

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

Writ Petition No.14776 of 2024

Nizamuddin Sirajuddin Ansari & ors. ... Petitioners
V/s.
Mukarramuddin Nizammuddin Ansari
& ors. ... Respondents.

Mr. Raju Suryawanshi, Mr. Vipul Shelar	Advocate for the Petitioner
Mr. Azimuddin Kazi a/w. Rizwan Khan a/w. Somesh Gandhi a/w. Ms. Sumaiya Momin i/b. N.N. Kazi & Associates	Advocate for Respondent No.2

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CORAM : S.M. MODAK, J

DATE : 27 November 2024.

P.C. :

Heard learned Advocate Shri Suryawanshi for the petitioners-defendant Nos.1 to 10 and learned Advocate Shri Kazi for Respondent No.2-original plaintiff.

2. Respondent No.1/plaintiff No.1 is not served. Even though he is not served, this Court is only dealing with the limited issue about the correctness of the order of the remand passed by the first appellate Court. After hearing both of them, this Court feels that order of remand is erroneous and matter needs to be remanded to the first appellate Court. I will give the reasoning hereinafter.

3. In a suit filed by the two plaintiffs who are the sons of defendant Nos.1 and 2, there is a challenge to 9 gift deeds (6 gift deed were executed earlier to suit and 3 during pendency of the suit). Defendant No.1 solely or with defendant No.2 have executed those gift deeds in favour of defendant Nos.3 to 10. The primary contention in the plaint is plaintiff Nos. 1 and 2 from their personal earning have contributed for purchase of those properties by defendant Nos.1 and 2 and as such it is their joint property. By those gift deeds their rights are violated. Injunction is also sought against the defendants for not creating third party interest.

4. Defendant Nos.1 to 3 have filed a common written-statement and denied the allegations. According to them, it is a separate property of defendant Nos.1 and 2.

5. The trial Court has refused to grant status-quo on 26 April 2022. However, surprisingly, the trial Court as per the said order of 26 April 2022 has enjoined defendants from creating third party interest by any mode without prior permission of the Court until further orders. The trial Court as per order dated 12 June 2023 has decided the exhibit 5 temporary injunction application by way of rejection. Similarly, the direction given in the earlier order was also vacated.

6. This order was challenged by the original plaintiffs by way of Misc. Civil Appeal and the appellate Court as per order dated 8 October 2024 **was pleased to set aside the said order and remanded**

the matter to the trial Court for hearing on Exhibit-5 and Exhibit-29. This order is challenged by the Petitioners.

7. According to Mr. Suryawanshi the well reasoned order of the trial Court was set aside only for the reason that the trial Court has not discussed about all the gift deeds and not referred about power of attorney and development agreements. It finds place in Para No.9. Whereas in Para No.10, the appellate Court has quoted the provisions of Section 52 of Transfer of Property Act. Appellate Court has referred one Conveyance Deed dated 25 July 2024. The Respondent claims that it was executed during the pendency of the appeal and it was shown to the appellate Court.

8. The appellate Court opined if there is alienation during the pendency of the proceedings without permission of the Court, it will affect the proceedings as well as the right of both the parties.

9. I am not inclined to subscribe to the reasoning given by the appellate Court because when the order passed by the trial Court is perused, I find there are observations about the merits of the claim. The trial Court has opined about the requisites of gift deed as per the Shariat law. The trial Court has also opined about not disclosing the source of money by the plaintiffs by way of contribution for purchase of the suit properties. **Whether these reasonings are proper or not, that is not discussed anywhere by the appellate Court while remanding the matter.**

10. Whether all the gift deeds are referred or not is not a relevant consideration. What is important is whether the averments made by the parties viz-a-viz relief sought are referred or not. If considered from that angle merely reference to all the documents is not good ground for remand.

11. In fact when the appellate Court is conscious about the provisions of Section 52 of the Transfer of Property Act and its effect, the appellate Court could have decided it on its merits. By remanding the matter without sufficient reasoning is nothing but abdicating its responsibility. It is a settled law that power of remand should not be resorted to on account of unjustified reasons

12. Hence, the order of remand needs to be set aside and the matter need to be sent back to the first appellate Court for hearing of Misc. Civil Appeal. There is a request for injuncting the defendants from creating third party interest because the huge property is involved. This prayer can be reiterated before the first appellate Court. The prayer for interim-relief cannot be considered at this stage because there is certain procedure for asking for a relief. Other sides needs to be served with necessary documents and need to be given an opportunity to put forth their grievance. Today it cannot be done. Hence, the following order is passed:-

ORDER

- 1) Writ Petition is allowed.

- 2) The order dated 8 October 2024 passed by District Judge-2, Bhiwandi is set aside.
- 3) The matter is remanded back to the Court of District Judge-2, Bhiwandi for hearing of Misc. Civil Appeal on merits.
- 4) The hearing is expedited and to be decided on priority basis.

12. No observations are made about the merits of the matter. The Appellate Court to decide it on its own merits.

(S.M. MODAK, J.)