

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APEAL FROM ORDER NO. 117 OF 2015
WITH CA/16741/2015 IN AO/117/2015

SHRIMANT BABURAO SARVADE
VERSUS
TUKARAM MALGI KOKATE

...
Advocate for Appellant : Mr. B. S. Kudale
Advocate for Respondent : Mr. P.V. Ambade
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CORAM : V. K. JADHAV, J.
DATED : 14th MARCH, 2016

PER COURT:-

1. By consent of parties, heard finally at admission stage.
2. The appellant is original plaintiff, instituted a suit bearing R.C.S. No. 295 of 2006 (old R.C.S. No. 191 of 2000) for the relief of specific performance of contract and injunction against the respondent-original defendant. Respondent-defendant has strongly resisted the claim by filing written statement at Exh.32. On the basis of rival pleadings of the parties, the trial court framed issues. The appellant-original plaintiff adduced his evidence by way of affidavit of evidence at Exh.53 and verified on the same day. The evidence of the appellant-plaintiff remained unchallenged. The learned C.J.S.D. Majalgaon, by judgment and decree dated 19.12.2006 decreed the suit.
3. Being aggrieved by the said judgment and decree, the

respondent-original defendant preferred R.C.A. No. 55 of 2012 before the District Court, alongwith an application for condonation of delay. After condoning the delay, the appeal was heard and learned District Judge-1, Majalgaon, by judgment and decree dated 12.10.2015, partly allowed the appeal and thereby set aside the judgment and decree of trial court and remanded the matter to the trial court for trial afresh. Hence, this appeal.

4. Learned counsel for the appellant-original plaintiff submits that in the appeal memo, filed before the lower appellate court, no ground has been raised as to what prevented respondent-defendant to remain present when the plaintiff adduced his evidence. Learned counsel submits that the lower appellate court has not assigned any reason as to why the matter is fit to be remanded. Even the lower appellate court has not applied its mind to the facts of the case and that the same is evident from the fact that in paragraph No. 20 of the impugned judgment, a judgment in the case of **Vidhyadhar vs. Manikrao and another**, reported in **(1999) 3 SCC 573** is referred to, which has no relevance to the matter under consideration. Learned counsel for the appellant further submits that the suit is of the year 2000 and therefore, if this court comes to the conclusion that the lower appellate court has rightly remanded the matter, then the trial court may be directed to decide the suit in time bound manner.

Learned counsel for the appellant in order to substantiate his submissions, places reliance on the judgment in the case of ***Maya Devi (dead) through LRS. vs. Rajkumari Batra (dead) through LRS. and others***, reported in ***2011 (1) Mh.L.J. 683***.

5. Learned counsel for the respondent-original defendant submits that initially an application for condonation of delay was rejected by the lower appellate court and being aggrieved by the same, the respondent-defendant preferred Second Appeal No. 791 of 2010. This court, by order dated 7.2.2012, directed the lower appellate court to consider the application for condonation of delay on its own merits. Learned counsel submits that the respondent-original defendant has successfully brought to the notice of this Court while hearing the said Second Appeal that the respondent-original defendant was suffering from “*Chikungunya*” and he was prevented by sufficient cause to appear before the court when the matter was called out for cross examination. Learned counsel submits that the trial court has committed haste while deciding the suit *ex-parte*. Learned counsel submits that the trial court has not given sufficient opportunity to the respondent-original defendant to cross examine the plaintiff and to further adduce evidence in support of his pleadings. Learned counsel submits that the lower appellate court has rightly considered the same and accordingly remanded the matter. Learned counsel submits that no interference is required and this appeal is liable to be dismissed.

6. On perusal of the impugned judgment and decree passed by the lower appellate court, and most particularly, paragraph No. 21 of the judgment, it appears that the lower appellate court has observed that on 15.12.2006 the General Power of Attorney of the appellant-original plaintiff had filed his affidavit of examination in chief and on the same day, the trial court passed order of "No Cross" of respondent-defendant, as he and his counsel remained absent before the trial court. The lower appellate court has further observed that even on that day, without there being any evidence closed pursis submitted by the appellant-plaintiff, the learned Judge of the trial court adjourned the matter for final arguments to 18.12.2006. On 18.12.2006, the appellant-plaintiff himself filed adjournment application and the said application was allowed and thereafter the matter was posted on the very next day and accordingly on that day, the trial court has pronounced the judgment. Even the lower appellate court has also observed that the appellant-plaintiff has not examined any witness on the document of agreement to sale and still then the trial court thought it fit to decree the suit. The lower appellate court has also observed that the trial court has not given opportunity to the defendant to cross examine the plaintiff's witness as well as to lead his evidence. I do not find any fault in the impugned judgment and decree passed by the lower appellate court. There is no merit in the appeal and the appeal deserves to be dismissed. Hence, I pass the following order:

O R D E R

- I) The Appeal From Order is hereby dismissed.
- II) In the circumstances, there shall be no order as to costs.
- III) The trial court is hereby directed to dispose of the suit as expeditiously as possible, preferably within a period of six months from today.
- IV) In view of dismissal of appeal from order, civil application No. 16741 of 2015 stands disposed of.

(V. K. JADHAV, J.)

rlj/