

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH: NAGPUR.**

WRIT PETITION NO. 3348 OF 2020

Shri Sushilkumar Kamalnarayan Jaiswal
(Pitariya), Aged – 67 Years, Occupation:
Retired, R/o. Jatpura, Ward No.2, Main
Road, Chandrapur, Tahsil & District :
Chandrapur (Maharashtra State)

.... **PETITIONER.**

// VERSUS //

Shri Awtarsingh S/o. Jawaharsingh Taneja,
Aged -67 Years, Occupation : Business,
R/o. All India Handloom Shop, Infront
of Government Hospital, Main Road,
Chandrapur, Tahsil & District :
Chandrapur (Maharashtra State).

.... **RESPONDENT.**

Shri Harish Dangre, Advocate for Petitioner.
Shri Rohit Joshi, Advocate for Respondent.

CORAM : ANIL S. KILOR, J.
DATED : JULY 05, 2023.

ORAL JUDGMENT :

1. Heard.

2. This writ petition takes exception to the judgment and decree dated 25/02/2020 passed by District Judge-4, Chandrapur in

Regular Civil Appeal No.105 of 2016, partly allowing the appeal and thereby setting aside the judgment and decree dated 14/10/2016 passed by 3rd Joint Civil Judge Junior Division, Chandrapur in Regular Civil Suit No. 282 of 2012 and thereby remanding the matter to the trial Court for deciding the suit afresh.

3. The facts leading to the present petition are as follows: (The parties are referred to as per their status before the trial Court.)

4. The plaintiff by filing Regular Civil Suit No.282 of 2012, has claimed possession and recovery of arrears of rent. According to him, he is the owner of the shop at Jatpura Ward bearing Plot No.7762 (7662), area admeasuring 196 Sq.Ft. The said suit shop was ancestral property of the father of the plaintiff-Kamalnarayan and after his death, the plaintiff and his sisters have become owners of the ancestral property of their father. In the partition, the suit shop came to his share and his name was entered in the revenue record. The defendant was inducted as a tenant by the father of the plaintiff for 11 months. After the death of the father of the plaintiff on 05/02/2011, the defendant's tenancy was terminated, but, he illegally occupied the suit shop. Though the plaintiff requested him to vacate the suit shop, which is required for his business,

the defendant did not pay any heed. Hence, the plaintiff issued notice to the defendant on 11/01/2011, despite the same the defendant did not vacate the suit property or paid the rent amount. It is further claimed that since the death of father of the plaintiff, the defendant stopped paying rent. Thus, the plaintiff has claimed the rent for 22 months also with interest @ 18% per annum.

5. The defendant resisted the suit by filing written statement. The defendant has also filed counter claim for declaration that his tenancy is irrevocable and that he is lawful and protected tenant.

6. The learned trial Court, after examining the oral as well as documentary evidence, partly decreed the suit vide judgment and decree dated 14/10/2016 and thereby directed the defendant to vacate the suit property for non-payment of rent from June 2009 to 13/02/2019 i.e. for 56 months. The learned trial Court further dismissed the counter claim of the defendant.

7. The defendant, feeling aggrieved by the judgment and decree dated 14/10/2016, carried an appeal before the District Judge-4, Chandrapur vide Regular Civil Appeal No.105 of 2016. The same came

to be partly allowed vide impugned judgment and decree dated 25/02/2020 and thereby while setting aside the judgment and decree passed by the trial Court, the matter was remanded back for deciding the same afresh. The said judgment and decree dated 25/02/2020 is the subject matter of the present petition.

8. Shri Dangre, learned counsel for the petitioner submits that in the present matter though both the parties went to the trial knowing well that the question of bonafide need is involved and both the parties have led evidence on the same, the learned lower appellate Court ought not to have remanded the matter back to the trial Court, only for the reason that the specific issue as regards 'bonafide need' was not framed, but should have decided the said issue after taking into consideration the documentary as well as oral evidence available on record.

9. It is further submitted that in rare situation only remand is possible. But, for the reason that certain authorities are cited by both the parties and not discussed and considered by the trial Court, that cannot be the ground for remand.

10. He further argues that the issues of tenability and ownership of the suit property, though not discussed by the trial Court, the same could have been decided by the learned lower appellate Court without remanding the matter. He, therefore, submits that the learned lower appellate Court, without taking into consideration the well settled law as regards the remand under Order XLI Rule 23 and 24 of the CPC, passed the impugned judgment and decree. In support of his submission, he has placed reliance on the judgments of the Hon'ble Supreme Court of India in the cases of *Maya Devi..vs.Raj Kumari Batra*, reported in **(2010)9 SCC 486** and *Zarif Ahmad.vs.Mohd. Farooq*, reported in **(2015)13 SCC 673**.

11. On the other hand, Shri Joshi, learned counsel for the respondent supports the impugned judgment and decree and submits that considering the reasons recorded by the learned lower appellate Court for remanding the matter back to the trial Court, it can be said that the Court has properly exercised the discretion under Order XLI Rule 23A of the C.P.C. and no perversity has been committed. He, therefore, prays for dismissal of the present petition.

12. In light of the rival contentions, I have perused the record and the impugned judgment and decree.

13. On bare perusal of the impugned judgment and decree, it can be seen that, following are the reasons recorded by the learned lower appellate Court for remand of the matter :

- a) The learned trial Court has not framed the issue as regards bonafide need and no discussion is made on the said issue;
- b) Issues regarding bar of jurisdiction of the Court and tenability of the suit, though framed, not decided;
- c) The additional issues framed were not added in the earlier issues framed at Exh.18. Moreover, no discussion was made on the additional issues;
- d) It has been reflected in the Roznama that the plaintiff and the defendant have placed reliance on certain authorities in support of their submissions as per Pursis Exhs.103 and 104 and Pursis dated 02/09/2016. No discussion was made by the learned trial Court on those authorities.

14. In the circumstances, the whole controversy revolves around a question, whether the remand made by the learned lower appellate Court for fresh decision is justifiable and warranted in this case. Before going further, it would be appropriate to reiterate the law as regards remand under Order XLI Rule 23 and 24 of the CPC.

15. The Hon'ble Supreme Court of India in the case of *Maya Devi* (supra), while dealing with the issue as regards the necessary factors to be considered while remanding the matter by the appellate Court, has held thus:

“30. Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate Court should remit the matter is discretionary with the appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate Court is of the view that it will prolong the litigation.”

16. The Hon'ble Supreme Court of India in the case of *Zarif Ahmad* (supra), while dealing with the issue regarding deprecating practice to remand the matter to the trial Court, has held thus:

“13. No doubt, Section 107 CPC empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 Order 41 CPC provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is not a healthy practice to remand a case to the trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, should a case be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case.”

17. Thus, from the above referred discussion, it is evident that Order XLI Rule 24 of the CPC provides that where evidence on record is sufficient, the appellate Court may determine the case finally. No doubt that whether or not the appellate Court should remit the matter is discretionary. However, it would largely depend upon the nature of dispute, the nature of the extent of evidence that may have to be appreciated, the complexity of the issue that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Hence, it is not a healthy practice to remand a case to the trial Court, unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Therefore, only in rare situations, a case should be remanded.

The remand on the ground that points touching appreciation of evidence were not dealt with by the trial Court, may not be proper because the first appellate Court is itself possessed of jurisdiction to enter into facts and appreciate evidence. Further the remand cannot be made merely for the purpose of allowing party to fill up the lacuna.

18. In light of above referred well settled law position, I will revert back to the facts of the present case.

19. The learned lower appellate Court, while recording observation that the trial Court has not framed or discussed the issue of reasonable and bonafide need of the plaintiff, has categorically observed that there was ample material on record on the said issue of bonafide need. The learned lower appellate Court has nowhere stated that both the parties have not led evidence on the point of bonafide need, in absence of any specific issue framed by the trial Court. It is a settled law that when both the parties went to the trial, knowing well the case of each others and lead evidence, even if a specific issue is not framed in that regard the decision would not vitiate.

20. In the present matter, as it is not the case that in absence of any specific issue on bonafide need, both the parties have not led any evidence on the issue of bonafide need. Therefore, the learned lower appellate Court could have decided the said issue of bonafide need after considering the evidence brought on record by both the parties in that regard.

21. The learned lower appellate Court has observed that three additional issues were framed regarding tenability of the suit when efficacious remedy was available, the issue as regards ownership of the suit shop and third one though vague it relates to tenability of the suit, were not answered while deciding the issues framed at Exh.18.

22. The learned lower appellate Court could have decided the aforesaid three additional issues at the stage of appeal considering the well settled position of law that the first appeal is the continuation of the suit and first appellate Court can reappreciate the facts and evidence. However, because the additional three issues which relate to tenability of the suit or regarding ownership, were not decided though framed, cannot be the ground for remand, particularly when the learned lower appellate Court could have decided the same considering the law and the evidence available on record.

23. The third reason given by the learned lower appellate Court for remand of the matter is that certain authorities cited and relied upon by both the parties have not been considered and dealt with by the learned trial Court. The said ground also cannot be held as sufficient for remand of the matter.

24. Thus, from the above discussion, it is evident that in the present matter the learned lower appellate Court could have avoided prolongation of the litigation between the parties as, according to me, this is not the case in which remand is necessary. Because of such remand it will make parties to wait for final decision of the case for the period which is avoidable.

25. In the circumstances, I am of the considered view that the learned lower appellate Court has committed error in remanding the matter. Accordingly, I pass the following order:

- i) The writ petition is partly allowed.
- ii) The impugned judgment and decree dated 25/02/2020 passed by District Judge-4, Chandrapur in Regular Civil Appeal No.105 of 2016 is hereby quashed and set aside.

- iii) The matter is remanded back to the District Judge-4, Chandrapur to decide it afresh, on its own merits, after hearing both the parties.
- iv) Both the parties shall appear before the District Judge-4, Chandrapur on 12/07/2023 at 11:00 a.m.
- v) The District Judge-4, Chandrapur shall decide the matter as expeditiously as possible and in any case within a period of two months from the date of appearance of the parties.

The Writ Petition is **disposed of** accordingly. No order as to costs.

(ANIL S. KILOR, J)

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