

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APEAL FROM ORDER NO. 31 OF 2014
WITH CA/2330/2014 IN AO/31/2014

MANGALA SHARAD MUTHA
VERSUS
SHOBHA MAHENDRA BORA

...
Advocate for Appellant : Mr. R.R. Sancheti with Mr. R.R. Mantri
Advocate for Respondents: Mr. L.B. Palod
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CORAM : V. K. JADHAV, J.
DATED : 5th APRIL, 2016

PER COURT:-

1. Being aggrieved by the order passed by learned Principal District Judge, Ahmednagar dated 30.11.2013 in Regular Civil Appeal No. 71 of 2009, the appellant-original defendant has preferred this appeal.

2. Brief facts, giving rise to the present appeal, are as follows:-

a) The respondent-plaintiff has instituted a suit for recovery of certain amounts with interest from the appellant-defendant. The appellant-defendant has strongly resisted the claim by filing written statement. The suit was resisted on various grounds, including the point of limitation, receipt of principal amount, interest, etc. Learned 4th Joint C.J.J.D. Ahmednagar by its judgment and decree dated

6.2.2009 dismissed the suit with costs.

b) Being aggrieved by the judgment and decree passed by the trial court, the respondent-original plaintiff had preferred appeal before the District Court, Ahmednagar. The learned Principal District Judge, Ahmednagar by its impugned order dated 30.11.2013 partly allowed the appeal, and thereby set aside the judgment and decree passed by the trial court and remanded the matter to the trial court with certain directions. Being aggrieved by the same, this appeal is preferred.

3. Learned counsel for the appellant-original defendant submits that the remand order in the present case is absolutely unwarranted. Learned counsel submits that the lower appellate court should have decided the appeal on its own merits and instead of that lower appellate court exercised the powers under Order XLI Rule 23 of the C.P.C. in a casual manner. Learned counsel submits that lower appellate court without assigning any reason has directed the trial court to recast the issues. In fact, the trial court has already framed issues by considering rival pleadings of the parties to the suit. Learned counsel submits that the appeal thus deserves to be allowed by setting aside the judgment and order passed by the lower appellate court. Learned counsel submits that the respondent-plaintiff

will fill up the lacuna by taking undue advantage of the remand order.

Learned counsel for the appellant, in order to substantiate his submissions, places reliance on the judgment of this Court in the case of ***Beniram Shriram Wani, deceased through his L.Rs. vs. Ramchandra Nathalal Gujarathi and Ors, reported in 2011 (5) Bom.C.R. 827.***

4. Learned counsel for the respondent-plaintiff submits that entire judgment of the trial court is based on admissibility of power of attorney and the evidence thereto. Learned counsel submits that the lower appellate court by placing reliance on the judgments of the Apex Court in the cases of ***Janki Vashdeo Bhojwani & Anr vs. Indusind Bank Ltd. and Ors, reported in AIR 2005 SC 439 and Vamanrao Sawalaram Bhosale vs. Vithal Tukaram Kadam, reported in 2006 (1) Bom.C.R. 448*** has discarded the evidence of power of attorney. Learned counsel submits that the lower appellate court has rightly distinguished the said citations and further observed that the power of attorney of respondent-plaintiff knows all transactions and therefore, the trial court has erroneously come to the conclusion that the power of attorney has no authority to depose in place of respondent-plaintiff. Learned counsel submits that since the trial court has discarded the entire evidence of the plaintiff and on

this ground alone, the documents produced before the trial court, were also not exhibited. The lower appellant court has rightly remanded the matter with certain directions. Those directions alongwith the direction of recasting issues are appropriate in the given set of circumstances. Learned counsel submits that there is no substance in the appeal and the appeal is thus liable to be dismissed.

5. It appears that the learned Judge of lower appellate court has discussed two judgments of the Apex Court i.e. (i) ***Janki Vashdeo Bhojwani & Anr (supra)*** and (ii) ***Vamanrao Sawalaram Bhosale (supra)*** and in view of the observations made by the Apex Court in the aforesaid judgments, the learned Judge of the lower appellate court has discussed the evidence of power of attorney. It is pertinent to note that the plaintiff as well as defendant both have not entered into witness box and their respective power of attorney have examined themselves before the trial court. The lower appellate court has reproduced in the judgment certain part of the evidence of power of attorney of the plaintiff. It appears from the said evidence that power of attorney is having knowledge of the transaction, which is subject matter of the suit. In view of this, lower appellate court has observed that the trial court has not considered this aspect of the case and it was obligatory on the part of trial court to consider entire

evidence with proper perspectives. It also appears from the observations made by the lower appellate court that even documentary evidence on record has not been referred to. I do not find any fault in the approach adopted by the lower appellate court. In the given circumstances, the lower appellate court has rightly directed recasting of issues and further directed the trial court to record his finding on all issues by appreciating the evidence on merits in accordance with law.

6. In view of the above discussion, I do not find any merits in this appeal. The appeal is therefore, liable to be dismissed with costs. The appeal is accordingly dismissed.

7. In view of dismissal of appeal from order, civil application No. 2330 of 2014 is disposed of.

8. At this stage, learned counsel for the appellant prays for continuation of stay, granted earlier. However, once the appeal is decided on merits, I am not inclined to continue the interim relief. The prayer for continuation of interim relief stands refused.

(V. K. JADHAV, J.)