

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

**923 APPEAL FROM ORDER NO.15 OF 2017
WITH CA/1982/2017 IN AO/15/2017**

1. Antaji s/o Rama Gangotri
Age: 66 years, Occu.: Agri.,
R/o.: Village Rohi Pimpalgaon,
Tq.Mudhkhed, Dist.Nanded.
2. Sanjiv s/o. Antaji Gangotri
Age: 39 years, Occu.: Agri.,
R/o.Village Rohi Pimpalgaon,
Tq.Mudhkhed, Dist.Nanded.
3. Balaji s/o Antaji Gangotri
Age: 33 years, Rohi Pimpalgaon,
Tq.Mudhkhed, Dist.Nanded. ..Appellants

VERSUS

1. Kasturbai w/o Madhavrao Gangotri
Age: 64 years, Occu.: Household,
R/o.Village-Bhopala,
Tq. & Dist.Latur.
2. Ravikiran s/o Madhavrao Gangotri
Age: 42 years, Occu.: Labour,
R/o.Village Bopala,
Tq. & Dist.Latur.
3. Sandesh s/o Madhavrao Gangotri
Age: 37 years, Occu.: Service,
R/o.Village Bhopala,
Tq. & Dist.Latur. ..Respondents

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Advocate for Appellants : Ms.Madhuri Jain h/f.

Mr.S.S.Patunkar

Advocate for Respondents : Mr.M.D.Gitte

...

CORAM : M.S.SONAK, J.

DATE : 23rd January, 2018

ORAL JUDGMENT:-

1) Heard Ms.Madhuri Jain learned counsel, who holds for Mr.S.S.Patunkar learned counsel for the appellants and Mr.M.D.Gitte learned counsel for the respondents.

2) Rule. Rule is made returnable forthwith at the request and consent of learned counsel for the parties.

3) This appeal takes exception to the impugned order dated 1.9.2016 by which, the Appeal Court has remanded the matter to the Trial Court by recasting the Issues as originally framed and made some directions in respect to alleged consent deed between the parties.

4) Infact the operative portion of the impugned order

is as follows:-

"O R D E R

1. Judgment and decree of the trial court is hereby set aside, matter is remanded back to the learned trial court for retrial as per direction given above.
2. Learned trial court is hereby directed to frame the issues below Exh.23 as directed above and an opportunity be given to the both parties to lead their evidence if any.
3. Defendant no.1 is hereby directed to file alleged consent deed on record if same is not in his possession he may file an application before the trial court and same be called from the revenue authority.
4. Learned trial court is hereby directed matter be reinstate in its original number and decided a fresh as early as possible from the receipt of record.
5. Both parties are directed to appear before learned trial court on 30.9.2016 positively.
6. Dictated and pronounced in open Court.

Sd/-

(V.K.Mande)

*Adhoc District Judge-2,
Nanded."*

Date: 01.09.2016

5) Ms.Jain learned counsel for the appellants submits that none of the parameters of Rule 23-A or 25 of Order 41 of the Code of Civil Procedure were satisfied in the present case and therefore, the impugned award of remand is *ultra vires*. She submits that there is no difference or substance in the issues recast by the Appeal Court and the issues originally framed by the Trial Court. She submits that the issue as to whether consent deed was never signed by the husband of the plaintiff i.e.Madhav or whether the signatures of Madhav was allegedly taken on the blank stamp paper when he was in drunken stage, were clearly framed and the Trial Court based upon the evidence on record has answered such issues against the original plaintiffs. She submits that in the circumstances, actual consent deed was never produced on

record by both the parties was quite irrelevant and in any case was not a sufficient ground to order remand. At the highest, the Appeal Court on the basis of entire material on record, could have re-assessed and revisited the findings recorded by the Trial Court while disposing of the Appeal instituted by the original plaintiffs.

6) Mr.M.D.Gitte, the learned counsel for the respondents (original plaintiffs) submits that there is no error in the Judgment and order of remand in the facts and circumstances of the present case. He points out that the consent deed was in possession of the present appellants (defendants in the Suit) and even though the same was never produced before the Trial Court, the Trial Court has decided the matter in their favour on the basis that such consent deed was validly executed by the husband of the defendant no.1/original plaintiff no.1 i.e. Madhav, who is since deceased. He submits that on the basis of the consent deed, the revenue authorities

effected some mutations in the entries in the revenue records. In these circumstances, the Appeal Court has directed the appellants (original defendants) to produce consent deed on record. If they do not possess such consent deed, the Appeal Court has granted the respondents liberty to apply to the Trial Court for production of such consent deed from the revenue authorities. He submits that therefore, there is no case made out to interfere in the impugned Judgment and order.

7) Upon taking into consideration rival contentions and after perusing record as well as the impugned Judgment and order, interference is warranted in the impugned order for the reasons set out hereafter.

8) From the pleadings, it is clear that even the original plaintiffs had made reference to the consent deed, but had alleged that such consent deed was a product of fraud played upon them. Infact their

pleadings were that the appellants (original defendants) obtained the signature of husband of the plaintiff no.1 on blank stamp paper when he was in drunken position by creating a mis-impression of batai Vyawahar (partition). This pleadings no doubt are denied by the defendants. Issues which had framed are based upon these pleadings and also other controversies between the parties. The Trial Court framed the following issues:-

"ISSUES

- 1. Whether plaintiffs prove that under the influence of liquor, defendants have obtained the signature of Madhav Rama on blank stamp paper ?*
- 2. Whether plaintiffs prove that behind the back of deceased Madhav Rama defendants have executed "Sammati Patra" on said stamp paper ?*
- 3. Whether plaintiffs prove that mutation entries no.523 and 1106 are illegal ?*
- 4. Whether defendants prove that partition was effected ?*

5. *Whether defendants prove that suit is bad for want of the principles of estoppel ?*

6. *Whether plaintiffs prove that they are entitled for declaration as sought for ?*

7. *Whether plaintiffs prove that they are entitled for possession as claimed for ?*

8. *Whether plaintiffs prove that they are entitled for perpetual injunction as sought for ?*

9. *Whether defendants prove that they are entitled for compensator costs as prayed for ?*

10. *What order, decree and costs ?"*

9) In the context of the consent deed, issue Nos.1, 2 and 3 are absolutely relevant, as they cover all the areas of the dispute between the parties.

10) No doubt, after assessing the evidence on record, the Trial Court answered such issues against the original

plaintiffs. If, on the basis of evidence on record, the Appeal Court were to come with a different view and reverses the findings recorded by the Trial Court, that was a different matter. However, the Appeal Court, on the ground that the opportunity is required to be afforded to the original plaintiffs to produce on record, the consent deed, had chosen to set aside the impugned decree and to remand the matter for virtually a *de-novo* trial. Such a ground of action does not appear to be justified under Rules 23, 23-A, 25 of Order 41 of the Code of Civil Procedure.

11) On the sole ground that the consent deed was not produced on record, there was no necessity to set aside the impugned decree and to remand the matter. There is nothing on record to indicate that the respondents (original plaintiffs) in the course of the trial before the Trial Judge took any steps with regard to the production of the consent deed. There is nothing on

record to indicate that any notice was issued to the defendants to produce the same. Since, it is the case of the defendants that such consent deed was not in their possession, there is also nothing on record to indicate that any steps were taken by the original plaintiffs to summon the revenue authority in whose custody the said consent deed was allegedly held. Instead, the original plaintiffs chose to lead evidence on the issues framed. The issues as framed by the Trial Court very clearly indicate the issue with regard to the fabrication of the consent deed. Since, such evidence has already been led by the original plaintiffs and has been countered by the original defendants, it was for the Appeal Court to have re-assessed such evidence in order to determine whether the findings of fact written by the Trial Judge warranted interference. There was no case made out for remand.

12) Atleast, prima-facie, it does not appear to be any significant different in the issues, which have been

recast by the Appeal Court in the impugned award and the issues as originally framed by the Trial Court. The issues framed/recast by the Appeal Court read as follows:-

"15. Therefore, it is just and proper to frame following issues. As per the pleading of both the parties and requires to decide the same.

I S S U E S

- 1. Do plaintiffs prove their ownership over the suit landed properties ?*
- 2. Do plaintiff prove suit property was given to the defendant No.1 on oral Batai basis and to that effect defendant No.1 obtained signature of Madhav on blank stamp paper under influence of liquor ?*
- 3. Does defendant No.1 prove deceased Madhav agreed to alienate his shares land to him for consideration of Rs.40,000/- in the year 1991 ?*
- 4. Does defendant No.1 prove deceased Madhav by obtaining consideration amount of Rs.40,000/-, he executed lawful consent deed in his favour and given*

suit land to him ?

5. Does defendant No.1 prove that partition was effected in the year 1991 in between four brother of their ancestral property ?

6. Does defendant No.1 prove deceased Madhav by obtaining amount of Rs.40,000/- purchased landed property at village Bopla, Tal.Dist.Latur ?

7. Are plaintiff entitle a relief of declaration as prayed for ?

8. Are plaintiff entitle recovery of possession of suit land from the defendant ?

9. Are plaintiff entitled a relief of perpetual injunction as prayed for ?

10. Are defendant entitle the compensatory cost as prayed for ?

11. What order and decree ?"

13) If the aforesaid re-framed/recast issues are

compared with the issues originally framed by the Trial Court, it cannot be really said that there was substantive difference between the two. In any case, merely because the issues may be required to be recast, that by itself, does not mean that the matter warrants a remand and that too, remand without any restrictions for virtually retrial of the Suit. On the basis of evidence on record, the Appeal Court could have itself decided the recast issues, if indeed, any recasting was necessary.

14) This is not a case where the Trial Court had disposed of the Suit on some preliminary points and therefore, the provisions of Order 41 Rule 23 were in any manner attracted. No doubt, under Order 41 Rule 23, the Appeal Court, if it considers it necessary in the interest of justice, may also remand a case and further direct the Trial Court that all the issues are required to be tried, in case so remanded. However, even before exercise of such powers, the Appeal Court has to be

satisfied that the interest of justice requires such remand. Power cannot be lightly exercised by the Appeal Court.

15) In *Balasubramania Iyer Vs. Subbiah Thevar and another* [**AIR 1965 Madras 417**], it is held that where the Trial Court has disposed of a Suit on merits, the Appeal Court must normally dispose of the Appeal on merits and not avoid this duty by lightly exercising the power of remand.

16) Infact in *K.Krishna Reddy Vs. Special Deputy Collector, Land Acquisition Unit 2, LMD Karimnagar, Andhra Pradesh* [(**1988**) **4 SCC, 163**], the Supreme Court held that an order of remand should not be taken to a matter of course. The power of remand should be sparingly exercised. There should always be an endeavour to dispose of the case by Appellate Court itself on merits.

17) In *Niranjan Lal Vs. U.T.I. and others* [**AIR 2007 Raj., 18**] it is held that the tendency to remand the case in toto after setting aside the Judgment and decree of the Trial Court and the tendency to direct *de novo* trial in a routine manner, is against the tenor of law. The Appellate court is expected to exercise its powers within the confines to Rules 23 to 26-A of Order 41 of the Code of Civil Procedure.

18) In *Sk.Ibrahim s/o Sk.Mohamood and others Vs. Sk.Mehmood s/o. Sk.Vazir* [**AIR 2003 Bom., 357**] this Court has held that where the parties were aware of their respective cases and led evidence on the said basis, omission to frame some issue is no ground for remand unless, such omission was fatal to the case of either of the parties.

19) In this case, the provisions of order 41 Rule 23-A

are also not attracted. Similarly, there is no question of applicability of Order 41 Rule 25 as well.

20) Therefore, on cumulative consideration of the aforesaid circumstances, the impugned order is set aside.

21) Since, the Appeal Court has not at all examined the appeal instituted by the respondent on its own merits, it is only appropriate that the matter be remanded to the Appeal Court for disposal of the appeal in accordance of law and on its own merits as expeditiously as possible and in any case within a period of six months from the date of production of an authenticated copy of this order.

22) It is clarified that this Court has not examined the merits of the matter, except for the purpose of examining whether any case was made out before the Appeal Court to remand the Suit before the Trial Court. Therefore,

observations in this order need not influence the Appeal Court while disposing of appeal on its own merits and in accordance with law.

23) The appeal is allowed to the aforesaid extent. There shall be no order as to costs.

24) As the appeal from order is disposed of, the Civil application for stay does not survive and it is also disposed of.

25) The parties to appear before the Appeal Court on 12.2.2018 at 11:00 a.m. and file authenticated copy of this order.

[M.S.SONAK, J.]