

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.61 OF 2019

1. Nanda Bhaskarrao Jagtap
Age 46 years, Occu. Household,
R/o. Santaji Nagar, Dabki Road,
Akola, District Akola
Through her General Power of Attorney
Bhaskarrao Sheshrao Jagtap
Age 68 years, Occu. Agriculture
R/o. Santajinagar, Dabki Road,
Near Nandini Mangal Karyalaya,
Akola, Tq. and District Akola .. (Original plaintiff)
2. Pramod s/o. Vitthalrao Ghadge
Age 39 years, Occu. Service,
R/o. Malhar Market, near Old Bus stand
Jalgaon, District Jalgaon (Khandesh) .. (Original defendant No.3)
.. Appellants

Versus

1. Bakulabai wd/o. Shrirang Kale
(deceased)
2. Prakash Shrirang Kale
Age 65 years, Occu. Service,
R/o. House No.548,
Nanda Nagar, Road No.7,
Indore (M.P.) .. Respondents
(Original defendants No.1, 2)

Mr. A. D. Sonkawade, Advocate alongwith Mr. Shubham Kute,
Advocate instructed by Mr. Ashwin V. Hon, Advocate for Appellants;

Mr. Avishkar S. Shelke, Advocate for Respondent No.2

CORAM : S. G. MEHARE, J.

DATE : 13-10-2023

ORAL JUDGMENT :-

1. The present appellants, the original plaintiff and defendant No.3, have impugned the Judgment and order of remand of the learned Ad hoc District Judge-1, Jalgaon, passed in Regular Civil Appeal No.877 of 2012, dated 19.08.2019.

2. The appellants are the plaintiff and defendant No.3; the respondents are defendants No.1 and 2. Appellant No.1, the sister of defendants Nos.2 and 3 and daughter of defendant No.1, had filed a suit for partition after her father's death. She had claimed that she was a legal heir entitled to a share in the property left by her father. The relations between the parties were not disputed.

3. The father died on 30.12.1998. The plaintiff had filed a suit bearing Special Civil Suit No.8 of 2000 for the partition on 18.01.2000. Before filing the suit, a notice for partition was sent to the defendants through a lawyer. The brother did not give her share and denied the partition. The notice was the cause of action for filing the suit.

4. Defendant No.1 had a case that soon after the death of the father, on the day of his *Varsha-Shraddha*, the plaintiff, in the presence of her husband and other relatives, had voluntarily relinquished her right in favour of defendants No.1 and 2. The father had expended the amount on her marriage in 1977. The

father gave the ornaments to her. The father was indebted. Hence, she relinquished her share and interest in the suit property.

5. Admittedly, the issue of limitation and voluntary relinquishment of rights by the plaintiff were not framed. However, the parties led the evidence, cross-examined the witnesses and advanced the arguments. The learned trial Court specifically discussed the defence raised by defendant No.2, the contesting brother. The trial Court, discussing the evidence on the points of limitation and relinquishment, has recorded the findings with reasons and held that neither the suit was barred by limitation nor the plaintiff had relinquished her share in the suit property. The learned trial Court decreed the suit and declared that the plaintiff is entitled to one-fourth ($\frac{1}{4}^{\text{th}}$) share in the suit property.

6. Defendant No.2 had preferred an appeal in the District Court. Hearing the parties, the learned Ad hoc District Judge-1, Jalgaon, formed an opinion that the trial Court did not frame the issues on the limitation and principle of estoppel. He has also formed an opinion that as the Will deed executed by the mother came into operation after her death and came to light after the decision of the learned trial Court, instead of considering the Will by way of additional evidence, it be sent back to the learned trial Court and granted leave to the defendant who was beneficiary of the Will to lead the evidence. The learned first appellate Court had recorded the findings that during the pendency of the appeal, the mother of

appellant no.2, i.e. appellant no.1 died. Hence, it is necessary to give the appellant an opportunity to adduce evidence in respect of the Will deed dated 22.02.2000. The learned first appellate Court directed the trial Court to give opportunity to both parties in respect of the Will deed and consider its legality and validity by framing particular issue on that point. In addition to the above directions it was also directed to the learned trial Court to decide the issues of limitation and principle of estoppel. On the above findings the first appellate Court remitted the suit to the learned trial Court without framing the issues.

7. The learned counsel for respondent/defendant No.2 submitted that an application for amendment of the written statement in pursuance of the Court order to prove the Will deed, but in the meantime, this Court had stayed the suit; hence, the amendment application remained pending.

8. The learned counsel for the appellants has vehemently argued that the learned first appellate Court did not frame the issues on the grounds raised by the respondents and erroneously granted leave to the parties to lead evidence. Therefore, the learned first Appellate Court erroneously exercised the power under Order XLI, Rule 23-A of the Code of Civil Procedure (for short, "C.P.C."). He has further argued that the learned first Appellate Court could not exercise power under Order XLI, Rule 23 of the C.P.C., as the suit was not decided on a preliminary issue.

9. To bolster his arguments, the learned counsel for the appellants relied on the case of ***Municipal Corporation, Hyderabad, Versus Sunder Singh (2008) 8 Supreme Court Cases 485***. He submits that there were no reasons before the learned first Appellate Court to remit the matter. He referred to Order XLI, Rule 24 of the C.P.C. and vehemently argued that the evidence on record was sufficient; therefore, the learned first Appellate Court instead of remanding it to the learned trial Court, should have determine the case finally. He has also argued that unless there are pleadings and evidence, the document, like Will-deed, cannot be admitted in evidence directly. On this ground also the impugned Judgment and decree is illegal and liable to be set aside.

10. Per contra, the learned counsel for the respondent referred to the defence raised by the contesting respondent and argued that since their father was indebted and had spent a good amount on the marriage of the plaintiff, she had voluntarily relinquished her right in the property of her father.

11. By referring to Order XIV, Rule (1), clauses (1) and (3) of the C.P.C., he argued that the issues are framed when a material proposition of fact or law is affirmed by the one party and denied by the other. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. The

Court has to frame distinct issues, and as per Rule 2 of Order XIV of the C.P.C., and pronounce Judgment on all issues. In a nutshell, he submits that the Court must bring to the notice of the litigant on whom the burden is to prove the particular facts by framing the issues. Therefore, the present respondent was unaware of what evidence he had to lead and the burden he had to discharge. The learned first Appellate Court had correctly considered the issues involved in the case and committed no error of law in remitting the matter as the trial Court did not frame the substantial issues. The learned first Appellate Court has correctly exercised the power under Order XLI, Rule 23-A of the C.P.C. The learned first Appellate Court had assigned the reasons in detail and rightly considered this as a fit case for remand.

12. To bolster his arguments, the learned counsel for the respondents has relied upon the cases of (i) ***Sitabai Pandurang Yerne Versus Durgabai Khushal Yerne and others, 2016(4) All M.R. 316*** and (ii) ***J. Balaji Singh Versus Diwakar Cole and Others, 2017 A.I.R. (SC) 2402***. Lastly, he submits that no prejudice has been caused to the appellants as the liberty has been granted to both parties to lead the evidence after framing the specific issues as the learned first Appellate Court directed and prayed to dismiss the appeal.

13. In reply, the learned counsel for the appellants would submit

that the facts of the case and the case laws relied on by the respondents were altogether different. The controversial disputes were not properly considered, and no evidence was found on those points. The case was summarily dismissed.

14. Before embarking upon the power of the Appellate Court to remand the matter, this Court is of the view that it would be better to discuss the effect of deciding the controversial issues without framing the issues.

15. Admittedly, in the absence of issues on limitation and estoppel, the parties have led the evidence; the learned trial Court had considered the same and recorded the findings. In view of that matter, recording the findings without framing issues on the basis of evidence led by the parties is the omission of framing the issues. Whether omission to frame an issue is, illegality or irregularity is to be determined from the facts of the case. The object of framing the issues is to bring the evidence, arguments and decision to a particular question so there may be no doubt about the dispute. The issues are framed with an object to point out real and substantial points on differences between the parties, specifically unambiguously emerging out of pleadings.

16. The Andhra Pradesh High Court, in the case ***R. B. Bharatha Charyulu v/s. R.B. Alivelu Manga Thayaru, A.I.R. 1996 Andhra Pradesh 238, 243***, observed that, although no specific

issues are raised, it is sufficient if all the controversies arising under the pleadings have been understood by the parties, and they have produced the evidence on such issues and the Court while disposing of such issues considered the points for determination which arose out of such controversy.

17. The Himachal Pradesh High Court, *in the case **Khemchand v. Hari Saran, A.I.R. 1988 H.P. 10***, observed that the mere omission to frame issue on a matter in controversy between the parties cannot be recorded as a fatal unless, upon examination of the record, it is found that failure to frame issue had resulted in the parties having gone to the trial without knowing that the said question was issue between them and having therefore, failed to adduce on that point.

18. This Court, in the case ***Sk. Ibrahim s/o. Sk. Mohamood and others v. Sk. Mehmood s/o. Sk. Vazir, A.I.R. 2003 Bombay 357***, has pronounced in paragraph no.10 that “It is well-settled law that when the parties are fully aware of their respective cases, lead all the necessary evidence not only in support of their case but in refutation of the claim of the other side, non-framing of the issues cannot be held to be a ground for remanding the case unless it is fatal to the case or resulted in mistrial which vitiates the proceedings. Because if the evidence which has been led before the trial Court is sufficient to reach a right conclusion and

neither party has raised any objection to the framing of the issues before the trial Court, there was no reason why the first appellate Court should have remanded the matter for fresh trial by giving *suo motu* directions to the parties to amend the pleadings which parties themselves have not sought. This is not permissible as a public policy for the reason that it is for the parties to put up their case in a proper manner, and once they undergo the rigour of the trial, the findings should not be interfered with by remanding the case”.

19. The defendant had a defence that the suit was barred by limitation, and the plaintiff had relinquished her share on the day of *Varsha Shraddha* of her deceased father. The defendant led the evidence and also argued the matter on this point. The learned trial Court has discussed the entire evidence and the submissions made by the respective learned counsels for the parties on the grounds as raised by the defendants and then recorded the findings. The sufficient material was available before the first Appellate Court to decide the appeal on merit. Here, the first Appellate Court has committed illegality in exercising power to remand the matter.

20. The learned Counsel for the appellants argued that the learned first Appellate Court cannot exercise power under Order XLI, Rule 23 of the C.P.C. unless a decree is passed on a

preliminary issue. While framing the issue, it appears that the Court had committed a mistake in writing rule 23 instead of 23-A.

21. The discussion made by the learned first Appellate Court reveals that he exercised his power under Order XLI, Rule 23A of the C.P.C. Hence, a mistake in writing the provision would make no difference.

22. A controversial point was whether there was material and the circumstances before the learned first Appellate Court to remand the matter. The issue of exercising the power of learned first Appellate Court under Order XLI, Rule 23 or Rule 23-A of the C.P.C. is squarely covered by the pronouncement of this Court in the case of **Sk. Ibrahim** (*supra*). The learned counsel for the appellants has correctly pointed out that sufficient material was available for the final adjudication of the dispute before the learned trial and first appellate Court. However, the learned first appellate Court committed a mistake in remitting the case to the trial Court. Hence, this Court negates his order of remand.

23. As far as the Will came to light after the Judgment of the trial Court is concerned, the beneficiary's rights to prove such document has been protected under Order XLI, Rule 27 of the C.P.C. The petitioner had filed an application to lead the additional evidence before the first appellate Court. The first appellate Court had not taken decision on said application. Therefore, the present

respondent's right to produce additional evidence is still protected.

24. For the above reasons, the impugned Judgment and order of the first Appellate Court remanding the matter to the trial Court deserves to be quashed and set aside. Hence, the order:-

ORDER

- i) The appeal is allowed.
- ii) The Judgment and order of remand of the learned Adhoc District Judge-1, Jalgaon, passed in Regular Civil Appeal No.877 of 2012, dated 19.08.2019, is quashed and set aside.
- ii) The learned Adhoc District Judge-1, Jalgaon, is directed to decide the appeal on merit.
- iii) The learned First Appellate Court is directed to decide the application Exhibit-11 under Order XLI, Rule 27 of the C.P.C. according to law.
- iv) R & P be returned to the learned first Appellate Court.
- v) Both parties are to appear before the first Appellate Court on 30.11.2023.

**(S. G. MEHARE)
JUDGE**