

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.113 OF 2014 WITH
CIVIL APPLICATION NO.12312 OF 2014

Deelip s/o Shivilal Jaiswal
Age 53 years, Occ. Business,
R/o Kumbharwada, Aurangabad.

... APPELLANT
(Original Plaintiff)

VERSUS

Yakub Khan s/o Rubab Khan,
Age 26 years, Occ. Business,
R/o Manjarpura, Aurangabad

... RESPONDENT
(Original Defendant)

.....
Shri A.D. Kasliwal, Advocate for appellant
Shri R.M. Deshmukh, Advocate for respondent
....

CORAM: A.I.S. CHEEMA, J.

DATED: 9th April, 2015.

Date of reserving judgment : 9/3/2015
Date of pronouncing judgment : 9/4/2015

JUDGMENT :

1. The appellant (original plaintiff – hereafter referred as plaintiff) had filed Regular Civil Suit No.1900/2012 (Old Special Civil Suit No.535/2008) for mandatory injunction and recovery of damages in lieu of licence fee with interest from

respondent (original defendant – hereafter referred to as defendant). The suit was decreed on 30.3.2013. The defendant filed Regular Civil Appeal No.138/2013, which came to be allowed on 30.9.2014 and the judgment and decree of the trial Court was set aside and the appellate Court remanded the matter to the trial Court with directions to frame proper issues and decide the suit by giving sufficient opportunity to the parties. It is against this order dated 30.9.2014 of the appellate Court that the present Appeal from Order has been filed.

2. Facts material for dealing with the present matter can be stated as under :

Plaintiff filed the suit claiming that on 16.2.2006 defendant has executed registered agreement of leave and licence with reference to the suit property and the defendant was allowed to use suit property for carrying on business for period of 12 months from 16.2.2006 to 15.2.2007 and the agreed licence fee was Rs.9000/- per month. As licence fee was not paid after 15.9.2006, plaintiff filed Rent Suit No.47/2006 for recovery of licence fee from 16.9.2006 to 15.11.2006. The suit was decreed. Defendant filed

Interpleader Suit No.435/2006 against plaintiff and his relatives, but the same was withdrawn on 5.6.2006 admitting that defendant was licensee of plaintiff. Defendant filed Regular Civil Suit No.638/2006 for injunction against plaintiff and his relatives in which also it was accepted in affidavit that defendant had executed leave and licence agreement. That suit was withdrawn. The leave and licence period expired on 15.2.2007, but defendant did not remove his belongings and thus, plaintiff claimed mandatory injunction to direct defendant to remove his belongings and not to enter the suit property and pay damages from 16.11.2006 to 15.10.2008 amounting to Rs.2,07,000/- with interest.

3. The suit was resisted by defendant by filing written statement. In substance, defendant claimed that there was and is no relationship of licensor or licensee and landlord and tenant between the parties. It is claimed that, he was tenant of late Harinarayan who was landlord and maternal uncle of plaintiff. He had been paying rent to late Harinarayan. Defendant claimed that the suit suffered from non-joinder and mis-joinder of parties. The suit was not tenable in the present forum. It is claimed that, plaintiff had no concern with the suit property. Under the garb of political support and

influential persons, plaintiff got prepared bogus documents about leave and licence cheating the defendant, contending that plaintiff will assist defendant to obtain licence from authorities. In the last period of Harinarayan, plaintiff was collecting rent. The leave and licence was false and got executed under duress for which defendant filed complaints. The decree in Rent Suit No.47/2006 was obtained by fraud. Defendant was never served with the summons of that suit. Plaintiff is not landlord or licensor of the suit shop. Defendant rightly filed Regular Civil Suit No.435/2006 as Interpleader Suit as after demise of Harinarayan, daughter of Harinarayan and widow were claiming rent from defendant. The plaintiff, with the help of goondas, kidnapped defendant and under coercion and duress and threat to kill plaintiff, prepared bogus application of withdrawal of the suit and also filed false Regular Civil Suit No.638/2006. Plaintiff threatened defendant that he should give evidence in Regular Civil Suit No.638/2006. However, the contents of the suit and affidavit are false and incorrect. The dispute regarding title of the suit property is pending. The judgment and decree passed in Rent Suit No.47/2006 came to be set aside by the Court in MARJI No.22/2007 on 30.9.2009. The defendant was inducted in the suit property by late Harinarayan Jaiswal as tenant and he

handed over possession of the suit premises on 24.9.2010 under possession receipt to Nandranibai, the wife of Harinarayan Jaiswal. Since then, the wife of Harinarayan is in actual and physical possession of the suit premises and defendant is not in occupation since then. The defendant thus claimed that the suit deserves to be dismissed.

4. After issues were framed by the trial Court at Exh.22 and parties brought on record evidence, trial Court found that, between the parties there was a relationship of licensor and licensee and that, on expiry of leave and licence agreement, the defendant was unauthorisedly continuing business in the suit property. Trial Court found that the plaintiff was entitled to damages of Rs.2,07,000/- and actual damages. Trial Court granted injunction in favour of the plaintiff.

5. Defendant filed appeal and the District Court referred to the case of the parties in their pleadings and arguments. District Judge found that there were pleadings that the alleged leave and licence was obtained by playing fraud and was got executed under duress and that there was no relationship between the parties as licensor and licensee;

that, there were pleadings that decree in Rent Suit No.47/2006 was obtained by fraud which has been set aside. Considering the rival claims, the District Court found that the trial Court did not consider the facts and pleadings of the parties and did not frame issues as per the pleadings. District Judge referred to the pleadings of defendant that he had been kidnapped and that he was constrained to file Regular Civil Suit No.638/2006 against legal representatives of late Harinarayan and that these facts had not been considered by the trial Court while framing issues. During the trial, defendant had carried out amendment with respect to restoration of the rent suit as well as he had claimed that there was handing over of possession to Nandranibai. District Judge observed that these facts were not considered while dealing with dispute between parties and so it was necessary to give opportunity to the defendants. District Judge found that the defendant was prejudiced by the orders of the trial Court. Consequently, the District Judge remanded the matter to the trial Court.

6. It has been argued before me by the learned counsel for the appellant – original plaintiff that, in the trial Court Issue No.1 related to question whether there was

existing relationship of licensor or licensee between the parties and this was dealt with by the trial Court, but the appellate Court did not raise necessary points for determination under Order XLI Rule 31 of the Code of Civil Procedure, 1908 (C.P.C. in brief). He submitted that, the appellate Court did not notice Exhibit 120 from the record of the trial Court where the defendant had filed application for additional issues and the additional issues were framed and thereafter Exhibit 121 was filed by the counsel for defendant that no further evidence was required to be led. According to him, in spite of this, the District Judge without considering all the issues which were raised before the trial Court, wrongly remanded the matter to the trial court referring to the pleadings in written statement. It has been submitted that, before the appellate Court, the appeal memo did not claim remand of the matter or that the parties had not been given due opportunity in the trial Court. Counsel referred to judgment in the matter of Santosh Hazari Vs. Purushottam Tiwari, deceased by L.Rs., reported in 2001(2) MLJ 786 to submit that, in the judgment of First Appeal, the same should reflect conscious application of mind and record findings supported by reasons on all issues arising in the appeal. It is argued that, the appellate Court did not discuss the evidence

while passing the impugned order. The trial Court had discussed the evidence which had been brought by the parties and thus, there was no necessity to remand the matter. Reliance was also placed on the case of P. Purushottam Reddy & anr. Vs. M/s Pratap Steels Ltd., reported in AIR 2002 SC 771 to submit that when there was no dispute being raised that proper issues were not framed or remand was necessary, the order of remand was erroneous. Referring to the judgment of B.M. Narayana Gowda Vs. Shanthamma (D) (deceased by L.Rs.) & anr. reported in 2011 ALL SCR 1337, the counsel argued that in the First Appeal it is necessary to decide questions of fact and law comprehensively by giving full dressed hearing. The counsel argued that the judgment of the appellate Court needs to be set aside and appellate Court should be directed to redecide all the issues raised in the matter.

7. Per contra, the learned counsel for the respondent – original defendant submitted that the appellate Court did frame points for consideration while deciding the appeal. According to him, the defendant had played fraud regarding execution of the agreement of leave and licence, but no issue was framed in that regard. He claimed that defendant had

also filed police complaint. According to him, defendant had already handed over possession to Nandranibai for which receipt Exh.115 was executed, but this was not properly considered. Learned counsel referred to unreported judgment of this Court (Bench at Aurangabad) in the matter of Maharashtra Jeevan Pradhikaran & ors. Vs. Vasudeo Jhammulal Sajnani, died through L.Rs. Smt. Renu Vasudeo Sajnani & ors., in First Appeal No.147 of 1995, decided on 22.9.2014, where it was found that the additional issues No.16 to 47 were issues of facts borne out of pleadings which were framed only at the time of delivery of judgment without hearing the parties and it was in the interest of justice to quash and set aside the decree and remand the matter back to the trial Court giving opportunity to the parties to re-argue the matter. Thus, according to him, error could not be found with the impugned judgment of the appellate Court.

8. In reply, counsel for the appellant – plaintiff referred to the judgment in the matter of Mr. Rui Jose D'Gama & anr. Vs. Shri Rama Pandurang Sawant & anr., reported in 2013(5) ALL MR 86 to submit that the appellate Court was required to formulate points for consideration and analyse evidence properly in terms of law laid down in Santosh

Hazari's matter. Reference was made to the case of Khatunbi wd/o Mohammad Sayeed & ors. Vs. Smt. Aminabai wd/o Mohammad Sabh, reported in 2006(6) ALL MR 310 to argue that compliance of Order XLI Rule 31 of C.P.C. is mandatory that the points for determination should be formulated and material on record should be analysed. Learned counsel also relied on the case of Thota Lakshmi Venkata Bala Vs. Muttamsetti Seethamma, reported in 2008 ALL SCR 2460.

9. Considering the rival cases put up and the Judgments and Rulings relied on by both the parties, Point for Consideration is – Whether the impugned order is correct, legal and proper or that the same is in violation of the provisions of law?

10. First, brief reference to concerned rulings needs to be made :-

(A) In the matter of "Santosh Hazari" (supra) in the First Appeal, the same was allowed by first appellate Court and judgment and decree passed by the trial Court was reversed and the suit was directed to be dismissed. The Second Appeal filed came to be dismissed in limine by the High Court. In that context, Hon'ble Supreme Court dealt with law relating to Second Appeals and as to how while

writing judgment of reversal by appellate Court it was necessary to keep in view certain principles. Para 15 of the judgment shows that the Hon'ble Supreme Court had found that the judgment of the appellate Court in that matter was very cryptic while reversing the findings on the question of possession and dispossession as alleged by the plaintiff as also on the questions of adverse possession as pleaded by the defendant. Hon'ble Supreme Court observed that the judgment of the appellate Court must reflect its conscious application of mind and record findings supported by reasons on all the issues arising out of contentions put forth and placed by the parties for decision of the appellate Court.

(B) In the matter of "Thota Lakshmi Venkat Bala" (supra), it was matter where the First Appeal was filed before the High Court, which came to be dismissed. It was observed that the parties had right to be heard on questions of law and facts and judgment of the First appeal must address itself to all issues of law and facts and decide the same by giving reasons in support of findings. The appeal carried to the Supreme Court came to be dismissed.

(C) In the matter of "Mr. Rui Jose D'Gama" (supra), it

was found that the appellate Court did not frame points for determination and although the appellate Court had analysed evidence led by both sides, the judgment and decree of the lower appellate Court was set aside and matter was sent back to the lower appellate Court for fresh consideration.

(D) In the matter of "Khatoonbi" (supra), this Court had insisted on the compliance of Order XLI Rule 31 of C.P.C. by appellate Court requiring framing of points for determination and analyzing the material on record and then to arrive at conclusions. Para 17 of that judgment shows that, in that matter the Single Judge, while disposing the First Appeal, had not complied with provisions of Order XLI Rule 31 of C.P.C. The judgment did not show that the Single Judge had considered the necessity of formulating the questions which were required to be dealt with in the appeal, but had reversed the judgment of the trial Court. Thus, the judgment was set aside and matter was remanded to the first appellate Court.

11. The judgments referred above deal with necessity of the first appellate Court as last Court of facts to consider all the issues raised in the matter and to decide the same while

reversing or affirming the judgment and decree of trial Court. it is necessary In the present matter, there has been an order of remand. For the purpose of remand, Order XLI Rule 23, 23-A and Rule 25 are relevant, which have been dealt with by the Hon'ble Supreme Court in the matter of "P. Purushottam Reddy" (supra).

12. For convenience of reference and discussion, it would be appropriate to reproduce Order 41 Rules 23, 23-A, 24 and 25 of the C.P.C., which read as follows:-

"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, with 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 to all just exceptions, be evidence during the trial after remand.

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

24. Where evidence on record sufficient Appellate Court may determine case finally.- 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 the Appellate Court proceeds.

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 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, 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 therefor within such time as may be fixed by the Appellate Court or extended by it from time to time.”

(emphasis supplied)

Section 107 of C.P.C. reads thus :-

“107. Powers of appellate Court :-

(1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power ---

- (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require such evidence to be taken.
- (2) Subject as aforesaid, the appellate Court shall

have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.”

13. Before proceeding further, it would be appropriate to reproduce observations of Judgment in similar matter of remand made by this Court (Coram: S.S. Shinde, J.) in the matter of Beniram Shriram Wani, (Deceased through his L.Rs. Jagannath Beniram Wani) vs. Ramchandra Nathalal Gujarathi and others, reported in 2011(5) Bom.C.R. 827. It was observed that:

“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 under Section 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 fell 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 fell 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.”

(emphasis supplied)

14. Present matter would also attract Order 41 Rule 23A of C.P.C., and if the above observations are kept in view, it is clear that the first appellate Court is expected to take recourse to the relevant evidence and documents referred by the trial Court and the first appellate Court, which is the last Court of facts, is required to consider all the issues which fell for consideration before the trial Court. Considering the Judgment relied on by the learned counsel for the Appellant – Plaintiff, it is quite apparent that the first appellate Court, even if it finds that matter requires to be remanded, is required to consider all the evidence and issues discussed by the trial Court and record its findings regarding the issues raised. In this context, it is necessary for the first appellate Court to raise appropriate and complete points

for consideration keeping in view Order XLI Rule 31 of C.P.C.

15. District Judge does not appear to have considered the material on record. If the impugned Judgment in the present matter is considered, it was argued before the District Judge (first appellate Court) by the counsel for Defendant that inspite of specific pleadings, the trial Court did not frame issues, whether the Defendant was inducted as tenant by Late Harinarayan Jaiswal, and, whether the alleged leave and licence agreement was executed by the Defendant with free will or under a duress. The first appellate Court gave its own reasoning from Para 25 of its Judgment. It referred to the pleadings and observed that the trial Court never considered the facts and pleadings of the parties and never framed the issues as per their pleadings. The first appellate Court observed that Defendant had come up with case that Late Harinarayan Jaiswal was uncle of Plaintiff and was his landlord and that Plaintiff had been authorized to collect rent; that after the death of Harinarayan Jaiswal dispute arose between Plaintiff and Legal Representatives of Harinarayan Jaiswal; and that Plaintiff got prepared false and bogus documents of leave and licence by cheating him and committed fraud with him. The first appellate Court observed that inspite of such specific pleadings, the trial Judge never framed issues to

that effect. It further observed that it was case of Defendant that with help of gundas the Plaintiff had kidnapped him and had coerced him to file R.C.S. No.638 of 2006. It was observed that these facts were not considered by the trial Court while framing issues. It also observed that Defendant had amended pleadings regarding restoration of Rent Suit No.47 of 2006 as well as handing over possession to Nandranibai, widow of Late Harinarayan and these facts were not considered while dealing with the dispute between the parties.

Making observations as above, the first appellate Court held that the Appellant before it (i.e. present Respondent – Defendant) had suffered prejudice and proceeded to set aside the Judgment and order of the trial Court and remanded the matter with direction “to frame proper issues” and to decide the suit by giving sufficient opportunities to the parties.

16. Perusal of the Judgment of the first appellate Court makes it clear that the first appellate Court was impressed by the arguments raised before it regarding non framing of issues. The first appellate Court does not appear to have gone into the issues recorded by the trial Court and does not appear to have discussed the reasons recorded by the trial Court while deciding

the matter. It appears to have simply discussed the pleadings and said that the particular issues were not framed.

If the Judgment of the trial Court is perused, it had framed the following issues and recorded findings as mentioned:

	ISSUES	FINDINGS
1	Does the plaintiff prove that there exists relationship of licensor and licensee between him and the defendant?	Yes.
2	Does the plaintiff prove that defendant was allowed to conduct business on suit property for period of 12 months commencing from 16.02.2006?	Yes.
3	Does the plaintiff prove that defendant is unauthorizedly trying to continue the business even after expiry of Leave and Licence Agreement?	Yes.
4	Whether the plaintiff is entitled for damages of Rs.2,07,000/- and further damages?	Yes.
5	Whether the plaintiff is entitled for relief of mandatory injunction as prayed for?	Yes.
6	What order and decree?	As per final order

17. Judgment of the trial Court shows that in support of

the findings recorded, the trial Court discussed the evidence which had been brought before the trial Court and recorded various reasons. Regarding the claim of the Defendant that Plaintiff prepared false and bogus documents about leave and licence by cheating him and committing fraud, the trial Court discussed the same while dealing with Issue No.1. In Para 10 to 14 of its Judgment, the trial Court discussed the affidavit which had been filed by the Defendant and his claim that on some pretext the leave and licence agreement was got executed from him. Trial court discussed the evidence which showed Defendant going along with Plaintiff to the Sub Registrar Office and in presence of witnesses mentioned, the leave and licence agreement was got executed at the Office of the Sub Registrar. Trial Court concluded that Defendant had failed to depict that at any point of time the Plaintiff has pressurized him to execute the agreement of leave and licence. Even regarding the aspect of Defendant claiming that with the help of Gundas Plaintiff had kidnapped him and under coercion he was constrained to withdraw R.C.S. No.638 of 2006, trial Court had, in Para 20 and 21 of its Judgment, discussed the evidence in this regard brought on record by the Plaintiff that the said complaint was not made against him. The trial Court discussed that Defendant in his testimony did not whisper about the application made to the

Police Station. Trial Court further, alternatively, discussed the scope of the suit which was before it and concluded in Para 21 of its Judgment that the Defendant had failed to prove that the agreement of leave and licence was got executed by the Plaintiff by playing fraud.

18. The above discussion while reading the Judgment of the first appellate Court with the Judgment of the trial Court makes it clear that while the trial Court had discussed the concerned issues and evidence, the first appellate Court did not refer to the evidence or reasonings recorded by the trial Court so as to discard them and resorted to a short-cut to dispose the appeal by referring to the pleadings and then observing that the issues were not framed and remanded the matter. There was no consideration if Order XIV of C.P.C. required framing of such issues or were they covered in issues as had been framed. The provisions of law and the case-law show that if the first appellate Court was of the view that certain issues were required to be framed, it could have itself framed the issues and could have seen if the evidence already available on record was sufficient. It had the powers itself to also record further evidence if it wanted. If the first appellate Court felt that it was necessary to refer the issues to the trial Court, it was required to frame the issues and

refer them to the trial Court for recording additional evidence and findings. The first appellate Court did not take recourse to any of the powers and options it had in view of Section 107 of C.P.C. and Order XLI Rule 23 to 25 of C.P.C., and simply making observations of non framing of issues on some of the aspects, remanded the matter. In Para 29 of its Judgment, the first appellate Court wrongly observed that the trial Court had not dealt with the aspect of handing over of possession to Nandranibai, widow of Late Harinarayan Jaiswal. In Para 36 of its Judgment, trial Court came to the conclusion that from the evidence it was established that Defendant had not delivered the possession of suit property to Nandranibai.

19. Perusal of the record of the trial Court shows that on the application of Defendant Exhibit 120, the trial Court had heard both the sides and allowed application for framing additional issues. The trial Court on 27th February 2013, framed following additional issues:

"(i) Does the defendant prove that he was the tenant of Late Harinarayan Mohanlal Jaiswal of the suit property?

(ii) Does he further prove that he has handed over the possession of the suit premises on 24.09.2010 under possession receipt to Nandranibai W/o Harinarayan Jaiswal?"

After the said issues were framed, vide Exhibit 121 Defendant initially filed purshis that no further evidence was to be led. However, subsequently, vide Exhibit 123, defendant sought exhibition of documents and leading of further evidence. The said application was heard and decided by the trial court against the Defendant. Although grievance was made before appellate Court, trial Court record shows that, in trial Court, defendant himself filed application Exhibit 124 seeking deletion of above Additional Issue No.1 and the trial Court accepted the said application and deleted Additional Issue No.1 which it had framed below Exhibit 120. The first appellate Court, which was last Court of facts, does not appear to have considered the orders passed by the trial Court while framing additional issues, refusing additional evidence and deleting issue regarding claim of Defendant that he was tenant of Late Harinarayan Jaiswal. Without considering any of this material, the first appellate court remanded the matter.

20. After this Appeal From Order was heard and reserved for Judgment, it was noticed that although Additional Issue No.2, as mentioned above, was framed by the trial Court, the trial court while passing its Judgment, did not reproduce the above

Additional Issue No.2 in the judgment. The counsel for both sides were heard further on the effect of this error of the trial Court. The counsel for Respondent – Defendant submitted that this was also reason why the remand to the trial Court would be justified.

The learned counsel for Appellant- Plaintiff further relied on the Judgments in the matter of :-

- (I) Nedunuri Kameswaramma vs. Sampati Subba Rao, [A.I.R. 1963 S.C. 884(1)],
- (II) Kunju Kesavan vs. M. M. Philip and others [A.I.R. 1964 S.C. 164], and
- (III) Sayeda Akhtar vs. Abdul Ahad, [A.I.R. 2003 S.C. 2985].

It has been submitted that the Judgments of the Hon'ble Supreme Court show that omission to frame issues does not vitiate proceeding in case where both the parties have led the evidence. It has been argued that where parties are aware of the dispute and lead evidence and the Court considers the evidence on that issue and also the material brought on record, in that case, merely because a particular issue was not framed, would not be the ground to set aside the decree. Learned counsel for Appellant – Plaintiff submitted that in the present matter the additional issue No.2 was framed relating to the dispute, whether or not the premises were handed over to Nandranibai. The same

only remained to be reproduced in the Judgment by the trial Court but the trial Court had discussed all the necessary evidence in this regard and the Judgment of the trial Court will show that the trial Court concluded in Para 36 of the Judgment that Defendant had not delivered possession of suit property to Nandranibai.

21. If the trial Court had not framed an issue or framed it but erroneously not reproduced it in judgment, appellate Court could have itself framed the issue and seen the evidence in that regard. In present matter, the additional issue No.2 was not written out in judgment which was avoidable mistake, but trial Court did discuss the issue and record conclusion on the same. First Appellate Court should have discussed these aspects. I find that the first appellate Court had not looked into virtually anything which was material and resorted to easy way of disposing the appeal by remanding the matter moment it was claimed that this or that issue has not been framed. The first appellate Court did not consider the record of trial Court. Had it considered, it would have known that there were disputes on these counts raised and the trial court had dealt with the same and took decision one way or the other. In that situation, it was expected of the first appellate Court to consider whether or not

the reasons recorded for framing or dropping an issue were correct, in case dispute regarding framing of issues was being raised before it. The Judgment of the first appellate Court is not at all maintainable. It is not correct, legal and proper. The first appellate Court failed to frame appropriate points for determination and failed to consider the evidence which had already been brought in the trial Court and give its own reasonings as to why the reasons and findings recorded by the trial Court could not be maintained.

22. For the above reasons, I pass following order:

ORDER

- (A) The Appeal from Order is allowed with costs.
- (B) The impugned Judgment of the District Judge-3, Aurangabad in Regular Civil Appeal No.138 of 2013, dated 30th September 2014, is quashed and set aside.
- (C) Judgment of the 7th Joint Civil Judge (Junior Division), Aurangabad in Regular Civil Suit No.1900 of 2012 (Old Special Civil Suit No.535 of 2008) dated 30th March 2013 is restored.

- (D) The matter is remanded back to the first appellate Court (District Judge-3, Aurangabad). The Regular Civil Appeal No.138 of 2013 is restored to its original Number.
- (E) The first appellate Court is directed to formulate necessary points for determination/ consideration and adjudicate on all issues raised by the parties and decide the appeal within six months from the date of receipt of copy of this Judgment, giving due opportunity to the parties concerned.
- (F) The first appellate Court shall re-hear the Appeal and decide the same according to law.
- (G) The parties to appear before the first appellate Court on 27th April 2015.

23. In view of disposal of Appeal from Order, Civil Application No.12312/2014 does not survive and hence, same stands disposed of.

(A.I.S. CHEEMA, J.)