

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

**APPEAL FROM ORDER NO.12 of 2019
with
CA NO.2775 of 2019**

- 1) Ramdas s/o Rangnath Pokale
Age: 67 Yrs., occu. Agril.
R/o Tawallwadi, Tal.Ashti,
District Beed.
- 2) Narmada w/o Trimbak Kokane,
Age: 72 Yrs.,
occ. And r/o as above.
- 3) Lochanabai w/o Tukaram Dhas,
Age: 65 Yrs., occu. Agril.
R/o Jamgaon, Tal.Ashti,
District Beed.

= **APPELLANTS**

(Orig.Deft.Nos.3 & 5)

VERSUS

- 1) Kalawati w/o Babasaheb Pokale,
Age: 62 Yrs., occu. Household,
R/o Tawalwadi, Tal.Ashti,
District Beed.
(Also know as Kalawati d/o
Yeshwanta Gore)
- 2) Shantaram s/o Pandharinath Tawale
Age: 60 Yrs., occu. Agril.
R/o Tawalwadi, Tal.Ashti,
District Beed.

= **RESPONDENTS**

(Resp.No.1 is orig.
pltff. And Resp.No.2
is orig.Deft.No.1)

WITH

**APPEAL FROM ORDER NO.13 of 2019
with
CA NO.2798 of 2019**

- 1) Ramdas s/o Rangnath Pokale
Age: 67 Yrs., occu. Agril.

R/o Tawallwadi, Tal.Ashti,
District Beed.

2) Narmadabai w/o Trimbak Kokane,
Age: 72 Yrs.,
occ. And r/o as above.

3) Lochanabai w/o Tukaram Dhas,
Age: 65 Yrs., occu. Agril.
R/o Jamgaon, Tal.Ashti,
District Beed.

= **APPELLANTS**

(Appellant No.1 is orig
Deft.No.1/plaintiff &
Appellant Nos.2 & 3
are orig.deft.3 & 4)

VERSUS

1) Kalawati w/o Babasaheb Pokale,
Age: 62 Yrs., occu. Household,
R/o Tawalwadi, Tal.Ashti,
District Beed.
(Also known as Kalawati w/o
Babasaheb Pokale)

2) Shantaram s/o Pandharinath Tawale
Age: 60 Yrs., occu. Agril.
R/o Tawalwadi, Tal.Ashti,
District Beed.

= **RESPONDENTS**

(Resp.No.1 is orig.deft
No.5 & Resp.No.2 is
orig. deft.No.6)

Mr.RS Wani, Advocate for Appellants;

Mr.GR Syed, Advocate for Respondent No.1;

Mr.HV Tungar, Advocate for Respondent No.2.

WITH

APPEAL FROM ORDER NO.22 of 2019

WITH

CA NO.3754 of 2019

Kalawatibai w/o Babasaheb Pokale,
(Kalawati D/o Yeshwanta Gore)
Age: 63 Yrs., occu. Household,
R/o Tawalwadi, Tq. Ashti,
District Beed.

= **APPELLANT**

(Orig.Plaintiff)

VERSUS

- 1) Shantaram s/o Pandharinath Tawale
Age: 57 Yrs., occu. Agril.
R/o Tawalwadi, Tq.Ashti,
District Beed.
- 2) Ramdas s/o Rangnath Pokale
Age: 65 Yrs., occu. Agril.
R/o Tawalwadi, Tal.Ashti,
District Beed.
- 3) Narmada w/o Trimbak Kokane,
Age: 70 Yrs., occ. Household,
R/o Tawalwadi, Tal.Ashti,
District Beed.
- 4) Lochanabai w/o Tukaram Dhas,
Age: 65 Yrs., occu. Agril.
R/o Jamgaon, Tal.Ashti,
District Beed.

= RESPONDENTS

(Resp.No.1 is orig.
deft.No.1 and Resp.
Nos.2 to 4 are
orig.deft.Nos.3to5)

WITH

APPEAL FROM ORDER NO.23 of 2019

WITH

CA NO.3755 of 2019

Kalawatibai w/o Babasaheb Pokale,
(Kalawati D/o Yeshwanta Gore)
Age: 63 Yrs., occu. Household,
R/o Tawalwadi, Tq. Ashti,
District Beed.

= APPELLANT

(Orig. Deft.No.5)

VERSUS

- 1) Shantaram s/o Pandharinath Tawale
Age: 57 Yrs., occu. Agril.
R/o Tawalwadi, Tq.Ashti,
District Beed.
- 2) Ramdas s/o Rangnath Pokale
Age: 65 Yrs., occu. Agril.
R/o Tawallwadi, Tal.Ashti,
District Beed.

3) Narmada w/o Trimbak Kokane,
Age: 70 Yrs., occ. Household,
R/o Tawalwadi, Tal.Ashti,
District Beed.

4) Lochanabai w/o Tukaram Dhas,
Age: 65 Yrs., occu. Agril.
R/o Jamgaon, Tal.Ashti,
District Beed.

= RESPONDENTS

(Resp.No.1 is orig.
deft.No.6 and Resp.
No.2 is orig pltff
and Resp.Nos.3&4
orig.deft.Nos.2to3)

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Mr.GR Syed Advocate for Appellant;

Mr. HV Tungar, Advocate for Resp.No.1

Mr.RS Wani, Advocate for Respondent Nos.2 to 4.

CORAM : SMT.VIBHA KANKANWADI, J.

RESERVED ON : 27th January, 2021

PRONOUNCED ON: 23rd February, 2021

JUDGMENT :-

1. All these Appeals from orders are almost between the same parties and involve common point and, therefore, they are being heard together and proposed to dispose of by a common judgment.

2. Appeal from Order No.12/2019 and Appeal from Order No.22/2019 challenge the judgment and order passed in Regular Civil Appeal No.22/2015 by learned District Judge-8, Beed on 14.12.2018. Appeal from Order No.12/2019 has been filed by

original defendant Nos.3 and 5; whereas Appeal from Order No.22/2019 is filed by original plaintiff. Original plaintiff filed Regular Civil Suit No. 322/2005 before Joint Civil Judge, Junior Division, Ashti, District Beed for declaration of ownership and permanent injunction. Appeal from Order No. 13 of 2019 has been filed by original deft No.1, who was later on transposed as plaintiff in Regular Civil Suit No.95 of 2005, with original defendant No.3 and 4; whereas Appeal from Order No.23 of 2005 is filed by original defendant No. 5 in the same suit. Appeal from Order No.13/2019 and Appeal from Order No. 23/2019 challenge the judgment and order passed in Regular Civil Appeal No.21/2015 by learned District Judge-8, Beed on 14.12.2018. Parties are referred by their names for the sake of convenience and to avoid confusion.

3. It appears from all these Appeal from Orders that Dwarkabai Babasaheb Pokale, who was defendant No.6 in RCS No.322/2005, had filed RCS No.95/2005 for partition, separate possession and mesne profits as well as for declaration that the divorce obtained from Defendant No.5 by deceased

Babasaheb is legal. Defendant No.5 is plaintiff in RCS No.322/2005. During pendency of the suit, Dwarkabai expired and in her RCS No.95/2005, original defendant No.1 therein, was transposed as plaintiff. Both the suits were tried before the Joint Civil Judge, Junior Division, Ashti, District Beed and they were disposed of by separate judgments by the same Judge on 31.12.2014. RCS No.322/2005 was decreed. The Kalawati and Ramdas were declared as owners of undivided 1/4th share each in the suit land. Defendant No.1 in RCS No. 322/2005 and deft. No.6 in RCS No.95/2005, viz. Shantaram was restrained from disturbing the possession of the plaintiffs over the suit land. In RCS No.95/2005 along with the transposed plaintiff, deft.Nos. 3 to 5 were declared as owners of 1/4th share each in the suit land as well as suit house. The partition was directed to be effected through precept to be sent to the Collector in respect of the agricultural land and through Court Commissioner in respect of the suit house.

4. Defendant — Shantaram challenged the

decree passed in RCS No.322/2005 by filing Regular Civil Appeal No.22/2015 and by filing Regular Civil Appeal No.21/2015 he challenged the judgment and decree passed in RCS No.95/2005. Both the appeals were heard by learned District Judge-8, Beed and by separate judgments pronounced on 14.12.2018, both the suits were remanded to the trial court with directions to allow defendant – Shantaram to amend his pleadings and adduce evidence, if any in view of the observations made in the judgment. It was thereafter directed that the learned Trial court should frame appropriate issues in consequence of the amendment and to give an opportunity to all the parties to put their fresh evidence. These judgments and orders passed in both the Regular Civil Appeals are the subject matter of these four Appeals from order. Civil Applications have been filed in respective Appeal from Orders for stay to the orders passed in the Regular Civil Appeals.

5. Heard learned Advocate Mr. Wani appearing for the appellants in AO Nos.12/2019 and 13/2019; Learned Advocate Shri GR Syed for appellants in AO Nos.22/2019 and 23/2019; Learned Advocate Mr. HV

Tungar for Respondent No.1, i.e. Respondent – Shantaram in all the four Appeals from Order.

6. It has been vehemently submitted on behalf of the appellants that the learned District Judge-8 failed to take into consideration the pleadings those were put by defendant – Shantaram in both the cases. Defendant No.1 had contended that deceased – Babasaheb, through whom plaintiff – Kalawati as well as Dwarkabai were claiming, had inducted him on batai basis in the month of Vaishakh prior to two years of his death. However, he preferred not to lead any evidence in support of his contention and he simply passed a pursis to that effect. If he had no intention to lead any evidence, the learned First appellate court cannot force him to lead it. Necessary particulars of alleged tenancy were never given by defendant No.1 – Shantaram in his written statement. He never made any application before the trial court when the matter was pending for about nine years two months and twenty six days to have appropriate issues framed in view of the decision. Now, at the time of appeals, something on the basis of the

other suit and the decision given by the Tahsildar, the learned first appellate court has given an opportunity to defendant no.1 to amend his written statement when, in fact, his appeal memo does not contain any such prayer. Perusal of the appeal memo would show that he never prayed for remand of the matter. The rules of amendment under Order VI, particularly Rule 17 of Code of Civil Procedure are very much strict and unless the reasons are assigned as to why those pleadings could not be incorporated at the appropriate stage, none of the parties can be allowed to amend their pleadings. Under such circumstance, the first appellate court by its judicial order cannot dilute the strict rule. Reliance has been placed on the decision in the case of Syeda Rahimunnisa Vs. Malan Bi (Dead) by Legal Representatives and another – (2016) 10 SCC 315., wherein it has been held that, -

“....in absence of any pleading for remand before High Court or first appellate court, matter cannot be remanded to lower court, where parties to appeal never complained at any stage of proceedings that trial of suit was unsatisfactory resulting in prejudice, under such circumstances remand cannot be made – Party seeking remand must make out case under Rule 23 or Rule 23-A or R. 25 of Order 41 CPC.”

7. It was further submitted on behalf of the appellants that the first appellate court failed to consider that though defendant No.1 had specifically denied in his written statement that plaintiff – Kalawati is cultivating the suit land after demise of her husband; yet preferred not to lead evidence though he was contending that he was inducted by Babasaheb. No doubt, there was internal dispute between Kalawatibai and Dwarkabai on the point of divorce that was allegedly given to Kalawatibai by Babasaheb and thereafter his marriage with Dwarkabai, however, by amending the plaint, plaintiff – Kalawatibai herself had contended that she as well as defendant Nos.2 and 3, i.e. Shantabai Rangnath Pokale and Ramdas Rangnath Pokale, be declared as owners. In fact, earlier she was praying that she alone had succeeded to the property left by Babasaheb, who was son of Rangnath and Shantabai. Mere producing certain certified copies of decision before the revenue authority, it cannot be stated that deft.No.1 was in possession in the capacity as tenant. Further, it was specifically mentioned that though defendant No.1 succeeded in getting his name

mutated to the 7/12 extract for the year 2004-2005, the appeal preferred by the plaintiff before the Sub Divisional officer, Beed was still pending when Kalawati filed the suit. Under such circumstance, when he preferred not to lead evidence, the first Appellate court exceeded in its jurisdiction in allowing him to amend the plaint and giving him an opportunity to lead evidence in respect of the amended plaint. The order of remand in both the appeals is, therefore, illegal and deserves to be set aside.

8. Per contra, learned Advocate Mr. Tungar, appearing for defendant – Shantaram, at whose instance now, the suits have been remanded by the first Appellate Court, submitted that, there were basic pleadings in the written statement filed by defendant – Shantaram in both the suits. Defendant No.1 had admitted the description of the suit land. In fact, in his written statement in RCS No.322/2005, he has specifically contended that deceased – Babasaheb had given customary divorce to plaintiff – Kalawati on 20.4.1978. He also contended that deceased Babasaheb had married to

Dwarkabai in May 1979 as per Hindu rites. He had thereafter contended that he was inducted by Babasaheb in the suit land for cultivating the land on batai basis as defendant-Ramdas was staying outside the village for his business and Babasaheb himself was unable to cultivate the land. There were attempts by him to get his name mutated, however, the Talathi had not mutated it. Finally, he applied for mutation of his name on 19.10.2004 and then after a detailed enquiry, his name came to be mutated. Taking into consideration this aspect which was also pleaded in RCS No.95/2005, issue to that effect in both the cases, ought to have been framed in respect of tenancy of defendant – Shantaram and thereafter adjudication in that respect ought to have been given.

9. The learned Advocate Shri Tungar has relied on the decision of the Division bench of this Court, bench at Panaji (Goa) in the case of Shri Ajit Gaitonde and Anr. Vs. Smt. Ezilda Emiliana Cristina Pinto(since deceased) – 2009 (3) ALL MR 838, wherein, it has been held thus,-

“..Where a Court is rendering a finding,

it has got to be relatable to a plea taken up in the pleadings of the parties and the issue framed thereupon. In the written statement, no such a plea was raised. Even the written statement of the defendants was vague in this behalf. The trial Court did not frame any issue as regard to the authority or otherwise of the power of attorney and the consequence of its ratification or otherwise. The trial Court held that the power of attorney did not empower the holder of the attorney to enter into agreement to sell or transfer the property, and as such, the findings of the trial Court are in apparent violation of the basic rule of law and the provisions of the Code of Civil Procedure. Held, it was expected of the trial Court to frame an issue and subject the parties to trial on that issue. Non-framing of an issue is a defect in the trial and has certainly affected the rights of the parties to the suit, adversely. These are the findings which could be rerecorded only based on specific pleadings and upon taking appropriate evidence to the extent which parties may deem fit and proper."

10. He further submitted that justice is required to be done even when due to rustic and rural pleadings, some facts remained to be mentioned. The learned First appellate court has taken a note of the order passed by the Tahsildar, certified copy of which was produced at Exhibit-155, in RCS No.95/2005, wherein, the Tahsildar had accepted that the appellant is cultivating the land in the capacity of tenant in the year 2004-2005. It

was specifically observed that the Trial Judge has overlooked the point of tenancy and possession of Shantaram on the basis of such tenancy and, therefore, it is necessary to allow Shantaram to raise the defence of tenancy by giving an opportunity to amend his written statement.

11. Reliance has also been placed by defendant- Shantaram on the decision in the case of C.N.Ramappa Gowda Vs. C.C.Chandregowda (Dead) Lrs and Anr. - 2012 ALL SCR 1563, wherein there was a suit for partition and it was decreed ex parte on the basis of affidavit of plaintiff. The Written statement was not filed despite several particulars were provided. The witnesses of the plaintiff were also not cross-examined. Under those circumstances, the High Court remanded the case to the trial court for de novo trial. The said course adopted by the High court was held to be justified by Hon'ble Supreme Court.

12. At the outset, some relevant facts are required to be considered. -

A] It appears that RCS No.95/2005 was filed by Dwarkabai for partition, separate possession and

other reliefs on 28.3.2005. Dwarkabai had come with a case that she is widow of Babasaheb. In her pleadings itself, she had contended that Babasaheb was married to Kalawati, i.e. deft.No.5, in that suit. But then as they were not having any issue, they had decided to take divorce by custom and accordingly, by a registered deed, executed on 20.4.1978, they had taken divorce. Thereafter, Kalawati did not reside with Babasaheb. Babasaheb performed marriage with her. But, thereafter it is also contended that deft.Nos.2 to 5 therein, had filed Workmen's Compensation application. It came to be allowed on 19.9.1996. She was not made party to that proceeding. According to her, she is the only heir left by Babasaheb. Deft.No.2 therein is mother of Babasaheb. She further contends that she had demanded her share to be carved out and handed over to her. But it was not given and, therefore, the suit was filed.

B] Ramdas- Defendant No.1 is brother of deceased Babasaheb. Deft.Nos.1 and 2, i.e. brother and mother of deceased Babasaheb, filed joint written statement and it was also admitted that a customary divorce was taken by Babasaheb from Kalawati. They accepted that plaintiff-Dwarkabai has share and, therefore, they prayed that the decree be granted as per law. Deft.Nos.3 and 4 appears to be sisters of Babasaheb and Ramdas. They also prayed for decree as per law.

C] Deft.No.5 — Kalawati's written statement

in RCS No.95/2005 and her plaint in RCS No.322/2005, depict same contentions and, therefore, they are clubbed here. She admitted the description of the properties, she has stated that one Rangnath was the original owner, who died about 45 years ago, leaving behind wife, two sons and two daughters. Babasaheb (Rangnath's son) expired on 3.12.1991. She denied that there was any such divorce between her and Babasaheb as per law. According to her, she is cultivating the land after demise of Babasaheb, through labours. Her attempt to get the land mutated in her name has failed. However, deft.No.1 – Shantaram in RCS No.322/2005 and deft.No.6 in RCS No.95/2005, is resisting her possession without any right, title and interest and, therefore, she prayed for declaration and injunction in her suit and dismissal of the suit filed by Dwarkabai.

D] The contentions in the suit filed by Dwarkabai have been admitted by deft.No.6 by filing his written statement at Exh.20.

E] It will not be out of place to mention here that, after Dwarkabai died, her son, i.e. defendant – Ramdas, got himself transposed as plaintiff.

F] In the Written Statement filed to RCS No. 322/2005, Ramdas has raised same defence.

G] Deft.No.1 – Shantaram in RCS No.322/2005

contended that he was inducted by Babasaheb to cultivate the land on batai basis and his name came to be ultimately mutated for the year 2004-2005 in the cultivation column.

13. After the pleadings were complete, issues came to be framed in both the cases. The parties have led oral as well as documentary evidence. Suffice to state here that, defendant – Shantaram preferred not to lead any oral evidence. After considering the evidence on record, both the suits came to be decreed. In fact, it should be partly decreed. But, then Kalawati and Ramdas as well as the sisters of Babasaheb were held to be having 1/4th share each in the suit land as well as suit house. Defendant – Shantaram was restrained permanently from causing obstruction to the plaintiff's possession over the suit land as per the decree in RCS No.322/2005.

14. Both the judgments and decrees were challenged by defendant – Shantaram by way of separate appeals, i.e. RCA No.21/2015 and 22/2015. The learned District Judge-8, Beed has remanded both the suits with directions to the lower court to allow defendant – Shantaram to amend his

pleadings and give an opportunity to all the parties to lead evidence in consequence of the amendment. Perusal of both the judgments passed by the first Appellate Court, would show that the learned District Judge has placed reliance on certified copy of the decision by Tahsildar (Exh. 55, which was filed in RCS No.95/2005). It appears that before the Tahsildar, defendant Shantaram had put-forth the theory that he was inducted as tenant. However, thereafter there was an agreement to sell. If we peruse the decision given by the Tahsildar, that was produced in the appeal before the first Appellate court, it does not give the date of agreement to sell. Further, it appears that the learned first Appellate court lost sight of the fact that if Shantaram intended to contend that in view of the agreement to sell, the possession was continued, then there should be a written agreement to sell. It appears that in both the matters, Shantaram had not filed any such document. Another fact to be noted is, it does not appear even in the written statement filed by Shantaram or any such order passed by the Tahsildar, as to on which date, Shantaram was inducted as tenant. He

has vaguely stated that two years prior to Babasaheb's death he was inducted. Babasaheb expired on 3.12.1991. It ought to have been considered by the learned first Appellate court that if this contention of the defendant (in absence of any evidence led by him) is to be accepted, it would date back to 1989 and since then till 2004-2005, there was not a single attempt by Shantaram to get his name mutated. The said mutation about his possession is said to be for the year 2004-2005. When Babasaheb had expired in 1991, then how without any further transaction his name can be mutated in 2004-2005, is a question. If Shantaram want to protect his alleged possession to be protected on the basis of alleged agreement to sell in view of Section 53-A of Transfer of Property Act, then such agreement should be in writing. Further in view of amendment in 2001 to the Transfer of Property Act, if possession is handed over, then such document should be registered. There is absolutely no application of mind to all these facts by the learned first Appellate Court.

15. It was defendant Shantaram who had opted for not to lead any evidence. He had not even made an attempt to amend his written statement during pendency of the appeal for about three years, ten months and thirteen days. Perusal of the appeal memo would show that there was absolutely no prayer for remand of the matter. Under such circumstance, on the basis of some flimsy ground, the first Appellate Court cannot exercise its powers under Rule 23 or 23-A of Order 41 CPC. Though the learned first Appellate court had taken the note of the pursis filed by Shantaram, at Exh. 116, for not adducing any evidence in RCS No.322/2005; yet it is very much surprising that such order of remand, that too with liberty to amend the written statement, has been passed.

16. Another glaring mistake has been committed by the learned First Appellate Court. In fact, whatever evidence has been led in RCS No.95/2005 ought to have been strictly considered while deciding the appeal arising out of that judgment and decree. Same is the rule for appeal arising from the judgment and decree passed in RCS

No.322/2005. Evidence led in one case can not be *suo motu* considered by the appellate authority while deciding another appeal. Merely because the concerned Judge is deciding two matters in respect of the same property and/or between same parties; yet it is permissible in law that a Judge can consider the evidence led in one of the matters while adjudicating the another case. Interestingly, though evidence in one matter is considered by learned District Judge-8 in another matter while deciding those two appeals, yet, she has written two separate judgments.

. In fact, this Court has time and again deprecated this practice of writing two separate judgments in respect of two or more matters, which one has impact on the other matter. Reason is obvious, the concerned Judicial Officer wanted to take the norms of disposal for two matters. Once, again such practice is required to be deprecated by reproducing the observations made by this Court in Second Appeal No.153/2017 with SA No. 154/2017 decided on 13.8.2019 – Vikas Shivdas Patil Vs. Sow. Gitanjali Vikas Patil. and in Cri. WP. No.1985/2019 with Cri.Revn.No.368/2019, dated

12.6.2020 (Monika Sales Agencies and Anr. Vs.

Mahesh Nagari Sah.Patsanstha Ltd.). The said

observations read thus, :

".....Though both the matters were between the same parties, wife had filed petition for restitution of conjugal rights whereas husband was asking divorce. Both the Courts below ought to have given a common Judgment so as to avoid any contrary observations, so also to have a compact view of the dispute between the parties and the adjudication thereof. It would be a harsh statement to make, but it has to be made just to get some disposal units, if such practice is adopted then it is depreciable. The parties approaching the Court should get clear idea as to why their petition/ petitions have been either allowed or rejected and when the evidence has been led in one of the matters only, then just by taking a pursis in another matter, it is not appropriate on the part of the trial Court to pronounce a total separate Judgments in order to create any confusion. Here in this case trial Court in both the matters had given the Judgment on the same day in both the matters when in fact a common Judgment could have been given. Points for consideration in such matters would be overlapping and under such circumstance a common Judgment ought to have been given. Same happened at the stage of appeal also, therefore at the cost of repetition it can be said that, if such practice is adopted, just to get more disposal units then it is required to be deprecated.

17. At the cost of repetitions, it is reiterated that, judicial officers, only to get more disposal norms, should not resort to such kind of practice, which will jeopardize the rights and remedies of the parties.

18. The learned first Appellate court has

given much weightage to the decision given by the Tahsildar- a revenue officer, who had, in fact, no right to adjudicate the civil rights of the parties. The learned first Appellate Court lost sight of the fact that the said order passed by the Tahsildar was subjudice before the Sub-Divisional Officer when RCS No.322/2005 was filed. That means the judgment and order, which is relied upon by the learned first Appellate Court, for remand, had, in fact, not attained finality. It is, therefore, dangerous for the Civil Courts to rely on a decision by the revenue officer, without there being any finality achieved to it.

19. Nobody had estopped or prevented defendant – Shantaram from taking all those contentions, which he had taken before the Tahsildar for a clear-cut pleadings and request the learned Trial Judge to frame an issue to that effect. The work of framing of issues is a conjoint task of the concerned Court as well as the lawyers, who are representing the parties. If we consider the tenor and frame of Order 14 of CPC, then it is for the concerned Court to hear the

parties. That means, both the parties to submit their pleadings or give summary of their pleadings before the concerned Court and then it is expected that based on those pleadings, issues should be framed. When the suit was pending for such a considerable time and there was no attempt by defendant Shantaram that proper issues have not been framed, he cannot raise it once again, when in spite of knowledge, he preferred not to lead evidence by giving the pursis at Exh.116. The facts in C.N.Ramappa 's case (supra) are different. In that case, it was an exparte decree and after it was shown by the defendant that why he could not produce or submit written statement, the matter was remanded by the High Court for a *de novo* trial.

20. Sisters of Babasaheb were also parties to RCS No.322/2005 as deft.Nos.4 and 5. In the decree passed by the learned Trial Judge, declaration is given to the extent of Kalawati and deft.No.3 – Ramdas's share, i.e. 1/4th each. Then the learned First Appellate Court observes about deft.Nos.4 and 5 that there is an error in the operative order passed by the learned trial Judge. In fact, there

was no hurdle for the appellate court to correct the operative order while arriving at the computation of the share. In para No.55, the learned Trial Judge has specifically observed that the plaintiff and deft.Nos.3 to 5 are entitled to 1/4th share each in the suit land. Therefore, it can be seen that the Trial Judge has accepted that those sisters had share in the suit land. Merely because there was a typographical mistake in the operative order, that could have certainly been corrected by the learned Judge in the appeal under Section 96 of Order 41 of CPC. Those observations by the learned first Appellate Court show non-application of mind so also it is the result of error in giving two separate judgments.

21. The learned first Appellate Court has, in fact, observed in para No.30, thus, -

“30.... Defendant Shantaram has raised a defence in the appeal that apart from tenancy, later on he continued his possession on the basis of agreement to sale executed by defendant Ramdas. No doubt this defence was not raised by present appellant in lower court but this theory of defendant reflects in the order of Tahsildar.”

. Thereafter learned Judge has reproduced

the case put-forward by Shantaram before the Tahsildar and again observed, - "Thus, it seems from above observations of Tahsildar that defendant's stand/defence is not coming at appellate stage as surprise. Why this defence was not raised in the lower court is not explained by appellant." When the defendant- Shantaram had not raised such defence by his own choice, preferred not to lead evidence by filing pursis Ex.116, took part in final arguments; then question of giving an opportunity to him does not arise. Surprisingly, the first Appellate court has invoked the principle of *Audi Alterum Partem* and meaning of that doctrine has been given in bracket by the learned first Appellate court as - "None should remain unheard".

22. At the cost of repetitions, it can be said that proper opportunity was given to Shantaram to defend his case. He has taken part in both the cases. In RCS No.95/2005, he is in fact admitting the suit and in RCS No.322/2005, he has filed the pursis at Exh.116 for not to lead evidence when his turn to lead evidence had come. He cannot get any advantage of his own silence and, therefore, the

order of remand passed in both the cases by the learned first Appellate court are perverse and illegal. They deserve to be set aside. It can be seen that in view of decision of remand, it appears that the appeals were not decided on merits. Therefore, Regular Civil Appeals are required to be restored to file and the First Appellate Court has to give decision on merits in both the matters. All the Appeals from orders are, therefore, deserve to be allowed. In consequence, when this Court has inclined to set aside the judgments and orders passed by the first Appellate Court, the Civil Applications for stay do not survive and they stand disposed of. With these observations, following order is passed, -

ORDER

I) The Appeal from Orders Nos. 12/2019; 13/2019; 22/2019 & 23/2019 stand allowed;

II) The judgment and order passed by learned District Judge-8, Beed in RCA No.21/2015 and 22/2015, dated 14.12.2018 are hereby set aside. Both these Civil

Appeals are restored to file with their old numbers and they are made over to learned Principal District Judge, Beed for their disposal according to law;

III) Pending Civil Applications stand disposed of.

IV) No order as to costs.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV