

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

**APPEAL FROM ORDER NO.245 OF 2024
WITH
INTERIM APPLICATION NO.7010 OF 2024
WITH**

INTERIM APPLICATION (ST) NO. 23968 OF 2024

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Baban Pandharinath Takle (since deceased)
through Gotiram Laxman Katke and others ...Appellants
vs.

Narhari Kashiram Divekar (since deceased)
through Lrs. Balkrishna Narhari Divekar & Ors. ... Respondents

Mr. Drupad Patil a/w. Ms. Srushti Chalke for Appellants.
Mr. Kamlesh Mali for Respondents.

CORAM : M.M. SATHAYE, J.

**DATE : 14th JANUARY 2025
(IN CHAMBER)**

P.C. :

1. Heard learned counsel for the parties. At the outset, I.A. (St) No. 23968 of 2024 filed for deleting name of Respondent No. 2A – Gangubai Vitthal Divekar is allowed. Necessary amendment be carried out within 1 week.

2. This appeal is filed under Order XLIII, Rule 1(u) of Civil Procedure Code, 1908 (in short ‘CPC’) challenging the Judgment and Order dated 29.01.2024 passed in Regular Civil Appeal No.8 of 2023 by District Judge-1, Vadgaon, Maval, District Pune, by which, the

Appellate Court has set aside the Judgment and Decree passed in Regular Civil Suit No. 71 of 1980 dated 18.01.2021 by Civil Judge Junior Division, Vadgaon, Maval, Pune, and the matter is remanded for fresh hearing expeditiously. The Appellants are original Plaintiffs and Respondents are original Defendants.

3. The Appellants had filed the said suit in the year 1980. The said suit took long 40 years in reaching its decision and the Trial Court decreed the same, declaring that the suit land Gat No. 570 at Village Nane, Tal. Maval, Dist. Pune is owned and possessed by Appellant No.1 during his lifetime and by Appellant Nos.2 to 5 after his demise and they are declared to be owner thereof. The Respondents were directed to hand over the possession of the suit land to the Appellants Nos. 2 to 5 and were perpetually restrained from obstructing and disturbing the possession of the Appellants.

4. This decree was carried in appeal by the Respondents by filling the said appeal. By the impugned order, the decree obtained by the Appellants after 40 years of long legal battle, has been set aside and the matter is remanded for fresh hearing.

5. Mr. Patil, learned counsel for the Appellants submitted that the Appellate Court, without coming to the conclusion based on the reasons that the judgment and decree of the Trial Court was required to be reversed, has simply remanded the matter, on the ground that the procedure adopted by the Trial Judge is not legal and proper and opportunity is not given to the Respondents. He submitted that the exercise of remand is done without commenting on merits of the

matter, as noted in paragraph No. 11 of the impugned Judgment. He submitted that if Respondents' case was of *ex-parte* decree then they should have filed an application under Section 9 Rule 13 of CPC. However, they have filed the appeal. If the Respondents had produced any documents or evidence which was found to be necessarily considered and re-trial was found necessary then there could have been some justification but such is not the case. He submitted that none of the Standard Operating Procedures (SOPs) which are relied upon by the Respondents, restrained the delivery of judgment. He further submitted that if the Appellate Court decided the matter on merits and found the reversal of decree necessary, then the remand was possible. However, without entering the merits, it was not permissible for the Appellate Court to remand the matter. He has relied upon the provisions of Order XLI Rules 23 & 23-A of the CPC in support of his submissions.

6. He has relied upon the judgments of **Vasant Bhaskar Thakur & Ors. Vs. Sitaram Waman Thakur**¹ and **Sirajudheen Vs. Zeenath & Ors.**²

7. Mr. Mali, learned counsel for the Respondents, on the other hand, relied upon SOP based on State Government's directions dated 31.05.2020 and submitted that the matter was not posted for the judgment. He submitted that the impugned order is based on principles of natural justice. He submitted that a normal course was not applicable at the relevant time due to partial-pandemic conditions. He has relied upon the judgment of **Kantabai Shivaji**

¹ Appeal from Order No. 609 of 2022 Order dated 29.08.2023.

² 2023 SSC Online SC 196

Gadakh Vs. Jagannath Bhika Gadakh³ in support of his contention of principles of natural justice and inability of the Defendants to lead evidence. He has also relied upon the judgment of **Rohidas Tukaram Mayekar Vs. Rupali Rohidas Mayekar**⁴ in support of his submission that it is misconceived notion that unless *ex-parte* order is set aside, the Appellate Court has no power to set aside *ex-parte* decree. He submitted that it is settled position that the remedies under Order 9 Rule 13 and Section 96 of CPC operate in different situations.

8. I have considered the rival contentions and perused the record.

9. Substantial question of law involved in this matter is “whether the Appellate Court was justified in remanding the matter, without considering the judgment of Trial Court on merits and without finding that it requires reversal and re-trial is necessary ?” Parties are heard on this point and appeal is taken up for hearing, considering that the suit involved is of the year 1980.

10. Perusal of the impugned order shows that applicability of the SOP and the stage at which the judgment was delivered has weighed with the Appellate Court. The Appellate Court has come to the conclusion that judgment of the Trial Court is passed without offering opportunity to the Defendants to adduce evidence and without specific order stating that evidence of the Defendants is closed. The Appellate Court has found that the course adopted by the learned Trial Judge was not legal and proper.

³ 2006 (5) Bom.C.R. 843

⁴ 2023 DGLS(Bom.) 2967

11. Few dates are essential to be considered. The suit is filed on 21.04.1980. Examination-in-chief of the Plaintiffs was completed and no cross order came to be passed on 17.02.2020 and the matter was placed for evidence of the Defendants on 02.03.2020. Admittedly therefore, the order of 'no cross' is passed prior to start of the pandemic. On 13.07.2020, the Appellants filed their written notes of argument and matter remained at the stage of argument till 03.11.2020. Thereafter, 18.01.2021, the judgment of the Trial Court was delivered.

12. Perusal of applicable first guideline/SOP (Table B) dated 31.05.2020 shows that the regular functioning of the Courts started w.e.f. 08.06.2020 in two shifts with 50% presence of judicial officers and staff in each shift. The Judicial Officers were directed to devote some time for adjusting the board to avoid crowd and were also directed not to pass adverse order owing to absence of parties and were also directed to generally refrain from taking coercive action, such as, passing *ex-parte* orders. However, the Judicial Officers were also directed to give priority to the cases which are posted for delivery of judgments. Next, 2nd SOP is dated 27.11.2020, which provided that all Courts except Courts in Pune Judicial District shall start regular functioning w.e.f. 01.12.2020, in two shifts. Judicial work was permitted with 100% of judicial officers and the staff in two shifts and preference was given to cases which are fixed for Judgment, order or hearing of the arguments in the second shift. The next, 3rd SOP was issued on 08.01.2021, during which the Trial Court has decided the suit on 18.01.2021. Under this SOP all the

Courts in Pune Judicial District had started regular functioning w.e.f. 11.01.2021 in two shifts.

13. From the aforesaid dates, it is clear that when the 'no cross order' was passed, no SOP was applicable. Written submissions were filed by the Appellants in July 2020, when the 1st SOP was in force, which permitted the Court functioning with 50% presence of the Judicial Officers and priority could be given to matters which are posted for delivery of judgments and ultimately the judgment is delivered during 3rd SOP when the regular functioning had started. Considering that 'no cross' order was passed and the Respondents did not challenge it, and further considering that the Appellants had filed written submissions, the suit was ripe for hearing. The suit was very old being filed in the year 1980, and it was obviously having preference. Perusal of the Judgment passed by the Trial Court, *ex-facie* shows that Respondents had filed written statement and advocate had appeared for them. In fact copy of Ex. 110/c produced on record, goes to show that despite copy of examination-in-chief (of Appellants' witness) being received on 17.02.2020, nobody came forward on behalf of the Respondents to cross examine the witness. Nor any application seeking a date / adjournment was filed and therefore 'no cross order' was passed. It is also not brought to the notice of this Court that any application was thereafter filed or request was made by the Respondents to set aside 'no cross order' or to seek any adjournment at the time of hearing of the suit.

14. In such circumstances, I do not find that the judgment/decreed of the Trial Court is *ex-parte* in its real sense. I also do not find that

there was any procedural illegality in passing the judgment/decreed by the Trial Court, so much so, as to warrant setting it aside.

15. So far as application of Order XLI Rule 23 and 23A of CPC is concerned, the Appellate Court has remanded the matter, not on preliminary point, and therefore Rule 23A is applied. The Appellate Court has remanded the matter, without considering the appeal on merits for coming to the conclusion that the decree is required to be reversed and re-trial is necessary.

16. In the case of **Sirajudheen v. Zeenath (supra)**, the Hon'ble Supreme Court has taken note of its earlier decisions and has held in paragraph 29 as under:

“29. After having taken note of the salient features of the impugned judgment as also the significant omissions therein, if we refer to the provisions empowering the Appellate Court to make an order of remand, it is difficult to find any justification for remand by the High Court in the present case. As noticed, the scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point. The remand in the present case could only be correlated with Rule 23-A of Order XLI CPC and for its applicability, the necessary requirements are that "the decree is reversed in appeal and a re-trial is considered necessary". As noticed hereinabove, there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court. Obviously, the reversal has to be based on cogent reasons and for that matter, adverting to and dealing with the reasons that had prevailed with the Trial Court remains a *sine qua non*. Thus, remand in the present case cannot be held justified even in terms of Rule 23-A of Order XLI CPC.”

[Emphasis Supplied]

It is also settled position of law by now, that the power of remand cannot be exercised in routine manner, because unwarranted

order of remand gives unnecessary lease of life to the litigation.

17. The Appellate Court was expected to decide the appeal by determining the correctness of the findings recorded by the Trial Court with reference to the evidence available on record and applicable law.

18. In the light of aforesaid position of law, when the impugned order is perused, it is found that the Appellate Court has not considered the dispute on merits to conclude that the judgment and decree passed by the Trial Court requires reversal. In fact, the Appellate Court has stated, in so many words in paragraph No. 11, that it is remanding the matter 'without commenting on the merits of the case'. Such course was not permissible. In light thereof, the impugned order cannot be sustained and is liable to be said aside.

19. So far as the judgment in the case of **Kantabai Shivaji Gadakh (supra)** relied upon by the Respondents is concerned, the said judgment considered powers of the Appellate Court under Order XLI Rule 33 of CPC for doing complete justice. Such is not the case in hand. In the said case, the Trial Court had refused to grant adjournment to a party. Therefore, the present case being distinguishable on facts, the said judgment does not advance the case of the Respondents. So far as the judgment in the case of **Rohidas Tukaram Mayekar (supra)** relied upon by the Respondents is concerned, in the said matter, *ex-parte* decree was under consideration in a matrimonial dispute. Considering that the present case is neither arising out of matrimonial dispute nor the decree is

ex-parte in its real sense, the said judgment is also not helpful to the Respondents.

20. In the light of aforesaid position of facts and law, the question of law is answered in negative and accordingly, the Appeal from Order is allowed by passing the following order.

- a) The impugned Judgment and Order dated 29.01.2024 is quashed and set aside. Regular Civil Appeal No. 8 of 2023 is restored to file.
- b) The Appellate Court is directed to decide the said appeal in accordance with the law, on its own merits, considering the evidence available on record, keeping in mind the exposition of law regarding remand, as indicated above.

21. In view of disposal of Appeal from Order, pending interim application/s are also disposed of in above terms.

22. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)