

Order below Exhibit 143 in Regular Civil Suit No. 31/2001
(Passed on 09/11/2012)

Nature of the Application

1. This is an application filed by the plaintiff to frame additional issue.

Contents In the Application

2. The plaintiff has contended that the plaint and prayer clause is amended. Therefore, it is necessary to frame additional issue viz. do the plaintiff prove that the plaintiff is entitled for recovery possession of encroached portion to the extent of 0.09 from defendants ? (for short proposed issue) , in the interest of justice.

3. On these grounds the plaintiff has prayed to grant the application.

Contents in the Say of Defendants

4. The defendants have filed their say and has strongly objected the application. The defendants have contended that the suit is for injunction. The application is not tenable.

5. On these grounds the defendants have prayed to reject the application.

The Argument

6. I have heard Shri. V.V. Shete, Advocate for plaintiff and Shri. H. R. Patil, Advocate for defendant, at length.

7. They argued in consonance with their contention in their application and say. I will deal with those at the time of discussing the points taken for consideration.

Points And Findings

8. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow :-

<u>Points</u>	<u>Findings</u>
1. Whether it is necessary to frame additional issue, as prayed for ? If yes, to what effect ?	Yes, Issue Recast.
2. What order ?	Application granted, partly.

Relevant Statutory Provision Under Order XIV Rule 1, 3 and 5 of the Code Of Civil Procedure

9. Before proceeding to discuss the merits of the application, for better appreciation, let me reproduce the relevant statutory provision under Order XIV Rule 1, 3 and 5 of the Code of Civil Procedure (for short C.P.C.)

10. O. XIV Rule 1 of the C.P.C. reads as under :-

Framing of issues :-

- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.
- (2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.
- (3) Each material proposition affirmed by one party and denied by the other shall form the subject of distinct issue.
- (4) Issues are of two kinds :
 - (a) Issues of fact,
 - (b) Issues of law.

- (5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and (after examination under Rule 2 of Order X and after hearing the parties or their pleaders) ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.
- (6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

11. Nowhere in the provision, it is mentioned that the Court will either repeat the issues or dispose of the issues technically in that sense so as to render justice. On the other hand, if the Court considers all the controversies between the parties either in their specific form for determination or incidentally, perhaps, the real purpose of of Order XIV of C.P.C. can be taken as complete in spirit.

12. Order XIV of C.P.C. is clear in its purport as to manner in which issues are to be framed. Similarly, Chapter VII of the Indian Evidence Act, 1872 stipulates, in clear terms, as regards the existence of burden, on the parties to prove the concerned issues. The need to frame an issue would arise, only when the assertion, made by one party, is denied by the other. If an assertion made by a plaintiff is not denied by the defendant, such assertion can be taken to have been accepted, by the latter and the necessary for the Court, to frame an issue upon the same does not arise. Instances are not lacking, where any independent assertions made by defendant in a written statement, are contradicted by a plaintiff by filing rejoinder or through other modes of pleadings. Either way, an issue comes to be framed, on the basis of the assertion made by one party, and the

denial by the others.

13. It is not necessary that on all pleas issues should be framed. Issues are framed on question of law and fact to determine if the plaintiff was entitled to the relief claimed or the suit was liable to be dismissed. The issues to be framed must be confined, as required by Order XIV, rule 1, to material questions of fact (or law) to *facta probanda* and not to *facta probantia*, that is to say, the evidence by which material questions of fact are proved or disproved. Issues are not to be framed on what may be called subordinate facts or evidentiary matter. Issues are framed for a right decision of the case with an object to pinpoint the real and substantial points of difference between the parties specifically and unambiguously emerging out of the pleadings. Vague issues, suggested in a mechanical way, should not be framed to keep the door open for astute casuistry as a suit proceeds at different levels leading inevitably to the law's delay. When in the course of pleading, the parties come to a point which is affirmed on one side and denied on the other, they are said to beat issue.

14. A Court should decline to frame an issue as to maintainability of a suit in absence of specific averment in the written statement as to how and in what circumstances the same is not maintainable in law.

15. O. XIV Rule 3 of the C.P.C. reads as under :-

Materials from which issues may be framed :-

The Court may frame the issues from all or any of the following materials :-

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;
- (b) allegations made in the pleadings or in

answers to interrogatories delivered in the suit ;

- (c) the contents of documents produced by either party.

16. There can be little doubt that the Court is under a duty to frame issues on matters in controversy between the parties. But where it appears that the points of controversy at the stage of framing issues are limited and do not include the entire ambit of the controversy initially raised in the pleadings, the Court is not bound to frame an issue on points abandoned.

17. Order XIV Rule 5 of C.P.C. reads as under:-

5. Power to amend and strike out issues :--

- (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.
- (2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

18. Order XIV Rule 5 of C. P. C., empowers the Courts to amend issues and to frame additional issues, necessary for determining the matter in controversy, at any time before the passing of a decree. For amending or framing additional issues, there need not be a regular application rather it is duty of the Court to frame proper issues and if proper issues are not framed, it should be ensured that the issues are amended or additional issues are framed before the conclusion of the trial, so that any prejudice to the parties be avoided. The purpose of framing issues is that parties should

be appraised of the points for which they are expected to lead evidence, so that any prejudice may not be caused to either side, due to absence of material issues. The discretion of a Court to frame issues is judicial but Court should not frame additional issues so as to convert character of suit or defence or make new case for either party. It is competent to the Court at any time before decree to frame an additional issue embracing a matter not included in the plaint or in the written statement provided it is not inconsistent. Where an issue framed by the Court is unwarranted for the purpose of deciding the real question involved in the suit it may be deleted.

Reasons as to Point No. 1

19. I have applied my mind to the contention of the learned Counsel for the plaintiff and the defendants and have gone through the pleadings of the plaintiff. I am satisfied with the arguments advanced on behalf of the plaintiff that the proposed issue is required to be framed and hold that this application is required to be granted, and issues Exhibit 32 are required to be recast. The reasons are :-

- That the plaintiff initially has filed this suit seeking seeking perpetual injunction in respect of land Survey No. 2/5 admeasuring Hectare 1.48 Are situated at village Ahmepdur and not to encroach beyond the area of Hectare 0.18 Are out of land Survey No. 1/2. Later on the plaintiff has amended the plaint by adding the prayer seeking possession of encroached portion admeasuring East-West 74 feet and South-North- 123 Feet i.e. Hectare 0.09 Are. The defendants in their written statement Exhibit 76 and 104 have defended this suit denying the plaintiff's claim.

Thus the parties are at variance in this regard and the right decision of the suit does appears to depend on it. The issue No. 1, in my opinion is framed in excessively broad manner and is not self contained. Therefore, it is necessary to frame issue in respect of this pleading and to recast issues Exhibit 32.

- That the objection raised by the defendants in their say that the suit is for perpetual injunction is not sustainable in view of amendment made by the plaintiff in the plaint.
- That the issues Exhibit 32 are required to be recast for the purpose of deciding the real question involved in the suit and new issues are required to be framed precisely indicating the points and controversy making the issue complete.

20. In short, considering the pleadings of both parties, in my view and relying on the principles discussed in para Nos. 10 to 18, supra, I hold that the issues Exhibit 32 are required to be recast.

21. Accordingly, I answer Point No. 1 in the affirmative, partly and Point No. 2 as application granted as per final order.

22. In the result, order.

Order

- 1) The application Exhibit 143 is granted, and issues Exhibit 32 are recast as herein below :-

RECAST ISSUES.

- 1) Whether the plaintiff proves that he is owner and possessor of the land Survey No. 2/5 admeasuring Hectare 1.48 Are situated at village Ahmepdur, as

alleged ?

- 2) Whether the plaintiff proves that defendants are encroaching beyond the area of Hectare 0.18 Are out of land Survey No.1/2 situated at village Ahmepdur, as alleged ?
- 3) Whether the plaintiff is entitled to perpetual injunction , as prayed for ?
- 4) Whether the plaintiff proves that the defendants have encroached on the land Survey No. 2/5 admeasuring Hectare 0.09 Are situated at village Ahmepdur, as alleged ? If yes, whether the plaintiff is entitled to to recover possession, as prayed for ? of the land Survey No. 2/5 admeasuring Hectare 1.48 Are situated at village Ahmepdur, as alleged ?
- 5) Whether, the suit seeking possession is within limitation ?
- 6) What order or decree ?

- 2) The costs will be in the cause.

(Pronounced in the open Court).

Date 09/11/2012.

(M.B.Lambe),
Jt. Civil Judge S.D.
Ahmedpur.