

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

APPEAL FROM ORDER NO. 348 OF 2021

SANTOSH
SUBHASH
KULKARNI

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Shahajirao Parashram Jadhav

...Appellant

Versus

Sarjerao Hari Bhagat (Since deceased)
through LR's. Indubai Sarjerao Bhagat
(Patil) & ors.

...Respondents

WITH

INTERIM APPLICATION NO. 3011 OF 2021

IN

APPEAL FROM ORDER NO. 348 OF 2021

Mr. Kuldeep Nikam, a/w Prasad Avhad, for the Appellant.
Mr. Vishal Muglikar, i/b Mr. Mayur Joglekar, for the
Respondents.

CORAM: N. J. JAMADAR, J.

DATED : 14th MARCH, 2023

ORDER:-

1. This appeal is directed against a judgment and order dated 24th June, 2021 passed by the learned Principal District Judge, Sangli, in Regular Civil Appeal No.225 of 2013, whereby and whereunder while allowing the said appeal by setting aside the judgment and order passed by the learned Joint Civil Judge, Junior Division, Sangli, in Regular Civil Suit No.117 of 2008, dated 11th November, 2008, the learned Principal District Judge remanded the said suit for afresh decision to the trial court.

2. Background facts necessary for determination of this appeal can be stated in brief as under:

(a) The appellant – plaintiff claimed that Late Sarjerao Hari Bhagat (Patil), the deceased defendant No.1 and Sambhajirao Hari Bhagat (Patil) – defendant No.2, were the owners of the suit property being agricultural land situated at Madhav Nagar, Taluka Miraj, District Sangli. Deceased defendant Nos.1 and 2 had agreed to sale the suit property for a consideration of Rs.15,000/-. Acknowledging the receipt of consideration of Rs.14,500/- defendant Nos.1 and 2 executed a registered Agreement to Sale in favour of the plaintiff on 19th February, 1991. The balance amount of Rs.500/- was agreed to be paid at the time of the execution of the Sale Deed, which was to be executed within one month of the lifting of the ban on sale of *Gunthewari land*.

(b) Asserting that defendant Nos.1 and 2 failed and neglected to execute the Sale Deed, the plaintiff instituted a suit for specific performance of the contract contained in the said registered agreement. Despite entering appearance, the defendants did not file the written statement and the suit proceeded without written statement of the defendants.

(c) Post consideration of the evidence adduced by the plaintiff, the trial court decreed the suit for specific performance by judgment and order dated 11th November, 2008.

(d) In the meanwhile, defendant No.1 Sarjerao passed away. Respondent Nos.1(a) to 1(c), the legal representatives of defendant No.1, preferred Regular Civil Appeal No.225 of 2013 assailing the judgment and decree passed by the trial court.

(e) By the impugned judgment and order, the learned Principal District Judge was persuaded to allow the appeal and set aside the judgment and decree passed by the trial court and remand the suit to the trial court for afresh decision. The learned Principal District Judge was of the view that since the suit came to be decreed without written statement of the defendants, in order to do complete justice between the parties a fair opportunity was required to be given to the legal representatives of defendant No.1 i.e. appellants in Regular Civil Appeal No.225 of 2013, to file written statement and contest the suit.

3. Being aggrieved by the impugned judgment and decree, the appellant/plaintiff is in appeal.

4. I have heard Mr. Nikam, the learned Counsel for the appellant and Mr. Muglikar, the learned Counsel for respondent Nos.1(a) to 1(c).

5. Mr. Nikam, the learned Counsel for the appellant, submitted that the impugned judgment and order is singularly unsustainable as it is passed in breach of the mandate contained in Order XLI Rule 23A of the Code of Civil Procedure, 1908 ("the Code"). Remand has been ordered for the mere reason that the suit proceeded without written statement. The lower Appellate Court has not at all recorded a finding that the decree was required to be reversed. Instead simply to give an opportunity to defendant Nos.1(a) to 1(c), the suit came to be remanded to the trial court. Such a course is legally impermissible.

6. To lend support to the aforesaid submission, Mr. Nikam placed a strong reliance on a judgment of the Supreme Court in the case of *Municipal Corporation, Hyderabad vs. Sunder Singh*¹, wherein the conditions which are required to be satisfied before an order of remand can be legitimately passed were expounded. Reliance was also placed on the judgment of a learned Single Judge of this Court in the case of *Rampyare Ram*

1 (2008) 8 Supreme Court Cases 485.

Hiraman Prasad vs. Usha Prasad Rampyare Ram Hiranman², wherein this Court has interfered with an order of remand in somewhat identical fact situation.

7. In opposition to this, Mr. Muglikar, the learned Counsel for respondent Nos.1(a) to 1(c), endeavoured to support the impugned judgment and order. It was urged that the remand was necessary as the trial court had not adverted to the principles which were required to be kept in view while granting the discretionary relief of specific performance. Moreover, since the suit property was stated to be the ancestral property of defendant Nos.1 and 2, the competence of defendant Nos.1 and 2 to convey the said property was also required to be adjudicated upon. Since the trial court had not delved into these aspects, the impugned order of remand cannot be faulted at. Nor it would cause any prejudice to the plaintiff as he would have full opportunity to lead evidence in support of his claim.

8. I have given anxious consideration to the aforesaid submissions. A short question which corps up for consideration is whether, in the facts and circumstances of the case, the District Court was justified in setting aside the decree and ordering a re-trial without reversing the decree?

2 2017(5) Mh.L.J. 378.

9. Under Order XLI of the Code, remand of the suit to the trial court by the Appellate Court is envisaged in three situations. Under Rule 23 the Appellate Court would be justified in resorting to the exercise of power to remand a suit for trial only where the trial court has disposed of the suit on a preliminary point. If the decree is reversed in appeal, in a case which is not disposed of on a preliminary point, remand is permissible under Rule 23A. However, twin conditions that need to be satisfied for remand under Rule 23A are: the decree is reversed in appeal and a re-trial is considered necessary. Under Rule 25 remand would be justified if the Appellate Court comes to the conclusion that the trial court had omitted to frame or try any issue, or to determine any question of fact which appears to the Appellate Court essential to the right decision of the suit upon merits. The Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred.

10. In the case of *P. Purushottam Reddy and another vs. Pratap Steels Ltd.*³, the Supreme Court expounded the different situations in which a remand is permissible under the provisions of Order XLI of the Code as under:

3 (2002) 2 SCC 686.

“11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary Neither Rule 23 nor Rule 23A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaintiff to satisfy the requirement of Forms 47 and 48 of Appendix A of CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to Clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise in as much as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - In law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material in as much as the High Court being the court of first appeal all the questions fact questions of fact and law arising in the case were open before it for consideration and decision.”

11. The distinction between the provisions contained in Rule 23 and 23A of Order XLI was also postulated by the Supreme Court in the case of *Municipal Corporation, Hyderabad* (supra) as under:

“32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order 41 rule 23-A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a re-trial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code.

34. An order of remand cannot be passed on ipse dixit of the court. The provisions of Order 2 Rule 2 of the Code of Civil Procedure as also Section 11 thereof could be invoked, provided of course the conditions precedent therefor were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in *Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas (2008) 11 SCC 753.*”

12. On the aforesaid touchstone, reverting to the facts of the case, from the perusal of the impugned order, it becomes abundantly clear that the only reason which weighed with the learned Principal District Judge to set aside the decree impugned before him and remand the matter to the trial court was that the deceased defendant No.1 had not filed the written statement and the decree came to be passed and thus it was necessary to provide a fair opportunity to the legal representatives of deceased defendant No.1, who had come in appeal, to file the written statement and contest the suit on merits. The learned Principal District Judge has not at all adverted to the merits of the matter. Nor ascribed any reason as

to why the decree was required to be reversed with reference to infirmity, if any, in the judgment of the trial court.

13. This being the nature of the impugned judgment, I find substance in the submission of Mr. Nikam that the order of remand is legally unsustainable. In the case of ***Rampyare Ram Hiranman Prasad*** (supra) a learned Single Judge of this Court, in an identical fact-situation of the Appellate Court therein remanding the proceedings without entering into the merits of the adjudication by the trial court, had enunciated the law in the following terms:

“7. Under the provisions of Order XLI, Rule 23-A of the Code, the Appellate Court can direct remand of the proceedings after it reverses the decree and further finds that a fresh trial is necessary. For said purpose, the Appellate Court would have to first go into the merits of the adjudication by the trial court and only on being satisfied that the decree is liable to be reversed and fresh trial is considered necessary that such order of remand can be passed. In *P. Purushottam Reddy and another* (supra), the Hon’ble Supreme Court has held that it is only in exceptional cases and where the conditions stipulated by provisions of Order XLI, Rule 23-A of the Code are satisfied that such order of remand can be passed. In the present case, the Appellate Court without entering into merits of the adjudication by the trial court merely remanded the proceedings so as to give an opportunity to the respondent to contest the proceedings. In absence of the conditions stipulated under Order XLI, Rule 23-A of the Code being satisfied such order of remand could not have been passed.”

14. The aforesaid pronouncement is on all four with the facts of the case at hand. The endeavour of Mr. Mugalikar to demonstrate that the aforesaid pronouncement would not

govern the facts of the instant case by inviting the Court to delve into the merits of the case on the aspect of non-consideration of the entitlement to the discretionary relief and competence of defendant Nos.1 and 2 to convey the property, which was stated to be ancestral, by the trial court, does not merit countenance for the reason that the aforesaid aspects were not at all considered by the learned Principal District Judge for ordering the remand. In fact, the learned Principal District Judge explicitly records that the Court was not deciding the appeal on merits. Thus, the aforesaid judgment applies with full force and vigor.

15. Resultantly, the appeal deserves to be allowed.

16. Hence, the following order:

: O R D E R :

- (i)** Appeal stands allowed.
- (ii)** Impugned judgment and order dated 24th June, 2021 in Regular Civil Appeal No.225 of 2013 stands quashed and set aside.
- (iii)** The appeal stands restored to file of the learned Principal District Judge for a fresh decision in accordance with law.

- (iv) By way of abundant caution, it is clarified that the learned Principal District Judge shall decide the said appeal on its own merits and without being influenced by any of the observations in the aforesaid order.
- (v) In view of disposal of the appeal, Interim Application No.3011 of 2021 does not survive and stands disposed.

No order as to costs.

[N. J. JAMADAR, J.]