

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

WRIT PETITION NO.9906 OF 2019

**LILABAI SARJERAO UNDE
VERSUS
SAYYED AHMEDALI CHANDALI THROUGH LRS MADINABAI
AHMEDALI SAYYED AND OTHERS**

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Advocate for the Petitioner : Shri N. B. Narwade
Advocate for Respondent No. 14 : Shri D. R. Adhav

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 08th AUGUST, 2019.

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PER COURT :

1. The petitioner original plaintiff is aggrieved by the order dated 30/04/2019, by which, the Appellate Court has rejected application Exhibit 94 filed by the petitioner seeking framing of a new issue under Order XLI Rule 25 of the Code of Civil Procedure and for remanding the matter to the Trial Court for recording of evidence on that issue.

2. The learned Advocate for the petitioner points out that respondent No. 14 in this petition, is the only contesting party. Rest of the parties have been served in the suit as well as the appeal and they have not caused any appearance. He,

therefore, prays for leave to delete respondent Nos. 1 to 13. Deletion is permitted at the risk of the petitioner.

3. I have considered the strenuous submissions for the learned Advocates and have gone through the petition paper book. Regular Civil Suit No. 104/2007 filed by the petitioner has suffered an order of dismissal on merits by judgment dated 16/03/2018. Regular Civil Appeal has been filed. The petitioner has raised a ground in the Appeal that issues were not properly cast.

4. Application Exhibit 94 has been filed by the petitioner praying for framing of an issue and for referring the said issue to the Trial Court so that the parties can lead evidence and the issue can be answered.

5. In my view, Exhibit 94 would practically lead to a remanding of the suit to the Trial Court. The Appellate Court, while exercising its jurisdiction under Section 96 of Code of Civil Procedure, has to notice as to whether the impugned judgment of the Trial Court could be termed as being perverse

or erroneous and unsustainable. If an issue is framed today, the appeal would be as good as allowed without any contest.

6. The learned Advocate for the contesting respondent No. 14 submits on instructions from the client present that Exhibit 94, in fact should have been considered by the Appellate Court alongwith the main Appeal. Since the petitioner insisted for an order, the Trial Court has taken up the said application and has passed the impugned order.

7. In my view, Exhibit 94 should have been dealt with by the Appellate Court alongwith the main Appeal as one of the grounds in the Appeal is as to whether the issues were properly framed.

8. In view of the above, this petition is partly allowed. The impugned order dated 30/04/2019 is quashed and set aside by imposing costs of Rs. 7,500/- on the petitioner, though the learned Advocate for respondent No. 14 prays that costs of Rs. 25,000/- be saddled. It is informed that the petitioner is a Cancer Patient and presently under treatment at Pune.

9. Shri Adhav learned Advocate submits, on instructions from respondent No. 14, that Rs. 7,500/- be paid for a social cause.

10. The learned Advocate for the applicant petitioner submits that the said amount will be deposited in this Court on or before 28/08/2019.

11. As such, the Registry shall transmit this amount, after deposit, to **"Shantivan". Arvi, Tq. Shirur Kasar, District Beed** either by Demand Draft (Demand Draft be drawn in the name of **" Bhavani Vidhyarthi Kalyan Pratishthan, Arvi")** or by way of electronic transfer (State Bank of India, Branch Shirur (Kasar), Account No. 33446000963, IFSC Code : SBIN0005995).

12. The Appellate Court would consider application Exhibit 94 on its own merits alongwith Regular Civil Appeal No. 144/2018, within the time frame as granted by this Court.

(RAVINDRA V. GHUGE, J.)

shp/-