

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

***SECOND APPEAL NO. 73 OF 2015
ALONG WITH
CIVIL APPLICATION NO. 169 OF 2015***

Bantar Sayaji Darekar,
R/at Sanaswadi, Tal. Shirur, Dist.Pune. ... Appellant/applicant
v/s

Antu Baburao Darekar
R/at Sanaswadi, Khandobachi Aali,
Tal. Shirur, Dist.Pune & ors. ... Respondents

Mr.G.S.Godbole i/by Ms.Sanjukta Dey and Ms.Shivani Samel for the
appellant and applicant.

Mr.S.V.Abhang i/by Lex Credence for Resp. No.1.

Mr.Drupad Patil for Resp. Nos.2 to 4 and 6 to 14.

Coram: N.M. Jamdar, J.

Dated: 13 July, 2016

ORAL ORDER:

Leave to amend. Amendment to be carried out forthwith.

2 Heard learned counsel for the parties.

3 At the request of the Appellant, Respondent Nos.5, 15 and 16
are deleted for the purpose of the Second Appeal as the Respondent
No.1 – decree holder is represented.

4 Admit on the following substantial question of law :

'Whether the first Appellate Court failed to consider the ground raised by the Appellant that since the Regular Civil Suit No.91 of 1984 was dismissed as against the Appellant, whether the decree could be executed against them ?'

5 By consent of parties, taken up for disposal forthwith. Filing of private paper-book is dispensed with.

6 Respondent No.1 Plaintiff filed a suit for partition of the joint family properties bearing Regular Civil Suit No.91 of 1984, which was dismissed as against the Appellant and was decreed on 19 August 1989 against Defendant Nos.2 to 4 and 6 to 8. The Respondent/Plaintiff filed Darkhast Proceedings bearing No.59 of 1989. On 22 October 1990, a separate suit was filed by the Appellant for a declaration that the decree cannot be executed by the Respondents/Plaintiffs against them. By an order passed by this Court earlier in a writ petition, the Appellant was permitted to intervene in Darkhast proceedings and file their objections under Order XXI Rule 97 of the Code of Civil Procedure. Thereafter the Appellant also sought amendment of the application filed under Order XXI Rule 97, which was rejected. Challenging this order a writ petition was filed which was allowed and the Appellant was permitted to amend the application.

7 The application under Order XXII Rule 97 filed by the Appellant was heard by the learned Civil Judge, Junior Division. The learned Civil Judge considered the merits of the contentions raised by the Appellant and also the submission that the decree cannot be executed against him as the suit was dismissed as against him. The learned Civil Judge, by an order dated 15 September 2014 dismissed the application. Thereafter the Appellant filed an appeal to the District Court, Pune, bearing Civil Appeal No.541 of 2014, which was dismissed by the impugned order dated 12 December 2014.

8 Learned counsel for the Appellant made a grievance that the contention that the decree is not executable against the Appellant as the suit was dismissed against him, has not been considered by the District Court at all. He submitted that, merely because the Appellant had taken various grounds on merits, does not mean that the ground of dismissal of the suit as against the Appellant, was given up. Learned counsel for the Respondents submitted that, even if the point that the suit was dismissed against the Appellant is kept aside, having invited the Court to adjudicate their claim on merits, which having been done, no grievance can be made by the Appellant.

9 Under Order XXI Rule 97, when a obstruction is raised, the decree holder can move the Court for removal of such obstruction and the obstructionist can seek adjudication of the right upon which the obstruction is being made. Order XXI Rule 101 lays down that

all questions will be decided on an application under Rule 97 or Rule 99 and not by way of separate suit. As per Rule 103, decision under Rule 98 or Rule 100 is to be treated as adverse and thus a first appeal can be filed. Therefore, the District Court has a duty to decide all the questions which have been raised by the parties and adjudicated by the executing Court.

10 None of the earlier orders passed by this Court which have been annexed to the compilation, indicate that the Appellant had given up the point that the suit having been dismissed against him the decree is not executable. The said point is specifically urged before the District Court. The learned District Judge has not adverted to this ground at all and straightway has gone on the merits of the other points raised by the Appellant. It may be, as contended by the learned counsel for the Respondent No.1 that, having invited the Court to decide on merits, impliedly the said point is given up, but that is a conclusion the District Court must reach by examining the record. The District Court cannot simply ignore a point put-forth by a party which is one of their main contentions. Therefore, it was put to the learned counsel for the decree holder as to whether the proceedings could be remanded back to the first appellate Court instead of admitting the second appeal. Learned counsel for the Respondent No.1 submitted that, in the circumstances, the remand would be more appropriate. The question of law framed as above will have to be answered in favour of the Appellant.

11 The second appeal is allowed by quashing and setting aside the judgment and order passed by the District Court, Pune, dated 12 December 2014 and restoring the Civil Appeal No.541 of 2014 to the file of the learned District Judge. All points of the parties are kept open.

12 In view of disposal of the second appeal, the civil application is disposed of.

13 The remand is necessitated only because one of the main points urged by the Appellant has not been considered by the learned District Judge at all, which was necessary being the first appellate Court. This Court has not considered the merits of the rival contentions on the said issue, which will be considered by the learned District Judge. Considering the fact that the decree is of the year 1984, the learned District Judge will give priority to the disposal of the appeal and dispose of the same on or before 31 December 2016.

14 Registry to communicate the order to the District Court, Pune, forthwith.

15 Parties shall appear before the learned District Judge, on 27 July 2016.

(N. M. Jamdar, J.)