



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
APEAL FROM ORDER NO. 23 OF 2023**

ARVIND NATTHU BORSE
VERSUS
SANJAY PANDHARINATH BORSE AND ORS

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Mr. P. N. Kalani h/f Mr. Jagdish G. Toshniwal, Advocate for the Appellant.

Mr. Chetan B. Chaudhari, Advocate for Respondent Nos.1 and 2.

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**WITH
CIVIL APPLICATION NO. 4406 OF 2023
IN AO/23/2023**

**CORAM : S. G. CHAPALGAONKAR, J.
DATED : 29th JANUARY, 2025.**

P.C.:-

1. The appellant/original defendant takes exception to the order dated 24.11.2024 passed by the Principal District Judge, Nandurbar in Regular Civil Appeal No.24/2023, thereby remanding the suit for fresh decision to the Trial Court. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The respondent nos.1 and 2 (original plaintiffs) instituted suit seeking decree of partition and separate possession in respect of suit property CTS No.570/B-1, more particularly described in paragraph no.2 of the plaint. The defendant refuted claim by filing written statement. The Trial Court after recording evidence and hearing the parties pleased to dismiss the suit vide judgment and order dated 04.02.2022. Aggrieved plaintiffs filed Regular Civil

Appeal No.24/2013 before the Principal District Judge at Nandurbar. The main ground of challenge was that Trial Court erred in allowing application below Exhibit-70 vide order dated 22.11.2010 and refuse to consider certified copies of compromise dated 26.08.1963 culminated into compromise decree passed in Regular Civil Suit No.200/1962.

3. The Appellate Court framed points for consideration. The first point was framed as to whether Trial Court erred in allowing application below Exhibit-70 vide order dated 22.11.2010, which has been answered in affirmative observing that in fact, defendant no.1 has admitted compromise decree passed in Regular Civil Suit No.200/1962, albeit took defence that it is not binding on him. The Appellate Court further observed that in view of Section 17(2)(vi) of the Registration Act, 1908, the decree or order of the Court and compromise decree need not be registered. The learned District Judge has further observed that Trial Court, therefore, seriously erred in passing order below Exhibit-70, refusing to admit compromise decree in evidence. With such observations, the Appellate Court recorded that this is a fit case for exercise of powers of remand under Order XLI, Rule 23-A of the Code of Civil Procedure as retrial of the suit is necessary in order to do justice between the parties.

4. Eventually, decree passed by the Trial Court has been set aside and Regular Civil Suit No.174/2000 has been restored to the file of Trial Court with direction to decide the same afresh within a period of six months.

5. Mr. Kalani, learned Advocate appearing for the appellant would submit that controversy in this Appeal from Order is limited. According to him, Appellate Court failed to exercise jurisdiction in tune with Order XLI, Rules 23, 24 and 25 of the Code of Civil Procedure. He would submit that remand of the matter is ordered only because compromise decree was not admitted in evidence and considered by Trial Court while passing final decree. He would submit that if Appellate Court was of the opinion that Trial Court committed error in not admitting said documents, the Appellate Court for the reasons as recorded could have considered compromise decree alongwith evidence already tendered by the respective parties and rendered the decision on merit in Appeal. According to him, Appellate Court failed to record any reason for remand of the matter or retrial of the suit.

6. Mr. Choudhary, the learned Advocate appearing for the respondents, however, supports the impugned judgment and order contending that Trial Court had committed serious error in ignoring certified copies of the decree passed in Regular Civil Suit

No.200/1962, which is vital document for the purpose of taking decision in respect of controversy between the parties.

7. At this stage, reference to the provisions of Order XLI Rules 23-A, 24 and 25 would be necessary. Rule 23-A provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23. Rule 24 further prescribes that where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds. Rule 25 further prescribes that where the court from whose decree the appeal is preferred has 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 the 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.

8. The bare look to the scheme under Rules 23 to 25 of the Order XLI depicts that remand of the matter is advisable only

when retrial is found absolutely necessary. Even when Appellate Court forms opinion that particular issue arising in the suit has not been dealt with by the Trial Court, the remand to determine that issue is permissible instead of remanding entire suit for retrial. Essentially, remand of the matter shall not be a routine practice, but shall be resorted to only when Appellate Court is not in a position to render its decision on the controversy between the parties on the basis of material, which is already part of the suit. The Supreme Court of India in case of ***Syeda Rahimunnisa vs Malan Bi (Dead) By Lrs. & Anr. Etc***¹ observed in paragraph no.36 as under:

“It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court. The High Court instead should have decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals.”

¹ (2016) 10 SCC 315.

9. Similarly, in case of ***Jegannathan vs Raju Sigamani & Anr.***² after considering the scheme of Rules 23 and 25 following observations are made in paragraph nos.6 and 8:

“6. Order 41 Rule 23 is invocable by the appellate Court where the appeal has arisen from the decree passed on a preliminary point. In other words, where the entire suit has been disposed of by the trial Court on a preliminary point and such decree is reversed in appeal and the appellate Court thinks proper to remand the case for fresh disposal. While doing so, the appellate Court may issue further direction for trial of certain issues.

8. Insofar as Order 41 Rule 25 of the Code is concerned, the appellate Court continues to be in seisin of the matter; it calls upon the trial Court to record the finding on some issue or issues and send that finding to the appellate Court. The power under Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue/s.”

10. From the aforesaid exposition of law, it is evident that power to remand the case under Order XLI Rule 23 cannot be exercised only because reasoning of Lower Court in some respect was wrong. The remand orders leads to unnecessary delays and cause prejudice to the parties to the case. When material was available before the District Judge, it could have itself decided Appeal one way or the other. The Appellate Court has already observed that compromise decree in Regular Civil Suit No.200/1962 ought to have been admitted in evidence and order dated 22.11.2010 passed below Exhibit-70 was erroneous, then it was for the Appellate

Court to consider said document alongwith evidence already tendered by the parties and decide the Appeal on merits. From the reasons recorded in Appeal it is not discernible that retrial was essential. None of the parties to the Appeal expressed need for recording any further evidence. Even Appellate Court does not observe that particular issue ought to have been framed and parties ought to have been given opportunity to lead evidence in pursuance of such issue. In this background, Appellate Court erroneously exercised jurisdiction under Order XLI Rule 23-A of the Code of Civil Procedure and passed remand order, which cannot be countenanced. In result, Appeal against Order succeeds. Hence, following order:

ORDER

- a. Appeal from Order is allowed.
- b. The judgment and decree dated 24.11.2022 passed by the Principal District Judge, Nandurbar in Regular Civil Appeal No.24/2013 is hereby quashed and set aside.
- c. The Regular Civil Appeal No.24/2013 is restored on file of the District Judge, Nandurbar, who shall proceed to decide the Appeal on merits in accordance with law.
- d. Appeal from Order is disposed of.

e. In view of disposal of Appeal from Order, nothing survives in Civil Application and same is accordingly disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/January-2025