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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.45 OF 2017

Sushilabai w/o Satwajirao Jagtap
Age - 82 years, Occ - Household
R/o Nawabpura, Aurangabad
Taluka and District - Aurangabad

APPELLANT

VERSUS

Ajay s/o Tulsidas Mote
Age - 38 years, Occ - Service
R/o "Tulsi Sadan", Vishnu Nagar
Behind Akashwani, Aurangabad
Taluka and District - Aurangabad

RESPONDENT

.....
Mr. V. D. Sapkal, Advocate for the appellant
Mr. A. S. Bajaj, Advocate for the respondent
.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 5th APRIL, 2018

ORAL JUDGMENT:

1. Heard learned advocates for the parties quite extensively.
2. The appeal from order has been preferred by plaintiff in special civil suit No. 233 of 2006 against order dated 12th September, 2017 passed by Ad hoc District Judge-2, Aurangabad in Regular Civil Appeal No.24 of 2016, preferred by the defendant against decree passed by trial court dated 30th November, 2007, remanding the matter for trial afresh in the

suit with liberty to examine necessary witnesses as referred to in application Exhibit-14 before the appellate court.

3. Briefly stated, it is the case of the plaintiff that a document registered on 14th July, 2004 as gift deed had been got executed by playing fraud, deception and misrepresentation and had never been intended to be executed by her as such. In the garb of executing registered power of attorney, the deed has been got executed and registered. It is contended by her that on realization of the same, suit has been instituted seeking cancellation of alleged gift deed and declaration that property referred to thereunder is under her ownership.

4. Case of the plaintiff had been resisted by the defendant denying claims made in the plaint. It is contended by the defendant that the gift deed has been executed by the plaintiff on her own volition and by her free will. She had expressed her desire to execute the same with an advocate. Accordingly, draft had been prepared and was approved by the plaintiff. Plaintiff had spent a sum of Rs.5,19,816/- over execution of said deed by withdrawing amount from bank. Contents of the deed were read over and explained to the plaintiff and the deed was executed by her. As required under law, deed of gift had been attested by two

witnesses and is registered. The plaintiff had also executed another gift deed in favour of her other nephew, namely, Dhananjay. The effect of the gift deed had been put in operation and accordingly name of the defendant had been mutated in revenue record. As expressed in the gift deed, rent of the property concerned began to be received by the defendant from tenant – United India Insurance Company Limited. The suit has been instituted at the instigation of other relatives. The defendant had been looking after quite a lot of family affairs of the plaintiff and her husband and had continued to help her after his death in financial transactions and property matters. Since the plaintiff had been issue-less, the defendant was being treated as a son.

5. The trial court, on pleadings to aforesaid effect, had framed following issues -

- " 1. *Does the plaintiff prove that the defendant got executed Gift Deed bearing 2797 dated 14/07/2004 by playing fraud and deception and misrepresentation?* *In affirmative*
2. *Does plaintiff prove her ownership over the suit property?* *In affirmative*

3. *Whether the plaintiff is entitled for the declaration as prayed?* *In affirmative*

4. *What order?* *Suit decreed with costs. "*

6. In support of her claims, the plaintiff had examined herself and one more witness, the attesting witness of the document, namely, Anand Ramkrishna Avad @ Anandgiri Maharaj. Documents in evidence viz., certified copy of property register card, gift deed, paper publication, note book in respect of accounts maintained by the plaintiff and copy of notice dated 1st September, 2006 were produced.

7. The defendant had examined himself and had filed a book published by the plaintiff, the autobiography of her husband, office copies of applications to city survey officer dated 15th July, 2004 and 17th July, 2004, certified copy of affidavit of the plaintiff and appeal memo before Superintendent of Land Records.

8. The trial court with reference to evidence adduced, had considered that gift deed dated 14th July, 2004 had been brought about by playing fraud, deception and misrepresentation and that the plaintiff is owner of suit property and had accordingly

declared the gift deed to have been cancelled.

9. The matter, under the circumstances, had been taken in Regular Civil Appeal referred to above. The appellate court purported to frame points for consideration *viz.*,

- “ 1. *Is exigency arises to remand the matter for afresh trial?* *In the affirmative*
2. *What order and decree?* *As per final order ”*

The appellate court, under its judgment and order has remanded the matter for trial afresh setting aside decree passed by the trial court.

10. Learned advocate Mr. Sapkal appearing for the appellant in the appeal from order before this court with quite some vehemence has submitted that impugned judgment and order passed by the appellate court is absolutely unsustainable. The appellate court has failed in its duty to scan evidence adduced in the matter and has gone about the same cursorily. The judgment, at many a place, is hit by conjectures and surmises, assumptions and presumptions.

11. He submits that issue, as framed by the appellate court while remanding the case is not only covered but is also

contained in issue No.1 framed by trial court. For said purpose, it is absolutely unnecessary to remand the matter. The issue had been subsisting issue and it was incumbent that the defendant ought to have adduced evidence and addressed the same, accordingly. There has been patent failure to adduce evidence in respect of such an issue and it is absolutely not accounted for with any plausible reason.

12. He submits that a gift deed is necessarily an act of free will without any consideration and without any conditions. Besides alleged gift deed is deficient of requirements of basic ingredients for a gift to be a valid even about delivery of possession and its acceptance. Possession as can be gathered from contents of the gift deed continues to be that of the plaintiff. The conditions contained therein establish that the possession of the property during lifetime was to be continued with the plaintiff and the conditions embodied in the deed were consideration for execution of deed. As such, gift being for consideration is devoid of basic requirements of transaction to be a gift. It is neither a gift in fact nor a gift in law.

13. Over and above this, according to him, while the deed requires to be attested by two witnesses and is accordingly

shown to have been attested, defendant had never sought an opportunity to prove execution of gift deed. He refers to and relies on section 68 of the Evidence Act and also points out proviso thereunder. He submits, without prejudice to the plaintiff's contentions, otherwise if the document is to be considered as an executed one, then the same may operate as a "*will*" and nothing more.

14. Learned advocate further submits that there is no explanation plausible or otherwise coming forth as to why documents had been kept back. He submits that the defendant had been intelligent enough and aware of to place on record certain documents which were in his favour. The documents sought to be produced now, also had been subsisting but were never relied on. In any case, such an approach with no plausible or with vacuous excuses is not to be given indulgence into. He submits that the appellate court's judgment gives no reflection at all on these aspects involved in the matter.

15. Mr. V. D. Sapkal, learned advocate submits that while there is no reference in the written statement to the documents now sought to be produced and relied on, neither it is a case that factors necessary while considering an application at appellate

stage for production of evidence pursuant to Order XLI, Rule 27 of the Civil Procedure Code are available nor there is any expression as to why the documents / evidence had not been adduced during trial or whether the evidence had been outside the control of the defendant. Despite pendency of the suit for over ten years, there had been no attempt of whatsoever nature in this respect.

16. He goes on to submit further that, allowing application Exhibit-14 at the time of hearing without being supported by reasons as ordained under Order XLI, Rule 27 of the Civil Procedure Code, is unsustainable.

17. He submits that a remand cannot be directed merely for asking or for that matter for no reason. He submits that it is not the case that there is no evidence on record at all sufficient to form a judgment. With reference to the evidence on record trial court had given its judgment and there is absolutely no reason given by the appellate judge as to why evidence on record is not sufficient or for that matter falls short for forming any judgment. He submits that the order impugned in the present appeal from order is absolutely misconceived and deserves to be set aside.

18. He submits that while making order of remand, high courts

and the Supreme Court have time and again considered that it is duty of the appellate court to scan evidence and come to a definitive conclusion as to reasons and findings given by the trial court are not sustainable and in the circumstances, as to why remand is necessary. Couple of judgments of this court and couple of judgments of the Supreme Court have been relied on to buttress his such submission.

19. He submits that it is only in exceptional cases court may exercise power to remand a case. He submits that the appellate court should be circumspective while ordering remand and an unwarranted order of remand to procrastinate litigation unduly has to be avoided.

20. On the other hand, Mr. Anil S. Bajaj, learned advocate appearing on behalf of the respondent – defendant submits that looking at the facts and circumstances, order passed by the appellate court cannot be dubbed as absolutely illegal or misconceived. He submits that it is not the case that for no reason order of remand has been passed. He submits that the documents, which are to be adduced in the evidence under the orders of the appellate court, are relevant documents, supporting case of the defendant, which could not produced

hitherto before court for the reasons which are not directly attributable at all to the defendant. He submits that the documents give an indication, rather establish that the document registered on 14th July, 2004 in fact was intended to be a gift deed and not otherwise.

21. He submits that plaintiff's case about a power of attorney was sought to be executed, is not supported by any evidence, albeit, one of the attesting witnesses, who happens to be defendant's cousin, with the passage of time, appears to have given into the desire of the plaintiff.

22. He submits that it is not the case that the plaintiff is illiterate or uneducated or for that matter she is a *pardanashin* lady. He submits that while going was good, all the benefits of the relationship were being enjoyed for quite a long time, over more than fifteen years, during lifetime of husband of the plaintiff and even thereafter.

23. However, after the execution of gift deed, reasoning out the same in the deed itself, it appears that few other persons, particularly relatives have been able to influence the plaintiff and have goaded and instigated her to institute proceedings.

24. He further submits that the document itself clearly gives an indication of absolute execution of a gift deed. He submits that it refers to even delivery of possession and the relationship and the reasons as to why the deed has been executed. He submits that the conditions which are appearing in the gift deed are the conditions incorporated in good faith and was an arrangement which would keep the relationship between the parties healthy. The conditions, according to him, would show that after the transfer of title, it was an arrangement that some of the benefits from the property would be received by the defendant and some during her lifetime by the plaintiff. Such an arrangement by itself would not deplete strength of the document as a gift deed.

25. He continues to submit that for a gift, it is not necessary that it should be coupled with delivery of possession. He for said purpose refers to and relies on section 122 of the Transfer of Property Act. He submits that all the ingredients referred to thereunder are present in the transaction entered into on 14th July, 2004. He submits, delivery of possession is essential is a general belief pervading over large section of society and even legal fraternity. In order to support his submission, he purports to refer and rely on a decision of the Supreme Court.

26. He further submits that in the circumstances, while documents have been subsisting and could have been produced, but could not be produced for the reasons beyond control of the defendant, he may not be deprived of the opportunity of adducing the same in evidence. He submits that pursuant to section 107, which is a substantial provision of the Civil Procedure Code and the operational provision as appearing under Order XLI, Rule 27 of the Code under the conditions referred to thereunder, allow production of evidence at appellate stage. He submits that while the appellate court has formed an opinion that the documents are necessary to be produced and evidence is required to be allowed in this respect and on the issue as framed, it is not such a case that it cannot be said that the discretion exercised is not in adherence to the known judicial principles. He submits that while discretion has been exercised by the appellate court, in favour of defendant, the same would be seldom liable to be interfered with. There are no strong reasons coming forth except technical ones, purporting to create blockade in production of evidence sought.

27. Mr. Anil S. Bajaj purports to rely on a clutch of judgments that even if there is lacunae or deficiency in evidence adduced,

the same can be rectified and allowed to be removed, having regard to judgments of the Apex Court.

28. He further submits that the position as would be emerging in law from various decisions, show that a belated approach is considered worth to be declined or rather rejected.

29. After hearing learned advocates for the parties following substantial question of law arises in the appeal from order

" Whether in the given facts and circumstances of the case the order of remand passed by the appellate court is sustainable in view of emerging legal position ? "

30. Mr. V. D. Sapkal, learned advocate for the applicant, during the course of submissions has drawn attention of the court to a few of judgments which according to him would be relevant to be considered in the scenario.

31. He refers to and relies on a judgment of this court in the case of *"Rameshkumar s/o Balubhai Sukhadia and Another V/s Kumwardevi Shamlal Rathor and Another"* reported in 2010 BCI 267 : 2010 (6) ALL MR 888 and draws attention to the observations as are appearing under paragraphs No. 8 and 25 therein. He submits that taking into account observations therein, more particularly as appearing

in paragraph No. 15 of the judgment while the appellate court has not dealt with findings reached by the trial court nor did it advert to the evidence adduced, in the circumstances, without giving any reason, without any appreciation of evidence, remand order is unsustainable. He submits that even otherwise the court has observed under paragraph No. 13 that the appellate court could have considered these aspects. It is not the case that the appellate court had not been empowered to adjudicate upon. In the circumstances, as observed in the cited judgment, according to him, it was not necessary to remand the matter to the trial court. He further adverts to section 107 of the Civil Procedure Code and submits that the appellate court has failed in its duty to exercise jurisdiction vested in it.

32. Mr. Sapkal further refers to yet another decision of this court in the case of *"Sayed Akbar Sayed Noor V/s Dhjondiba Namdeo Bhosale and Another"* reported in 2010 BCI 277 : 2011 (1) ALL MR 791 submitting that therein as well, as in present case a single point for consideration as to whether it is a fit case for remand to the trial court had been framed by the appellate court without going into other aspects. He submits that findings of the trial court have not been taken into account or dealt with by the appellate court and without giving any reason and without appreciation of

documents and contentions, it is not permissible for the appellate court to brush aside findings of the trial court as observed under paragraph No. 11 of said judgment. He therefore, submits that as observed in said decision, the matter requires to be restored to the appellate court for its proper consideration. He submits that scope of power to remand in terms of Order XLI, Rule 23-A of the Civil Procedure Code is limited. The suit was not decided on preliminary point and as such, power to remand pursuant to said provision would hardly be available to be exercised.

33. Referring to observations as appearing under paragraphs No. 19, 20, 21 of decision of the Supreme Court in the case of *“Municipal Corporation Hyderabad V/s Sunder Singh”* reported in *AIR 2008 SC 2579*, he submits that the impugned order is wholly unsustainable.

34. Further, referring to decision of the Supreme Court in the case of *“Ashwinikumar K. Patel V/s Upendra J. Patel”* reported in *AIR 1999 SC 1125*, placing reliance on head note “A”, he submits that a court should not ordinarily remand a case to lower court merely for it considered that reasoning of lower court is wrong. When material is available before the court, it should have itself

decided appeal one way or the other. It ought to have considered various aspects mentioned in the order of the trial court and considered whether order of trial court ought to be confirmed, reversed or modified. In the present matter, he submits, the court could have considered documents and evidence by itself. He submits that the court ought to have considered validity of the disputed gift deed, as referred to paragraphs No. 7 and 12 from said decision.

35. He submits that when evidence on record is sufficient to decide controversy either way, merely for further evidence is sought to be produced, is not a ground for remand and refers to a decision of this court in the case of “*Mahadeorao Damduji Satawne V/s Nagpur Improvement Trust and Others*” reported in 2015 (4) BCR 357. He particularly refers to paragraphs No. 11 and 14 from aforesaid judgment. He submits that looking at the nature of appellate judgment, the impugned order is wholly unsustainable and deserves to be interfered with.

36. Relying on observations appearing in paragraph No. 5 of decision of this court in the case of “*Balkrushna Dattatraya Butte V/s Duttatraya Shanakr Mohite and Others*” reported in 1997 BCI 53 : 1998 (2) ALL MR 740, he submits that an order of remand cannot be made

without considering merits of the findings recorded by trial court. He submits, it has been observed in the same that not only merits of the decision of trial court are required to be seen, but the findings have to be reversed and set aside, if the appellate court considers retrial was necessary. He submits, it has been further observed in the decision that after amendment in provisions also findings of the trial court have to be examined and reversed in appeal and then retrial, if considered necessary, may be ordered. He particularly refers to the observations in paragraph No. 8 and submits that the appellate court has committed mistake in mixing up production of additional evidence under Order XLI, Rule 27 of the Civil Procedure Code and framing of issue under Order XIV of the Civil Procedure Code. He submits that similar is the situation in present matter. The appellate court did not find trial court went through the proceedings hastily, on the contrary, defendant had completed his evidence. It is not the case that the defendant did not receive opportunity to lead evidence. He submits that in the circumstances, as observed in paragraph No. 9 thereunder, interest of justice has to be interest of justice on both sides, for both the parties and should not cause justice to one party and injustice to the other.

37. Relying on observations as appearing in paragraph No. 10 of the decision of the Supreme Court in the case of “*P. Purushottam Reddy and Another V/s M/s Pratap Steels Ltd.*” reported in *AIR 2002 SC 771*, learned advocate submits that while the issue framed and sought to be remitted was in fact the other side of the first issue framed by the trial court and particularly when during the trial the parties had never complained about prejudice being caused for want of specific issue, neither it is a case of the parties that oral or documentary evidence was excluded or was not allowed to be taken on record, it was absolutely not necessary to frame the issue and remand the matter. Even otherwise, he submits that as observed in paragraph No. 3 thereunder, it is not the case of omission of framing or trying of issue. Further, without prejudice to his other contentions, he submits that even if it comes to production of additional evidence, the appellate court itself could have received evidence and it was not necessary to send the matter back for retrial. He further submits that it is not the case that the judgment rendered by the trial court is not the judgment in the eye of law or the trial court has not satisfactorily disposed of the suit and in the circumstances, order of remand in the present matter is an unwarranted order.

38. Learned advocate Mr. Sapkal further refers to and relies on a decision of the Supreme Court in the case of “*State of T. N. V/s S. Kumarswami and Others*” reported in *AIR 1977 SC 2026* and refers to paragraphs No .4 and 5 thereunder, reading, thus-

“ 4. *The finding of the subordinate judge on the two matters was brushed aside by the High Court without any reason without any appreciation of documents and without any appreciation of contentions of the parties. The High Court gave a perfunctory Judgment. The High Court failed to exercise the duties as an appellate court. It is unfortunate that the High Court did so.*

5. *The only way to do justice in the matter is to remand it to the High Court. The High Court will hear the matter. The Bench which heard this matter earlier will not hear it on remand. We are sorry to make this observation but it is because of the manner in which the Division Bench of the High Court pronounced judgment in this matter. ”*

39. Mr. Sapkal submits that similar is the situation in the present matter. The findings of the trial court stand set aside by the appellate court without any appreciation of documents and without any reason. Judgment of the appellate court in the circumstances and facts, is perfunctory and as such, he urges to set aside the impugned order and restore the appeal and direct the appellate court to proceed with the appeal on merits.

40. Learned advocate for the respondent Mr. Anil S. Bajaj,

opposing aforesaid submissions, submits that so far as the contention that the gift deed without delivery of possession is not a gift in the fact or in law is concerned, the same is unsustainable in view of the decision of the Supreme Court in the case of “*Renikuntla Rajamma V/s K. Sarwanamma*” reported in (2014) 9 SCC 445. For said purpose, he places reliance on observations as are appearing under paragraph No. 11 in the same and submits that in the present matter as well transfer of possession of property covered by the registered gift deed is not a *sine qua non*. He further hastens to add that defendant is making aforesaid submission without prejudice to his case otherwise.

41. Mr.Bajaj further refers to a decision in the case of “*Iridium India Telecom Ltd,. V/s Motorola Inc. and Others*” reported in 2004 (1) *Bombay Cases Reporter* 479 and refers to quotation in paragraph No. 9 thereunder, reading, thus –

“ *There may well be cases where even though the court finds that it is able to pronounce judgment on the State of the record as it is, and so, it cannot strictly say that it requires additional evidence to enable it to pronounce judgment it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence 'for any other substantial cause' under Rule 27 (1) (b) of the Code. ”*

42. He submits that in the present matter factual scenario is covered by said quotation and in the circumstances, remand order has been properly and justifiably passed and should not be faulted with.

43. He, referring to judgments in the cases of “*Jegannathan V/s Raju Sigamani and Another*” reported in (2012) 5 SCC 540 and “*Narayan V/s Kumaran and Others*” reported in (2004) 4 SCC 26, submits that appeal against order ought to raise substantial question of law as in second appeal. He submits that in the present matter there would hardly arise any question of law, much less a substantial one at that and as such, appeal from order is not maintainable.

44. Referring to a decision in the case of “*Smt Shantibai K. Vardhan and Others V/s Ms. Meera G. Patel and Another*” reported in 2008 (6) Mh.LJ 833 he submits that procedural law shall not frustrate rights of the parties and in the circumstances technical approach should be eschewed and remand order, which is otherwise sustainable on the facts of the case may not be undone for alleged ostensible absence of relevant consideration.

45. Mr. Bajaj further refers to and relies on decisions in the cases of “*Union of India V/s Ibrahim Uddin and Another*” reported in 2012 (8) SCC 148; “*North Eastern Railway Administration, Gorakhpur V/s Bhagwan*

Das” reported in 2008 (6) SCC 511; “*Bachahan Devi and Another V/s Nagar Nigam, Gorakhpur and Another*” reported in (2008) 12 SCC 372 and second appeal No.347 of 2016 in support of his submission that application pursuant to Order XLI, Rule 27 of the Civil Procedure Code has been rightly decided. He submits that as observed in the judgment in the case of “*Union of India* ” 2012 (8) SCC 148 (*supra*), head note “L” and referring to paragraphs No. 36 and 49 submits that while additional evidence has been found by the appellate court to have bearing on the issue, the order passed by the appellate court cannot be faulted with and would remove deficiency in evidence and would clear the doubt.

46. Mr. Bajaj lastly refers to a decision in the case of “*Maria Margarida Sequeria Fernandes and Others V/s Erasmo Jack De Sequeria*” reported in 2012 (5) SCC 370 and draws attention to observations as appearing under paragraphs No. 32, 33, 38 and 41 thereunder, reading, thus,

“ 32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

38. Lord Denning, in the case of Jones v. National Coal Board [1957] 2 QB 55 has observed that:

"In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."

41. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized."

47. He submits that the truth alone should be a guiding star and in the circumstances impugned order can seldom be faulted with.

48. Perusal of the judgment and order passed by the appellate court depicts that at the fag end of appellate proceedings, an application had been moved at Exhibit-14 praying for letting in additional evidence in the form of income tax return, balance sheet, letter dated 15th July, 2004 to United India Insurance Company to pay monthly rent to the defendant and the response by the United Indian Insurance Company Limited directing the defendant to furnish indemnity bond. The appellate court had rejected the application of the defendant. The defendant had been before this court in a writ petition and the high court had

restored the application directing the same to be decided along with the appeal.

49. Further perusal of the judgment shows, the appellate court had considered that gift deed executed by the plaintiff will have to be scrutinized with reference to the documents, which had not come on record and if they are on record that would enable the court to come to final conclusion and justice would be done. The appellate court has also adverted to that subsequent to the judgment of trial court, during pendency of the regular civil appeal, plaintiff had executed a deed of gift of the suit property on 26th December, 2013 in favour of Dhananjay and considered, its legality will have to be examined.

50. The court has referred to that on 14th July, 2004 two gift deeds had been executed by the plaintiff, one in favour of defendant and another in favour of Dhananjay and the plaintiff had admitted the gift deed in favour of Dhanajay while she has disputed the one in favour of the defendant and no rational explanation has come forth in respect of the same, creating doubt in the mind of the judge as to why she has admitted gift deed in favour of Dhananjay and has disputed the other. Further consideration that appears to have weighed with the appellate

court is point of time at which the suit had been filed. The court had considered that plaintiff had remained silent for a long period and has not explained as to why suddenly in 2006 the suit has been instituted. According to appellate court that creates doubt. The court has also observed that the plaintiff is a social worker, she is an educated lady, she has been member of District Remand Home. In the circumstances, it was considered, it was difficult to believe that she had not read contents of the gift deed executed in favour of defendant before putting her signature on the document. The court has further considered that curiously she had not lodged complaint against defendant or for that matter her advocate having cheated her. The court then considered that burden of proof as to whether gift deed executed by the plaintiff is legal and valid is on the defendant and he will have to prove the same and such an issue had not been framed by the trial court and, therefore, had framed following issue-

"Does defendant prove that Gift Deed executed by the plaintiff in his favour on 14/07/2004 is valid?"

51. The court had then observed that procedural law is not meant to frustrate rights of parties, but is to achieve ends of justice and as such, purportedly has remanded the matter

setting aside judgment and decree by the trial court directing trial afresh and opportunity to examine witnesses pursuant to Exhibit-14, further directing to decide the suit expeditiously.

52. The substantial question framed above is answered thus, as apparently, the appellate court has not set aside the judgment of the trial court on merits of the case and yet considered remand is necessary. It appears to have got swayed away on other considerations, and as such, same is rendered unsustainable and the same deserves to be set aside and to reconsider the appeal with reference to decisions being relied upon on either side without getting bogged down by observations of this court in the judgment in the appeal from order and to decide the regular civil appeal on its own merits, including, if found necessary, to remand the matter.

53. Having regard to aforesaid, the appeal from order is allowed. Judgment and order dated 12th September, 2017 passed by Ad-hoc District Judge-2, Aurangabad in Regular Civil Appeal No. 24 of 2016 is set aside. The matter is restored to the appellate court for decision of appeal along with application filed therein, by applying mind to various facets as adverted to by the parties. It is further made clear that all the points are kept open

for the parties to be agitated.

54. It is expected that the appeal would be proceeded with as expeditiously as possible and in any case would be disposed of within three months from the date of receipt of writ of this order.

55. In view of disposal of the appeal from order, civil application No. 12214 of 2017 does not survive and stands disposed of.

[SUNIL P. DESHMUKH, J.]

drp/ao45-17