

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10949 OF 2017

Dhondiba Mohanji Yelwande (Since deceased) Through LRs. & Ors. V/s. Vithalrao Kashinath Dhankawade & Ors.		Petitioners Respondents
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Mr. Shriram S. Kulkarni for the Petitioners.
Mr. Ashok B. Tajane for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th JANUARY, 2018.

P.C. :

1] Heard learned counsel for the Petitioners and the Respondents.

2] By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 18th August, 2017 passed by the Adhoc District Judge-1, Pune, thereby rejecting the application at Exhibit-95 filed by the Petitioners for framing of additional issues in the Civil Appeal No.330 of 2012.

3] The said application was filed by the Petitioners, who are the original Respondents in the Appellate Court contending *inter-alia* that in view of the additional written statement filed on the record, there may be some additional issues which are arising in the matter and the Appellate Court should frame those issues, so that the parties can proceed with the hearing of the appeal.

4] The Appellate Court, however, by its impugned order rejected the said application, further observing that as the amendments in the pleadings were carried out due to subsequent event and its effect on the suit will be a matter of final decision of the appeal and as the Court has power to frame additional issues, if required, “after the appeal is finally heard”; at this stage, it is not necessary to frame those issues.

5] However, in my considered opinion, once the Appellate Court has held that framing of additional issues may be necessary on account of amendments carried out in the pleadings due to subsequent events and has further held that it has power to frame additional issues, it follows that the Appellate Court should have framed such

issues or recast them before final hearing of the appeal commences. The Appellate Court cannot be justified in framing or recasting the issues “after the appeal is finally heard”, as then it will not give an opportunity to the parties to argue the matter on those issues. Therefore, it would be proper and just to accept the fair submission made by learned counsel for the Petitioners that the Petitioners would submit the draft issues before the Appellate Court and the Appellate Court would consider the same at the time of final hearing of the appeal.

6] Learned counsel for the Respondents has raised objection on ground that earlier also similar such application at Exhibit-48 was filed for framing of additional issues and that application was rejected by the Appellate Court on 22nd July, 2015, hence the present application is bared by *res-judicata*.

7] However, as rightly submitted by learned counsel for the Petitioners, subsequent to that order dated 22nd July, 2015 the plaint is amended and additional written statement is also filed. In view thereof the said order cannot act as a *res-judicata*.

8] The impugned order passed by the Appellate Court is thus set-aside. The Writ Petition is accordingly allowed, giving an opportunity to the Petitioners to submit the draft issues to the Appellate Court, which would be considered by the Appellate Court at the time of final hearing of the appeal.

9] The Appellate Court is directed to decide the appeal as expeditiously as possible.

[DR.SHALINI PHANSALKAR-JOSHI, J.]