

HIYA ASSOCIATES & ORS.

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v.

NAKSHATRA PROPERTIES PVT. LTD.

(Civil Appeal Nos. 9996-9997 of 2018)

SEPTEMBER 26, 2018

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**[ABHAY MANOHAR SAPRE AND
MOHAN M. SHANTANAGOUDAR, JJ.]**

Remand:

Remand of case to Revisionary Court – On facts, failure of the appellant-tenant to vacate possession of the suit premises to respondent-owner in terms of the compromise, led to filing of execution application by respondent – Objections raised by appellant – Executing court overruling all the objections, directed issuance of warrant of possession in respect of suit premises against the appellants – Filing of Revision by appellant – Revisionary Court remanded the matter to the Executing Court – In writ petition, the High Court set aside the order of the revisionary court and restored the order of the Executing Court – On appeal, held: Revisionary Court erred in remanding the case to the Executing Court for its fresh consideration on merits – Since the Executing Court had already decided all objections raised by the appellants on merits and had found no merit therein, the Revisionary Court was under legal obligation to decide the legality and correctness of the findings recorded by the Executing Court – Revisionary Court also erred in allowing the appellants to file additional documents, which were neither relevant and nor material for deciding the correctness of the order passed by the Executing Court – Furthermore, the High Court having noticed the errors in the order of the Revisionary Court should have remanded the case to the Revisionary Court for deciding the revision afresh on merits – Thus, case remanded to the Revisionary Court for deciding the revision afresh.

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Remand of a case to Subordinate Court – When necessary – Held: Remand is necessary when the Superior Court while exercising

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A *its appellate or revisionary jurisdiction finds that the Subordinate Court has failed to decide some material issues arising in the case or there is some procedural lacuna noticed in the trial, which has adversely affected the rights of the parties or when some additional evidence is considered necessary to decide the rights which was not before the trial court.*

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Partly allowing the appeals, the Court

HELD: 1.1 The impugned order as also the order passed by the Revisionary Court are set aside. The case is remanded to the Revisionary Court for deciding the appellants revision afresh on merits in accordance with law. [Para 14, 28] [140-A-B; 142-C]

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1.2 The Revisionary Court committed two errors. In the first place, it should not have remanded the case to the Executing Court for its fresh consideration on merits but it should have decided the revision on merits in accordance with law. It is for the reason that the Executing Court had already decided all objections raised by the defendants (appellants) on merits and had found no merit therein. The Revisionary Court was, therefore, under legal obligation to decide the legality and correctness of the findings recorded by the Executing Court on its merits in its revisionary jurisdiction instead of remanding the case to the Executing Court. Indeed, there is no justifiable reason, which could justify remand having regard to the nature of the objections raised by the defendants (appellants) before the Executing Court. This was not the case, which needed remand to the Executing Court for its fresh decision on merits. [Para 16, 17] [140-C-E]

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1.3 The remand of a case to the Subordinate Court is considered necessary when the Superior Court while exercising its appellate or revisionary jurisdiction finds that the Subordinate Court has failed to decide some material issues arising in the case or there is some procedural lacuna noticed in the trial, which has adversely affected the rights of the parties while prosecuting the suit/proceedings or when some additional evidence is considered necessary to decide the rights of the parties which was not before the Trial Court etc. Such was not the case here. [Para 18][140-F-G]

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1.4 The error committed by the Revisionary Court was that it allowed the defendants (revision petitioners) to file additional documents to prove their case. The documents sought to be filed by the defendants were neither relevant and nor material for deciding the legality and correctness of the order passed by the Executing Court. The legality and correctness of the order impugned in the revision could be decided one way or the other without the aid of any additional document but on the basis of material already on record. Indeed, if the Executing Court could decide the issue finally at its level, the Revisionary Court too could do the same at its level. [Para 20] [141-A-B]

1.5 As regards, the impugned order passed by the High Court, the Court having noticed the aforementioned errors in the order of the Revisionary Court should have remanded the case to the Revisionary Court for deciding the revision afresh on merits. Instead, the High Court itself went into the question on merits and upheld the order of the Executing Court. The High Court should not have done and left it for the Revisionary Court to do. It does not mean that the High Court had no jurisdiction to decide the issue but having regard to the nature of objections, remedy available to the parties to have finding on the question from the Revisionary Court and to put the record straight, it was not called for in this case. [Para 23, 24] [141-E-G]

Roshanlal v. Madan Lal AIR 1975 SC 2130
– referred to.

Case Law Reference

AIR 1975 SC 2130 referred to Para 21

CIVILAPPELLATE JURISDICTION : Civil Appeal Nos. 9996-9997 of 2018.

From the Judgment and Order dated 21.07.2017 and 26.07.2017 of the High Court of Judicature at Bombay in Writ Petition No. 6733 of 2017.

D.N. Goburdhan, Ms. Pallavi Chopra, Advs. for the Appellants.

Gourab Banerji, Sr. Adv., Sahil Tagotra, S. P. Mukherjee, Raka Chatterjee, Advs. for the Respondent.

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- A The Judgment of the Court was delivered by
ABHAY MANOHAR SAPRE, J. 1. Leave granted.
2. These appeals arise from the final judgment and order dated 21.07.2017 & 26.07.2017 passed by the High Court of Judicature at Bombay in Writ Petition No.6733 of 2017 whereby the High Court
B allowed the writ petition filed by the respondent herein, set aside the order dated 26.09.2016 passed by the Small Causes Court, Appellate Bench, Mumbai in R.A. No.333/2015 and restored the order dated 28.10.2015 of the Executing Court in Execution Application No.31/2013 in R.A.E. Suit No.872/2007.
- C 3. The issue involved in these appeals is short. Few facts, however, need mention to appreciate the issue, which is the subject matter of these appeals.
4. The appellants are the defendants and the respondent is the plaintiff in the civil suit out of which these appeals arise.
- D 5. The issue arises out of eviction suit, which resulted in passing of a compromise decree followed by its execution. So far as the present appeals are concerned, they arise out of an order passed in the execution proceedings.
6. The Respondent(plaintiff) filed a suit (No.872/2007) in the Court of Small Causes at Mumbai against the appellants(defendants) for their
E eviction from the suit premises. The eviction was claimed *inter alia* on the ground of unauthorized user of the suit premises by the appellants (defendants) which, according to the respondent (plaintiff), amounted to the change of user under the provision of Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (hereinafter referred to as “the
F Act”). It is not necessary to set out the facts in the pleadings of the parties.
7. During the pendency of the suit, the parties, i.e., the appellants and respondent, compromised the matter and accordingly filed their consent terms on which the compromise was arrived at between them.
- G 8. The Court accordingly, by order dated 05.09.2007, pronounced the judgment and disposed of the suit in accordance with the consent terms. In terms of the compromise, the defendants (appellants) were to handover the vacant possession of the suit premises to the plaintiff (respondent) on or before 31.01.2009 and the defendants (appellants)
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were also liable to pay Rs.5000/- per day by way of *mesne profits* if they fail to handover possession of the suit premises after 31.01.2009. A

9. Since the defendants (appellants) failed to handover the vacant possession of the suit premises to the plaintiff (respondent) in terms of the compromise, the plaintiff (respondent) filed an execution application (No.31/2013) for execution of the consent decree dated 05.09.2007 and prayed therein for issuance of possession warrant in respect of the suit premises against the defendants (appellants). B

10. The defendants (appellants) filed their reply and raised several objections on facts and law including maintainability of the execution application. By order dated 28.10.2015, the Executing Court overruled all the objections on merits and, in consequence, held that the execution application filed by the plaintiff (respondent) is maintainable in law and the consent decree is, therefore, executable against the defendants (appellants). The Executing Court, therefore, directed issuance of warrant of possession against the defendants (appellants) in relation to the suit premises. C D

11. The defendants (appellants) felt aggrieved and filed revision before the Small Causes Court at Mumbai. The Revisionary Court, by order dated 26.09.2016, allowed the revision, set aside the order dated 28.10.2015 passed by the Executing Court and remanded the case to the Executing Court for deciding the objection raised by the defendants (appellants) against the execution application afresh on merits. One of the reasons to remand the case to the Executing Court was that the Revisionary Court allowed the defendants (appellants) to file additional documents (Ex.22), which they had filed for the first time in the revision petition. E F

12. The plaintiff (respondent) felt aggrieved by the order of the Revisionary Court and filed writ petition under Article 227 of the Constitution of India in the High Court of Bombay. By impugned order, the High Court allowed the writ petition, set aside the order of the Revisionary Court and restored the order of the Executing Court, which gives rise to filing of the present appeals by way of special leave by the defendants (appellants) in this Court. G

13. Heard Mr. D.N. Goburdhan, learned counsel for the appellants and Mr. Gourab Banerji, learned senior counsel for the respondent.

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A 14. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeals in part and while setting aside the impugned order as also the order passed by the Revisionary Court remand the case to the Revisionary Court for deciding the defendants' (appellants) revision afresh on merits in accordance with law.

B 15. The reasons to remand the case to the Revisionary Court are more than one as mentioned hereinbelow.

C 16. In our opinion, the Revisionary Court committed two errors. In the first place, it should not have remanded the case to the Executing Court for its fresh consideration on merits but it should have decided the revision on merits in accordance with law.

D 17. It is for the reason that the Executing Court had already decided all objections raised by the defendants (appellants) on merits and had found no merit therein. The Revisionary Court was, therefore, under legal obligation to decide the legality and correctness of the findings recorded by the Executing Court on its merits in its revisionary jurisdiction instead of remanding the case to the Executing Court. Indeed, we do not find any justifiable reason, which could justify remand having regard to the nature of the objections raised by the defendants (appellants) before the Executing Court. In other words, this was not the case, which needed remand to the Executing Court for its fresh decision on merits.

E 18. In our opinion, the remand of a case to the Subordinate Court is considered necessary when the Superior Court while exercising its appellate or revisionary jurisdiction finds that the Subordinate Court has failed to decide some material issues arising in the case or there is some procedural lacuna noticed in the trial, which has adversely affected the rights of the parties while prosecuting the suit/proceedings or when some additional evidence is considered necessary to decide the rights of the parties which was not before the Trial Court etc. (See Order 41 Rules 23, 23-A, 24 and 25 of the Code of Civil Procedure, 1908). Such was not the case here.

F 19. Second error committed by the Revisionary Court was that it allowed the defendants (revision petitioners) to file additional documents (Ex.22) to prove their case.

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20. In our opinion, the documents sought to be filed by the defendants (revision petitioners) were neither relevant and nor material for deciding the legality and correctness of the order passed by the Executing Court. The legality and correctness of the order impugned in the revision could be decided one way or the other without the aid of any additional document but on the basis of material already on record keeping in view the law laid down by this Court in several decided cases on the issue in question. Indeed, if the Executing Court could decide the issue finally at its level, the Revisionary Court too could do the same at its level.

21. In our view, the issue in question was not required to be decided under Order 21 Rule 97 of the Code of Civil Procedure but it should have been so decided keeping in view the law laid down by this Court in the case of *Roshanlal vs. Madan Lal* (AIR 1975 SC 2130) which lays down the principle as to how the issue of such a nature needs to be dealt with by the Executing Court when it is raised by the judgment debtor in execution proceedings.

22. It is due to these two aforementioned reasons, we are of the considered view that the order passed by the Revisionary Court is not legally sustainable.

23. So far as the impugned order passed by the High Court is concerned, in our view, the High Court having noticed the aforementioned errors in the order of the Revisionary Court should have remanded the case to the Revisionary Court for deciding the revision afresh on merits in accordance with law. Instead, the High Court itself went into the question on merits and upheld the order of the Executing Court. This, in our opinion, the High Court should not have done and left it for the Revisionary Court to do.

24. By these observations, we do not mean that the High Court had no jurisdiction to decide the issue but having regard to the nature of objections, remedy available to the parties to have finding on the question arising in the case one way or the other from the Revisionary Court and to put the record straight, it was not called for in this case.

25. It is for these reasons, we consider it proper to set aside the impugned order and also the order of the Revisionary Court and remand the case to the Revisionary Court to decide the defendants' (appellants') revision afresh on merits in accordance with law.

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A 26. The Revisionary Court would decide the legality and correctness of the order passed by the Executing Court dated 28.10.2015 on merits keeping in view the law laid down by this Court in *Roshanlal* (supra) and other cases on the subject.

B 27. While deciding the revision, the Revisionary Court would not be influenced by the observations contained in impugned order and also of this Court order because we have not applied our mind to the merits of the case having formed an opinion to remand the case to the Revisionary Court.

C 28. The appeals thus succeed and are accordingly allowed in part. Impugned order and the order of the Revisionary Court are set aside and the case is remanded to the Revisionary Court to decide the defendants' (appellants') revision (No.333/2015) afresh on its merits in accordance with law.

D 29. Since the matter is an old one, we direct the Revisionary Court to decide the revision within six months as an outer limit.