

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

WRIT PETITION NO.730 OF 2016

Smt. Sonabai Sahebrao Pathrud
Aged 75 years, Occupation: Agriculture
Residing at Nari, Taluka: Barshi,
District: Solapur

... Petitioner

Vs

1 Bhausahab Ganpati Gaikwad
Aged Adult, Occupation: Household,
residing at Nari Taluka: Barshi,
District: Solapur

2 Vishnu Dnandev Ranmal
Aged about 44 years,
Occupation Agri
Residing at Nari, Taluka: Barshi,
District: Solapur

3 Anil Dnandev Ranmal aged about
55 years, Occupation: Agri.
Residing at Nari, Taluka Barshi,
District Solapur

4 Dattatray Dnandev Ranmal aged
about 50 years, Occupation: Agriculture
Residing at Nari, Taluka: Barshi,
District: Solapur

... Respondents

...

Mr. G.N.Salunkhe i/by Mr. Umesh Kurund for the Petitioner.
Mr. Ashok B. Tajane for the Respondent No.1.

CORAM : SANDEEP K. SHINDE J.

DATE : AUGUST 5, 2019

ORAL JUDGMENT :

Rule. Rule made returnable forthwith. Mr. Tajane waives service on behalf of the respondent no.1.

2 Petitioner/plaintiff, instituted suit for perpetual injunction on 14th February, 2000 against the respondent no.1/defendant no.1. Counter-claim was filed by the defendant no.1 therein to contend that on 28th February, 1992 by an agreement ('Suit Agreement' for short) plaintiff and her daughters agreed to sell land admeasuring five acres to the defendant for consideration of Rs.22,000/- and in pursuant thereto, possession was handed over to him. Defendant in the Written Statement would contend that pursuant to agreement dated 28th February, 1992, requisite permission was obtained by the plaintiff from Sub-Divisional Officer, Solapur on 26th September, 1992. Defendant would assert his possession in the suit land.

3 The learned Trial Court dismissed the suit as well as counter-claim and declined the decree of specific performance of the

suit agreement and directed the plaintiff to repay Rs.22,000/-, being earnest money to the defendant no.1.

4 The defendant no.1 presented Regular Civil Appeal No.88 of 2000, however, before that, plaintiff sold the suit land to the respondent nos.2 to 4 by registered sale deed dated 15th February, 2010. It is not in dispute that there was no restraint order against the plaintiff to sell or to alienate suit land. It is only after alienation of the suit land as aforesaid, defendant no.1 instituted Regular Civil Appeal No.88 of 2000.

5 The Appellate Court upon taking cognizance of the fact that the suit land has been alienated by the petitioner/plaintiff, the respondent nos.2 to 4, being purchasers of the suit land, were impleaded as respondents in the Regular Civil Appeal No.88 of 2000.

6 The Appellate Court by judgment and order set aside the decree passed by the Trial Court and remanded the matter in exercise of its powers under Order 41 Rule 23 of the Code of Civil Procedure, 1908 and as such, parties were relegated to the Trial Court for fresh trial.

7 Petitioner/plaintiff after remand, sought amendment to the plaint under Order 6 Rule 17 of the CPC vide application dated 10th December, 2014. He sought leave to incorporate pleadings. In the pleadings, it was pleaded that *He sold the suit land to the defendant nos. 2 to 4 by registered sale deed dated 15th February, 2010 and handed over possession to them. That while executing the sale deed, there was no restraint order against the him to alienate the suit land and upon receiving the consideration, sale deed was registered on 15th February, 2010. In terms of the decree passed in Regular Civil Suit No.88 of 2000, he deposited Rs.22,000/- being of earnest money. He sold the land for the legal necessity and resultantly defendant nos.2 to 4 are now owners of the suit land.*

8 This amendment was opposed by the respondent-defendant no.1, on the ground of inordinate delay in-as-much though order of as remand order was passed on 13th January, 2014, plaintiff sought amendment in December, 2014.

9 The learned Trial Judge declined the leave to amend the plaint on the ground that the proposed amendment, is contrary to

the finding recorded at the first instance and next ground is, that there is a finding of fact that defendant-respondent no.1 is in possession of the suit land.

10 Heard learned counsel for the parties.

11 It is not in dispute that the plaintiff sold the suit property to the respondent nos.2 to 4 on 15th March, 2010 by registered sale deed, i.e., after the suit and the counter-claim of the defendant was dismissed, but before presentation of the Regular Civil Appeal by the defendant no.1. It is not in dispute that there was no order in force on 15th March, 2010, restraining the plaintiffs from alienating the suit land. It is an admitted fact that the respondent nos.2 to 4 (Purchasers) were impleaded as respondents in the Regular Civil Appeal No.88 of 2000.

12 That once the order of remand is passed by the Appellate Court, it implies a reversal of the decision of the lower Court and re-opens the whole case for retrial by the lower Court except in regard to matters decided by the order of remand. In the case of **United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. AIR 2000 SC**

2957 has explained effect of remand in paragraph no.16 of its judgment, thus;

“16 But, it is now well settled that an order of remand by the appellate Court to the trial Court which had disposed of the suit revives the suit in full except as to matters, if any decided finally by the appellate Court. Once the suit is revived, it must, in the eye of the law, be deemed to be pending from the beginning when it was instituted. The judgment disposing of the suit passed by the single Judge which is set aside gets effaced altogether and the continuity of the suit in the trial Court is restored, as a matter of law. The suit cannot be treated as one freshly instituted on the date of the remand order. Otherwise serious questions as to limitation would arise. In fact, if any evidence was recorded before its earlier disposal, it would be evidence in the remanded suit and if any interlocutory orders were passed earlier, they would revive. In the case of a remand, it is as if the suit was never disposed of (subject to any adjudication which has become final, in the appellate judgment). The position could have been different if the appeal was disposed of once and for all and the suit was not remanded.”

13 Thus, once the decree passed by the trial Court is set aside, parties are at liberty to assert rival claims afresh. In this view of the matter, impugned order cannot sustain. Even otherwise proposed amendment is sought to bring on record events occurred subsequent to the decree passed by the trial Court.

14 The petition is, therefore, allowed and application filed by the plaintiff below Exhibit 185 in Regular Civil Appeal No.88 of 2000 is allowed. Amendment shall be carried out within four weeks from today. All contentions of the parties are kept open. Needless to state that defendant no.1 is entitled to file additional Written Statement.

15 At this stage, Mr. Tajane the learned counsel for the respondent apprehends obstruction to respondents' possession in the suit land and seeks protection thereto. The defendant No.1 is granted liberty to move the Trial Court for appropriate reliefs and if an application is filed and the relief is sought, the Trial Court shall decide the same independently without being influenced by the order passed by this Court.

16 Rule is made absolute in the aforesaid terms. Petition is disposed of.

(SANDEEP K. SHINDE, J.)