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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 10 OF 2013
WITH
CIVIL APPLICATION NO.8826 OF 2010
CIVIL APPLICATION NO.6993 OF 2006
IN
SECOND APPEAL NO.10 OF 2013**

1. Achutrao Bhaurao Shinde,
Age: 65 years, Occ: Agri.,
2. Prakash s/o Karbhari Shinde,
Age: 38 years, Occ: Agri.,
3. Shantabai w/o Karbhari Shinde,
Age: 60 years, Occ: Agri.,

All R/o. Lalwadi, Tq. Ambad,
Dist. Jalna.

..APPELLANTS

VERSUS

1. Dattu s/o Eknath Lambdande
(Jagtap), Age: Major, Occ: Agri.,
R/o. Ghotan, Tq. & Dist.Jalna.
2. Ramchandra s/o Shivram Dera
(Chawan), Age: Major, Occ: Agri.,
R/o. Nanegaon, Tq. Badnapur,
Dist. Jalna.
(Died through L.Rs.)
- 2A. Digambar s/o Ramchandra Dere
(Chavan), Age: Major, Occ: Agri.,
R/o. Nanegaon, Tq. Badnapur,
Dist. Jalna.
- 2B. Bhaskar s/o Ramchandra Dere
(Died through L.Rs)

2B-I Sushilabai w/o Late Bhaskar

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Dere (Chavan), Age: 45 years,
Occ: Household, R/o. Nanegaon,
Tq. Badnapur, Dist. Jalna.

2B-II. Krishna s/o Bhaskar Dere
(Chavan), Age: 30 years,
Occ: Agri., R/o. Nanegaon,
Tq. Badgaon, Dist. Jalna.

2B-III Dnyaneshwar s/o Bhaskar
Dere (Chavan) Age: 28 years,
Occ: Agri., R/o. Nanegaon,
Tq. Badnapur, Dist. Jalna.

3. Dhondiba s/o shivram Dere (Chavan)
Age: Major, Occ: Agri.,
R/o. Nanegaon, Tq. & Dist. Jalna.

4. Meerabai w/o Babasaheb Shinde,
Age: Major, Occ: Agri.,

5. Ramnath s/o Nana Shinde,
(Died through his L.Rs.)

5A. Annasaheb s/o Ramnath Shinde,
Age: 35 years, Occ: Agri.,
R/o. Lalwadi, Tq. Ambad,
Dist. Jalna.

5B. Mrs. Kusumbai w/o Late Ramnath
Shinde, Age: 55 years,
Occ: Household, R/o. Lalwadi,
Tq. Ambad, Dist. Jalna.

6. Vithal s/o Babasaheb Shinde,
Age: Major, Occ: Agri.,

R.No. 4,5 and 6 R/o. Lalwadi,
Tq. Ambad, Dist. Jalna.

7. Pralhad s/o Lalsing Lamana,
Age: Major, Occ: Agri.,

8. Lalsing s/o Puna Lamana,

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Age: Major, Occ: Agri.,

Both R/o. Masai tanda,
Tq. Ambad, Dist. Jalna.

8A. Babu s/o Sukrao Lamani,
R/o. Masai Tanda, Tq. Ambad,
Dist. Jalna.

9. Shri. R.R. Kulkarni,
Advocate, Ambad, Dist. Jalna.
(deleted as per Courts order
dated 04.01.2013)

..RESPONDENTS

Mr N.R. Solunke, Advocate for appellants;
Mr S.R. Andhale, Advocate for respondent No.1;
Mr A.N. Nagargoje, Advocate for respondent Nos. 3
to 6;
Mr S.D. Hiwrekar, Advocate for respondent No.9

CORAM : NITIN W. SAMBRE, J.

DATE : 6th SEPTEMBER, 2017

ORAL ORDER :

The appellants filed Regular Civil Suit No. 139 of 1997 in the Court of Civil Judge, Junior Division, Ambad for possession and declaration of ownership over the suit property, which suit came to be dismissed in default on 5th July, 1999.

2. The respondents-defendants preferred

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counter claim praying therein possession of 3 acres of land, each out of Gat Nos. 21 and 33.

3. The said counter claim came to be allowed by judgment and order dated 17th December, 1999.

4. In-stead of questioning the order of dismissal of suit in default passed on 5th July, 1999 in an Appeal against the Order under Order 41 Rule 1R of the Code of Civil Procedure, the appellants-plaintiffs have not chosen to question the same in an appeal.

5. The appellants had chosen to file appeal being Regular Civil Appeal No. 9 of 2000 against order of allowing the counter claim, which came to be dismissed by learned 2nd Adhoc Additional District Judge, Jalna vide judgment and order dated 7th October, 2004.

6. In the present appeal, both these orders are questioned by the appellants-plaintiffs.

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7. Mr. Solunke, learned Counsel for the appellants-plaintiffs would urge that it is because of wrong advise given by the lawyer, the appellants could not question the order of dismissal of suit in default passed on 5th July, 1999. According to him, this Court can exercise the inherent powers under Section 151 of the Code of Civil Procedure and set aside the order of dismissal of suit in default in second appeal and can restore the suit. He would then urge that the counter claim was allowed, as the lawyer has not intimated the appellants about the said proceedings and as such appellants have neither filed their written statement nor had cross examined the witness of the defendants. According to him, it is a clear case of denial of justice.

8. Mr. Solunke, learned Counsel for the appellants-plaintiffs so as to substantiate his contention that in second appellate jurisdiction, this Court, in the interest of justice and in

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exercise of inherent powers can set aside the order of dismissal of suit in default and also that of allowing counter claim, would rely upon the judgment in the matter of **Smt. Shobha widow of Suresh Kurekar vs Shri Mohan son of Suresh Kurekar** reported in **2017(3) Mh.L.J. 334**.

Perusal of the said judgment depicts that the Court in the said matter of **Smt. Shobha widow of Suresh Kurekar** (supra) was exercising jurisdiction under Order 41 Rule 1R of the Code of Civil Procedure, while entertaining the appeal against order of dismissal of suit in default and not in second appellate jurisdiction. The scope, while entertaining the Appeal against Order and that of second appellate jurisdiction are altogether different and to be more precise exercise of second appellate jurisdiction has very narrow scope. The appeal is to be entertained only on involvement of substantial question of law. As such, the said judgment is of hardly any assistance.

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9. This Court, in second appeal, is restricting the claim of appellants only to the extent of findings recorded by the trial Court and confirmed by the appellate Court on the issue of grant of counter claim filed by the respondents. So far as the counter claim of the respondents is concerned, the appellants have neither filed any written statement nor adduced any evidence. Rather, claim by the original defendant has gone unchallenged before the Court below. In view thereof, I hardly see any scope to interfere in the second appellate jurisdiction. As such, second appeal, which is restricted to the extent of findings recorded on counter claim, is dismissed.

10. However, in the interest of justice, it will be appropriate to observe that the appellants are not precluded from taking appropriate steps in the matter of questioning the findings recorded by the trial Court while deciding the counter claim preferred by the respondents in independent

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proceedings if so advised and if permissible in law. The appellants will also be at liberty to question the order of dismissal of suit in default, which was dismissed on 5th July, 1999 in appropriate proceedings, if so advised.

11. With above observations, present appeal, in my opinion, fails and same stands dismissed. As a consequences, pending civil applications stand disposed of.

(NITIN W. SAMBRE, J.)

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