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

**APPEAL FROM ORDER NO. 621 OF 2024
WITH
INTERIM APPLICATION NO. 12028 OF 2024
IN
APPEAL FROM ORDER NO. 621 OF 2024**

Balu Ramchandra Rasal & Ors.

....Appellants

V/S

Gajanan Shivram Barge & Ors.

....Respondents

Mr. Vaibhav R. Gaikwad for the Appellants.

Mr. Vishwanath S. Talkute for the Respondent No. 1

CORAM : M. M. SATHAYE, J.

DATED : 13th NOVEMBER 2024

P.C.:

1. Heard learned Counsel for the Appellants and learned Counsel for the Respondent No. 1. Perused the record.

2. This Appeal from Order is filed challenging the Judgment and Order dated 30 April 2024 passed by the District Judge-2, Satara in Regular Civil Appeal No. 148 of 2018 by which the Appeal filed by the present Respondent No. 1 (Original Defendant No. 2) has been allowed, thereby setting aside the Judgment and Decree of the Trial Court (dated 30/09/2011 in R.C.S. No. 154 of 2005) and remanding the matter back to the Trial Court for fresh decision after providing an opportunity to the Defendant No. 2 to cross-examine Plaintiffs' witnesses and after providing an opportunity to both the parties to adduce their evidence.

3. Learned Counsel for the Appellants has relied upon Order 41 Rule 23A

of the Civil Procedure Code ('CPC' for short) and has submitted that in the facts and circumstances of the present case, in the impugned order, the Appellate Court has not reversed the decree of the Trial Court and without reaching such decision, the matter is remanded. He submitted that such course is permitted. He has relied upon the following judgments/orders in support of his contentions.

- (a) Municipal Corporation, Hyderabad vs. Sunder Singh¹
- (b) Rampyare Ram Hiranman Prasad vs. Usha Prasad
Rampyare Ram Hiranman²
- (c) Shahajirao Parashram Jadhav vs. Sarjerao Hari Bhagat
(Since deceased) through Lrs. Indubai Sarjerao Bhagat
(Patil) & Ors³

4. On the other hand, learned Counsel for the Respondent No. 1 (Original Defendant No. 2) has supported the impugned order. He submitted that there is apparent collusion between Plaintiffs and Defendant No. 1. He pointed out that overall reading of the impugned Judgment would show that since the Defendant No. 2 had shown all seriousness to contest the suit by filing written statement, the Appeal Court has found it necessary to give an opportunity to the Defendant No. 2 and therefore, no interference is necessary.

5. I have carefully considered the rival submissions.

6. Perusal of the Judgments of the Trial Court and Appeal Court shows that the legal heirs of Defendant No. 1 (present Respondent No. 2 onwards) have admitted the claim of the Original Plaintiff by filing a purshis Ex 28. The contesting Defendant No. 2 i.e. the present Appellant was served with suit summons who appeared and filed written statement on 04/09/2007.

¹ (2008) 8 SCC 485

² 2017 (5) Mh.L.J. 378

³ Bombay HC AO/348/2021, Order dt. 14/03/2023

Issues were framed on 27/04/2009. It is important to note that thereafter for 2 years, it appears that the suit did not proceed and ultimately on 14/03/2011 the Plaintiff has adduced evidence and filed affidavit of examination-in-chief. It is recorded in the impugned order that on 27/06/2011 that the Trial Court passed an order of “no cross” against the Defendant No. 2 and thereafter, in August 2011, the Plaintiffs’ evidence was closed. It is also recorded that advocate of Defendant No. 2 remained absent. The suit was thereafter decreed in September, 2011.

7. It is material to note that although in paragraph no. 25 of the impugned order, the Appeal Court has referred to the provisions of Order 41 Rule 23-A of CPC, in the same paragraph, it is noted by the Appeal Court that issue as to ‘non-joinder of parties’ was not framed and there was no contest on part of the contesting Defendant No. 2. The Appeal Court has also found that Advocate appointed by the Defendant No. 2 did not appear and proceeded his case and it has resulted in Defendant No. 2 suffering decree without he being heard.

8. Since the Appeal Court has opined that issue as to non-joinder of the party was not framed by the Trial Court, strictly speaking, this order cannot be restricted within Order 41 Rule 23-A and would cross over to an order under Order 41 Rule 25 also. It is in this context that the discretion exercised by the Appeal Court will have to be tested.

9. In such circumstances, narrow interpretation of Rule 23A of Order 41, as suggested by learned Counsel for the Appellant cannot be countenanced in the peculiar facts of this case. The Appeal court found that re-trial is necessary.

10. Before parting, it is necessary to deal with the judgments / orders

relied upon by the Appellant.

11. In case of **Shahajirao Parashram Jadhav (supra)** it can be seen that it was a suit for specific performance and the Defendant therein had not filed written statement and in those circumstances, the impugned order of remand therein, was quashed and set aside. In the present matter, suit is filed by the Plaintiffs against the Defendant No. 1 for partition where Defendant No. 1 has admitted the claim of the Plaintiffs and the Defendant No. 2, though made party, was not heard despite filing written statement. Perusal of the written statement filed by the Defendant No. 2 shows that he is relying upon a sale deed to claim right to eastern 50% share and upon sathe-khat (agreement to sell) to claim right in western 50% share in the subject matter property. He is also claiming to be in possession based on said documents. Therefore, the present case is clearly distinguishable on facts and as such the said Judgment does not advance the case of the Appellants.

12. In **Rampyare Ram Hiranman Prasad (supra)** the matter arose out of divorce Petition which was withdrawn by the wife and husband's counter claim has continued in absence of wife resulting in divorce. Hence remand was ordered, which was under consideration. It is, therefore, obvious that the colour of that litigation was completely different than that of the present litigation. Therefore this Judgment also would not advance the case of the Appellants.

13. In the case of **Municipal Corporation, Hyderabad (supra)** the Hon'ble Supreme Court was considering the suit filed for permanent injunction restraining the other side from interfering with possession and enjoyment over the suit property involved. Hon'ble Supreme Court has held that on facts, the High Court of Andhra Pradesh did not record that retrial was

necessary and also did not arrive at findings that the decree was liable to be reversed. In this context it is held that Order 41 Rule 23-A was not attracted. It is important to note that in the present case, it is recorded in the impugned Judgment that for the reasons mentioned therein (including not framing of necessary issue and first principles of natural justice), the Appellate Court has come to a positive conclusion that re-trial is necessary and thereafter the Judgment of the Trial Court is set aside thereby remanding the matter. In that view of the matter, the said Judgment, in fact may help the Respondent No. 1 but would not advance the case of the Appellants.

14. In the aforesaid facts and circumstances, I do not find that there is any illegality, perversity or apparent error in the power/ discretion exercised by the Appeal Court while passing the impugned Order. The decision is based on the material on record. This is not a fit case to interfere.

15. The Appeal from Order is accordingly dismissed. In view of the dismissal of the Appeal from Order, the Interim Application is also disposed of.

16. All concerned to act on duly authenticated or digitally signed copy of this Order.

(M. M. SATHAYE, J.)