite service of the said notice, the defendant Nos. 1 and 2 had not appeared and, thereafter, the trial Court proceeded with the suit in absence of defendant Nos. 1 and 2. In the totality of the circumstances, in my view, the learned District Judge was justified in remitting the matter for trial for afresh decision with a view to provide an effective opportunity of hearing and have a decision on merits.

**6)** Since the trial proceeded *ex-parte* from the stage of the cross-examination of the plaintiffs witness, it may be expedient to modify the impugned order to the extent that the trial shall commence from the stage of cross-examination of the plaintiffs witnesses.

**7)** It is needless to clarify that the defendant shall be provided an opportunity to adduce evidence in accordance with law.

**8)** Since the suit for specific performance of an agreement, purportedly executed on 11<sup>th</sup> March, 2008, has been instituted in the year 2010, the trial Court is requested to make an endeavor to decide the suit as expeditiously as possible and preferably within a period of nine months from the date of the communication of this order.

**9)** Till the decision of the suit, the ad-interim order passed by this Court, restraining the defendant from creating third party interest in the suit property shall continue to operate.

**10)** Subject to the aforesaid clarification, the Appeal stands disposed.

**11)** In the circumstances, there shall be no order as to costs.

**12)** In view of the disposal of the Appeal, the Interim Application also stands disposed.

**[N. J. JAMADAR, J.]**