

(2010) 10 BOM CK 0251

In the Bombay High Court

Case No : Appeal From Order No. 37 of 2000 and Civil Application No. 3374 of 2000

Beniram Shriram Wani, (Deceased through hsi L.Rs.
Jagannath Beniram Wani)

APPELLANT

Vs

Ramchandra Nathalal Gujarathi and Others

RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 3, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 25, Order 41 Rule 31

Citation : (2011) 5 BomCR 827

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : A.N. Sabnis, holding for . and P.M. Shah, for the Appellant; C.V. Thombre, Respondent No. 2, for the Respondent

Judgement

S.S. Shinde, J.—This appeal From Order is filed challenging the order dated 1.3.2000 passed by the learned Additional District Judge, Dhule in Regular Civil Appeal No. 244 of 1987. The appellant herein and respondent Nos. 3 to 5 are original plaintiffs and respondents Nos. 1 and 2 are the original defendants. The appellant and the respondents are adjacent land owners. The respondents are owners of double storeyed building. It is the case of the appellant that the respondents are discharging their waste water from tap in the open space which belongs to the appellant. There is one tap on the first floor and other two taps are on the ground floor. Because of this waste water, damages is caused to the land of the appellant and the land has become unused.

2. On 4.4.1976. a notice came to be served on the respondents. The appellant instituted R.C.S. No. 69 of 1976 and prayed for injunction against the respondents. On 19.8.1987, R.C.S. No. 69 of 1976 came to be decreed whereby the respondents are permanently restrained from discharging the waste water from the taps and the respondents are directed to remove the taps. The respondents preferred Regular Civil Appeal No. 244 of 1987. The said appeal

came to be allowed and the matter is remanded back to the trial court. Hence, this Appeal from Order.

3. Learned Counsel appearing for the appellant submitted that the provisions of Order XLI Rule 23 cannot be exercised in casual manner that the judgment and decree being liable to be set aside as perverse. Counsel further submitted that the trial court held that the plaintiff is owner of the suit property after considering the pleading of both the parties and evidence on record. It is further submitted that when the respondents have raised plea of easement, it was implicit that they accepted the ownership of the plaintiff over the suit property. Therefore, the appellate court was not justified in remanding the matter back to the trial court. It is further submitted that the suit is instituted in the year 1976 and the appellate Court passed the order of remand in the year 2000 i.e. after a period of 25 years, which causes great inconvenience and injustice to the appellant herein. It is further submitted that emphasis of the respondents in respect of title of the plaintiff over the suit property beyond reasonable doubt is misconceived. The appellate court without considering the legal provisions that the appellate court is also court of facts and law and neglecting this fact has remanded the matter back to the trial court.

It is further argued that the impugned judgment and order is in contravention of the provisions of Order 41 Rule 23, 23A, 25 and 33 of C.P.C. In support of his contention, counsel invited my attention to the reported judgments of the Supreme Court in the cases of State of Tamil Nadu Vs. S. Kumaraswami and Others, , Ashwinkumar K. Patel Vs. Upendra J. Patel and Others, , P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., , Municipal Corporation, Hyderabad Vs. Sunder Singh, , State of Punjab and Another Vs. Gram Panchayat and Others, , Godrej Rustom Karmani Vs. Hari Aildas Thadani and Others, and J. Arun Keshavrao Mone (Mane) and Ors. v. Ramesh Balvant Baxi and Anr. reported in (2006) BCI 19 Relying on the aforesaid judgments, counsel for the appellant would submit that the this Appeal From Order deserves to be allowed.

4. On the other hand, learned Counsel appearing for the respondent No. 2 invited my attention to the findings recorded by the lower appellate court and also para 11 of the trial court judgment and submitted that the lower appellate court has rightly remanded the matter back to the trial court and no interference in this Appeal from Order is warranted.

5. I have given due consideration to the rival submissions advanced by the parties and I am of the opinion that the remand order passed by the lower appellate court thereby remanding the matter back to the trial court, is absolutely unwarranted. It is not permissible in this Appeal From Order to appreciate or reappraise the evidence or facts. However, suffice it to say that so far as the point of ownership which was framed by the trial court has been answered in favour of the appellant. The lower appellate court has also framed the issue about the ownership of the house property No. 416/A and 416/B and held that the plaintiffs are owners of the said property. Therefore, the trial court

as well as the lower appellate Court have held that the original plaintiff i.e. appellant herein is owner of the house property bearing No. 416/A and 416/B. Having been confirmed the findings of the trial court about ownership of the plaintiff, the remand order was absolutely unwarranted.

6. In the present case, the suit was filed by the plaintiff in the year 1976 and the remand order passed by the lower appellate court in the year 2000 i.e. after 24 years. The relief granted by the appellate Court by way of remand order was absolutely unwarranted. The lower appellate court itself should have framed the points and could have gone into the issues raised before it and ought to have decided the appeal on merits, one way or the other. The appellate court is also the court of facts and law and it could have framed substantial questions of law and decide the appeal on merits. The Hon''ble Supreme Court in number of pronouncements has held that the powers under Order XLI Rule 23 cannot be exercised in a casual and routine manner.

7. In the circumstances, at the outset, it is necessary to take into consideration the provisions, under which this Appeal From Order is filed in this Court and to what extent this Court can interfere in the impugned judgment and order passed by the lower appellate Court.

In the case of Narayanan Vs. Kumaran and Others, , the Hon''ble Supreme court has considered the provisions of Order 43 Rule 1(u) i.e. appeal from order under the provisions of Section 104 of C.P.C. Order 43 Rule 1(u) reads thus:

43. (1) Appeals from Orders. - An appeal shall lie from the following orders under the provisions of Section 104 namely-(a) to (t) * * *

(u) an order under Rule 23 or Rue 23-A of Order 41 remanding a case, where an appeal would lie from the decree of the appellate court.

In para 17 of the said judgment it is held thus:

17. It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100. We therefore, accept the contention of Mr. T.L.V. Iyer and hold that the appellant under an appeal under Order 43 Rule 1 Clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this Clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate Court.

Therefore, in the present case, this Appeal from order is required to be heard

only on the grounds enumerated in Section 100 of C.P.C. In short, unless there is substantial questions of law falls for consideration of this Court, this Court is not suppose to entertain this appeal from order. This Court has to confine itself such facts, conclusions and decisions which have bearing on the order of remand and cannot canvass all the findings of the facts arrived at by the lower appellate court.

8. The trial court while entertaining the suit filed by the plaintiff framed as many as nine issues for its determination. The said issues are as under:

- i) Does plaintiff prove his ownership to Gram Panchayat No. 416/A and 416/B?
- ii) Does plaintiff prove that the defendants have started discharging water on his property, since last two years, by three taps?
- iii) Is suit bad for mis joinder and non-joinder of the parties?
- iv) Do defendants prove that they have right of easement to discharge the water to the western side?
- v) Are defendants entitle to compensatory costs as prayed?
- vi) Is plaintiff entitled to mandatory injunction as prayed?
- Vii) What order and decree?
- Viii) Whether plaintiff?s suit is barred by limitation?
- ix) Whether plaintiff?s suit as framed, is tenable?

9. After considering the issue Nos. 1 to 9, the trial court decree the suit. On careful perusal of the judgment and order of the lower appellate court, it clearly reveals that the lower appellate court has not formulated any point for its determination nor has discussed the important points which were addressed before the trial court. It has not taken recourse to any relevant evidence or documents while reaching to the conclusion and while setting aside the impugned judgment and order of the trial court and remanding the matter back to the trial court.

10. Since this is Appeal from Order against the remand order passed by the District Court, in view of the authoritative pronouncement of the Hon"ble Supreme Court in the case of Narayanan Vs. Kumaran and Others, and more particularity para 17, this appeal From Order is required to be heard keeping in mind Section 100 of C.P.C. This Appeal from Order raises following substantial questions of law for consideration of this Court:

I) When the learned Trial Court had held that the plaintiff is the owner of the suit property after considering the pleading of both the parties and evidence on record thereafter whether the Appellate Court has committed gross error by remanding the matter back to the Trial Court to decide the issue of Ownership?

II) When the Respondents had raised plea of easement, it was implicit in it that

they accept the ownership of plaintiff over the suit property therefore, whether the Appellate court was justified in remanding the matter back to the Trial Court?

III) The suit was instituted in the year 1976. The Appellate Court passed the order of remand in 2000. Whether the Appellate court has committed gross error in passing the order of remand after such a long intervening period of 24 years?

IV) The suit was filed for injunction against the Respondent from releasing waste water in the property of plaintiff. Whether in such a suit the emphasis of the Appellant over the proof of title of the plaintiff over the suit property beyond reasonable doubt is misconceived?

V) Whether the Appellate Court has committed patent error by remanding the matter back without considering the legal provision that the Appellate Court is also a Court of facts and law. If at all it had found any evidence lacking it had the jurisdiction to direct the parties to led evidence on that aspect without remanding the matter back?

VI) Whether the powers under Order 41 Rule 23-A can be exercised in a casual manner. Without the judgment and decree being liable to be set aside or perverse?

11. At this juncture, it would be appropriate to refer the provisions of Order 41 Rule 23, 23-A and 25 of C.P.C., which reads thus:

ORDER XLI

APPEALS FROM ORIGINAL DECREES

1 to 22 * * *

23 Remand of case by Appellate Court where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

23A Remand in other cases Whether 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

24 * * *

25 Where Appellate court may frame issues and refer them for trial to Court whose decree appealed from.- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of

facts, 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, and in such case, shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate court together with its findings thereon and the reasons there for [within such time as may be fixed by the Appellate Court or extended by it from time to time]

If the impugned judgment is perused it clearly emerges that the lower appellate court has set aside the judgment and order of the trial court in its entirety and not only on the preliminary points. The lower appellate court has remanded the matter back to the trial court after setting aside the judgment and decree of the trial court. Therefore, the case in hand would fall u/s 23A of Order 41 of C.P.C. However, Rule 23A provides same powers to the appellate court as it has under Rule 23. In the instant case, the lower appellate court has not taken recourse to any relevant evidence and documents as referred by the trial court. The lower appellate court has also not considered all issues felt for consideration before the trial court. Rule 23A of Order 41 contemplates appeal against the final judgment and order of the trial court. When the appeal is filed challenging the judgment and decree of the trial court, then it is the duty of the appellate court to take into consideration the entire important points, evidence and documents into account and then pass the necessary order in the light of the provisions of Section 107 of C.P.C. The appellate court itself is competent to formulate the points, to address the legal issues involved in the matter and also appreciate the evidentiary value of the documents, the remand of the matter to the trial Court was not warranted.

The lower appellate court itself could have considered these legal aspects. It was not that the lower appellate court was not empowered to adjudicate these legal points. It was not necessary to remand the matter back to the trial court on the legal aspects. Since the appeal is a continuous proceeding of the suit, it was open for the lower appellate court to exercise its jurisdiction and address the legal issues and all other issues felt for its consideration by framing necessary points and then decide the matter by one way or the other. The lower appellate court can do so under Sub-section (2) of Section 107 of C.P.C. However, the lower appellate court has failed in discharging its duties to exercise its jurisdiction vested in it and rather chosen easier way to remand the matter back to the trial court.

12. In the above background it would be relevant at this juncture to refer to some of the important judgment of the Hon'ble Supreme Court on interpretation of Order 41 Rule 23, 23A and 25 of C.P.C. In the case of State of T.N. (supra) the Hon'ble Supreme court held that it is not permissible for the appellate court to brush aside the findings of trial court without giving any reason, without any appreciation of documents and without any appreciation of contentions of parties.

Yet in another case Ashwinkumar K. Patel (supra), the Hon''ble Supreme Court in para 7 held thus:

7. In our view, the High court should not ordinarily remand a case under Order 41, Rule 23 of C.P.C. to the lower Court merely because it considered that the reasoning of the lower court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prime facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.

Yet in another case P. Purushottam Reddy and another (supra), the Hon''ble Supreme Court in para 10 held thus:

10. ...It is only in exceptional cases the Court may exercise the power of remand dehors the Rules 23 and 23A. To wit, the superior Court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3 or Order 41, Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and therefore must be avoided.

Yet in another case of Municipal Corporation, Hyderabad v. Sunder Singh (supra), the Hon''ble Supreme Court in para 11 held thus:

11. It is now well settled that before invoking the said provisions, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the CPC and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial Court, it has to come with a proper findings of its own. The appellate court cannot shirk its duties.

13. Therefore, taking into consideration the provisions of Civil Procedure Code, the powers of the lower appellate court and discussion made herein above, in my opinion, the remand order by the lower appellate court is not proper. The lower appellate court, as stated herein above, has taken into consideration the legal aspects involved in the mater and without any basis has reached to erroneous

conclusion to set aside the well reasoned judgment and order of the trial court.

However, since this Court has to consider this appeal From Order only on the grounds enumerated in Section 100 of C.P.C. and should confine itself to such facts, conclusion and decision which have bearing on the order of remand and cannot canvass all points of facts arrived at by the lower appellate court, it is not possible for this Court to enter into appreciation or reappreciation of evidence. The Hon"ble Supreme Court in the case of Narayanan v. Kumaran and Ors. (supra) held that the court cannot go into excruciating details of facts and appreciate evidence while entertaining the Appeal from Order under the provisions of Order 43 Rule 1(u) of C.P.C.

14. In the light of the discussions made in the foregoing paragraphs, the impugned judgment and order dated 1.3.2000 passed by the Additional District Judge, Dhule in Regular Civil Appeal No. 244 of 1987 is quashed and set aside. The Regular Civil Appeal No. 244 of 1987 is restored to its original file. The lower appellate court is directed to formulate the necessary points for its determination/consideration and adjudicate all those points and decide the same within a period of six months from date of receipt of copy of this judgment, by giving full opportunity to the parties concerned. The parties are at liberty to agitate relevant issues involved in the matter and the lower appellate court can decide the matter itself. With these observations, this Appeal From order is allowed to the above extent and disposed of.

15. Civil application No. 3374 of 2000, stands disposed of accordingly.

16. Record and proceeding, if any, of this case be sent back forthwith to the concerned Court.