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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 23 OF 2024
WITH
APPEAL FROM ORDER NO. 24 OF 2024

1. Ramdas Manik Marathe
Age 77 years, Occupation Agri.
2. Ravindra Ramdas Marathe,
Age 50 years, Occupation Agri.
Both R/o. War, Tq. And Dist. Dhule. .. Appellants.

VERSUS

1. Ashabai Nanabhau Jadhav,
Age 52 years, Occupation Agri.
2. Rajendra Ramdas Marathe,
Age 45 years, Occupation Agri.
3. Mangla Ramdas Marathe,
Age 42 years, Occupation Agri.
4. Rajubai Ramdas Marathe,
Age 40 years, Occupation Agri.
5. Sangita Ramdas Marathe,
Age 38 years, Occ. Agri.

All R/o. War, Tq. And Dist. Dhule.

.. Respondents.

Mr. A.S. Sawant, Advocate for appellants,
Mr. S.P. Tiwari, Advocate h/f. Mr. N.L. Choudhari, Advocate for
respondent No.1
Respondent Nos. 2 to 5 served.

CORAM : S.G. CHAPALGAONKAR, J.

DATE : 11th DECEMBER, 2024.

J U D G M E N T :-

The appellants/original defendant Nos. 1 and 2 impugn the common judgment and decree passed in R.C.A. No. 4 of 2017 and 5 of 2017 dated 21.12.2023 passed by the District Judge, Dhule, thereby setting aside the judgment and decree dated 24.11.2016 passed by Civil Judge (Senior Division) Dhule in R.C.S. No. 239 of 2012, whereby plaintiff's suit was decreed for the relief of damages and defendants' counterclaim for delivery of vacant possession of the suit property was decreed.

2. Narration of the facts germane for deciding the appeal is summarized as under :-

Respondent No.1/plaintiff instituted R.C.S. No. 239 of 2012 before the Civil Judge (Senior Division) at Dhule raising the claim for specific performance of contract, permanent injunction and alternative relief of damages. Plaintiffs contend that defendant is the owner of the land Gat No. 352/3 admeasuring 1 Hectare 43 R situated at village Var, Taluka and District Dhule. She executed registered agreement to sale dated 8.4.2004 in favour of plaintiff and agreed to sale 70R land out of her ownership for consideration of Rs. 1,55,000/-. The earnest amount of Rs. 15000/- was paid at the time of agreement. Defendants had handed over possession of the suit property to the plaintiff and agreed to execute sale deed within a period of one year i.e. by 8.4.2004, after accepting balance consideration of Rs. 5,000/-.

The defendants avoided to execute the sale deed in favour of plaintiff for one or the other count. Plaintiff was always ready and willing to perform her part of the contract. On 9.5.2011, plaintiff issued a legal notice to defendant No.1, calling upon him to execute the sale deed. However, he flatly refused to do so and threatened to take possession.

3. Defendants filed written statement containing counter claim. Defendants contend that husband of the plaintiff is a money lender. Defendant No.1 was in need of money. Plaintiff's husband paid Rs. 1,00,000/- subject payment of interest @ 3% p.a. and by way of security of loan, a registered agreement to sale was taken. It was a nominal agreement intended as security for loan. The claim is frivolous. According to defendants, interest of Rs. 36,000/- per year has been regularly paid to the plaintiff. On 31.3.2010, total amount with interest i.e. Rs. 1,36,000/- was paid to the plaintiff and her husband. The plaintiff assured to close the transaction and cancel the mutation entry. However, filed the present suit. As such, the defendants prayed that the suit be dismissed and in case the Court finds that plaintiff is in possession, same be handed over to them.

4. The trial court framed issues, recorded evidence of the parties and concluded that the plaintiff has proved the agreement to sale, but failed to establish readiness and willingness to perform her part of contract. Therefore, a decree for damages Rs. 1,50,000/- was passed in favour of the plaintiff and plaintiff was directed to hand over vacant possession of the property to the defendants by allowing the counter claim.

5. Plaintiff assailed the decree passed in suit as well as counter claim by filing two separate appeals, bearing R.C.A. No. 4 of 2017 and R.C.A. No. 5 of 2017. The appellate court, partly allowed both the appeals and remanded the matter back to the trial court from the stage of framing of issues and to decide the suit afresh by giving opportunity to both the parties. As such, the order of remand is subjected to challenge in present appeals.

6. Mr. Amol Sawant, learned advocate for the appellant vehemently submits that the parties have led evidence in tune with the respective pleadings. The trial court has accordingly recorded findings against the issues framed and delivered its judgment. In appeals filed by plaintiff, the appellate court opined that issues as framed by the trial court were inadequate and it does not refer to the controversies which crept up from pleadings of the parties; accordingly, remanded the matter back by setting aside the judgment and decree passed by trial court. Mr. Sawant would further submit that it is not a case where parties are required to lead any more evidence. Even assuming that the trial court had not framed any particular issue, unless the court finds that fresh evidence is required to be led by parties, order of remand could not be passed. He would submit that the appellate court was well equipped with the pleadings and evidence of the parties on all aspects of the matter and it was possible for the appellate court to render its judgment, without relegating the parties to the trial court. He would submit that there was absolutely no necessity to direct fresh trial when substantive evidence was already led by the parties. He would, therefore, urge that the appellate court failed to exercise jurisdiction in tune with the

provisions of Order 41 and unnecessarily remanded matter back to the trial court thereby causing hardship to both sides. In support of his contention, he relies upon the judgment of the Honourable Supreme Court in the matter of *Nirmala Devi Vs. Gurgaon Scheduled Caste and Vimukta Agricultural Credit Society (2021) 18 SCC 785*, to contend that mere omission to frame an issue does not vitiate the proceeding when parties were fully aware about the rival case and led evidence not only in support of their contention but in refutation of those of other side. In such case, it cannot be said that absence of issue was fatal to the case or there was mistrial which vitiated the proceeding.

7. Per contra, Mr. S.P. Tiwari, learned advocate for respondent No.1/plaintiff vehemently submits that the appellate court has clearly noted that trial court has failed to frame the issues in tune with Order 14 of C.P.C. The appellate court referred to the provisions of Civil Manual and finding substantive failure to cast relevant issues, directed remand of the matter. He would, therefore, urge that the appellate court has rightly exercised jurisdiction in tune with Order 41 Rule 23 of C.P.C. which does not warrant interference in present appeals.

8. Having considered submissions advanced and after going through reasoning adopted by appellate court, it can be observed that appellate court remanded matter to trial court with direction to frame proper and material issues and decide suit afresh by giving opportunity to both sides. However, appellate court has not specified exactly what issues ought to have been framed by the trial court. By reading the judgment of the appellate court some inference in this record can be drawn. Para. 18 of the judgment reads as under :-

“ I have perused the entire judgment and decree passed by learned trial court. After perusal of entire judgment, it appears that, learned trial court has not framed the issue regarding the maintainability of counter-claim ?. Whether defendant No.1 is entitled for possession of suit property on the basis of title ? Whether court fees on the counter-claim is properly paid/ Whether the doctrine of Section 53A of the Transfer of Property Act is applicable in present case ?”

9. In this regard, it can be observed from the grounds of appeal and submissions advanced by respective parties before the District Court that it was not the case of the plaintiff that she wanted to lead any more evidence in support of her contention or it was not the case of defendants that some important evidence could not be laid for want of proper issues. In this case, plaintiff is claiming specific performance of contract by asserting her possession, whereas, defendants refute the claim for specific performance and by way of counter claim seek decree for possession. In this background, assuming that issues as mentioned in para.18 of the appellate court's judgment are framed, the question is, whether fresh trial is required or any more evidence is required to be led by parties. The learned advocates appearing for the respective parties, do not dispute before this Court that no more evidence is required to be recorded and matter can be decided on the basis of evidence already adduced by the parties.

10. In the light of aforesaid scenario, reference can be made to the provisions of Order 41 Rule 25, which stipulates that, where the

Court from whose decree an appeal preferred has omitted to frame any issue or determine any question of fact, which was essential to the right decision of the suit, the appellate court may frame such issue and refer the same for trial to the court and direct such court to take additional evidence required. Therefore, in the peculiar case where the appellate court forms the opinion that particular issue is not framed, that itself is not ground to remand the matter. Instead, particular issue can be framed and referred to the trial court in case evidence is required to be led by parties. However, when the particular issue can be decided on the basis of evidence already recorded by the parties, the remand of the matter or even reference of the issue to the trial court would not be necessary. In this regard, reference can be given to the judgment of the Supreme Court in the matter of *Ashwin Kumar K. Patel Vs. State of Uttar Pradesh reported in AIR 1999 SC 1125*, wherein, the Supreme Court observed that power of the appellate court under Order 41 Rule 23 should not ordinarily be exercised merely because in its view reasoning of the trial court in some aspects was wrong. When material is available before the appellate court, appellate court itself should decide the appeal one way or the other.

11. Considering scheme of the provisions of Order 41 Rules, 23, 23A, 24 and 25, it has been reiterated that remand order should not be casually passed since it causes delay and prejudice to the involved parties. Provisions contained under Rule 23A of Order 41 contemplates that when the appeal is disposed of otherwise on preliminary point and decree is reversed in appeal and re-trial is considered necessary, the appellate court can exercise power as contained in Rule 23. Said power is further subject to Rule 24 and 25 of Order 41, which suggest that

where evidence upon record is sufficient to enable the appellate court to pronounce judgment, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the court from whose judgment appeal is preferred has proceeded wholly upon some ground other than on which the appellate court proceeds. Rule 25 further clarifies that where the trial court has omitted to frame or try any issue or determine any question of fact, which was essential for right decision of the suit, the appellate court may frame such issue and refer the same for trial to the court from whose decree appeal is preferred and in such a case, direct such court to take additional evidence required.

12. In the light of aforesaid legal position, if concern of the appellate court as discernible from para. 18 of the judgment is considered, all the 3 issues, as to entitlement of the defendant No.1 to get possession of the suit property or sufficiency of court fees on counter claim or application of doctrine under Section 53A of the Transfer of Property Act, can be considered at the appellate stage, without recording of additional evidence. Nothing is discernible from the reasoning of the appellate court to support its direction for fresh trial. None of the parties has actually shown intention to bring on record additional evidence either oral or documentary. Apparently, parties have recorded oral evidence on all aspects of the matter. Requisite documents are tendered in evidence. Therefore, there was no impediment for the first appellate court, to re-appreciate the same and render its decision on merit.

13. This court is of the view that remand in such case was absolutely unwarranted and would result in unnecessary delay in the decision of the lis. In the result, the following order :-

ORDER

- [A] Both the appeals are partly allowed;
- [B] The impugned judgment and decree dated 21.12.2023 passed in R.C. A. No.4 of 2017, which is subject matter of Appeal From Order No. 23 of 2024 is hereby quashed and set aside;
- [C] The impugned judgment and decree dated 21.12.2013, passed in R.C.A. No.5 of 2017, which is subject matter of Appeal From Order No. 24 of 2024 is hereby quashed and set aside;
- [D] The appellate court shall re-register /re-admit the appeals and decide the same, on the basis of evidence already tendered into service, in consonance with powers conferred under Order 41.
- [E] Parties shall appear before the appellate court on 10th of February, 2025. The appellate court shall endeavour to decide the appeals, within a period of one year from the date of appearance of parties.
- [F] Civil applications, if any, stand disposed of .
- [G] Both the appeals stand disposed of with aforesaid directions.

[S.G. CHAPALGAONKAR, J]

grt/-