

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

934 APEAL FROM ORDER NO. 52 OF 2016
WITH CA/12145/2016 IN AO/52/2016

JINAS SHRIRANG OHAL
VERSUS
BALBHIM SHRIRANG OHAL AND OTHERS

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Advocate for Petitioner : Ajinkya Kale h/f. Talekar And Associates
Advocate for Respondents : Choudhary S.S. Adv. For R/1, 2, 3 & 5

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CORAM : V.K. JADHAV, J.
DATE : 13-01-2017.

P.C. :

1. Heard finally with consent at admission stage.
2. Being aggrieved by the judgment and order dated 10.06.2016 passed by the District Judge-3, Osmanabad in Regular Civil Appeal No. 167 of 2009. The original plaintiffs have preferred this appeal.
3. Brief facts giving rise to the present appeal are as follows.
4. The appellant had instituted the Regular Civil Suit No. 135 of 2006 against the respondent for declaration of ownership and decree of perpetual injunction. The learned Civil Judge Junior Division, Kallam by its judgment and decree dated 10.11.2006 decreed the suit and declared that the appellant-plaintiff is the

owner of the suit property and further restrained the original defendant nos. 1 to 6 from causing any obstruction to the peaceful possession of the plaintiff over the suit property. Being aggrieved by the same, the original defendant nos. 1 to 6 have preferred Regular Civil Appeal No. 167 of 2009 and the learned District Judge-3, Osmanabad by its impugned judgment and order dated 10.06.2016 set aside the judgment and decree passed by the Civil Judge Junior Division as aforesaid and remanded the matter to the trial court with direction to decide the suit afresh, after giving opportunities to the parties particularly the liberty to original defendant nos. 1 to 6 to place on record their written statement subject to the cost. Aggrieved by the same the plaintiff has preferred this appeal.

5. The learned counsel for the appellant submits that, the learned District Judge has mechanically passed the order of remand without application of mind. The learned counsel submits that, the conditions as prescribed under Order 41 Rule 23 are absent and even then the learned appellate court has remanded the matter. The learned counsel submits that, the remedy lies to the respondent original defendant nos. 1 to 6 to file an application before the trial court for setting aside the ex-parte judgment and decree, however, the respondent original defendant nos. 1 to 6 preferred this appeal.

6. The learned counsel for the appellant in order to

substantiate his contention placed his reliance in the case of **Municipal Corporation, Hyderabad V/s. Sunder Singh** reported in **(2008) 8 SCC 485** and in the case of **Beniram Shriram Wani and Anr V/s. Ramchandra Nathalal Gujarati** reported in **2011(3) Mh.L.J.** and in the case of **Rameshkumar s/o Balubhai Sukhadia and Anr. V/s. Kumwardevi w/o Shamlal Rathor through LRS and anr.** reported in **2010 (7) Mh.L.J. 249.**

7. The learned counsel for the respondent-defendant nos. 1 to 6 submits that, the learned Judge of the trial court has adjudged the cause within the purview of Order 8 Rule 10 of Civil Procedure Code. The learned counsel submits that, respondent nos. 1 to 6 are the old aged persons and they could not file the written statement within time. Learned counsel submits that, the lower appellate Court has given opportunity to both the parties to lead their evidence and, thus, no prejudice is likely to be caused to the appellant-plaintiff. The learned counsel submits that, the condition prescribed in under Order 41 rule 23 are not attracted and the provisions of Order 41 Rule 23-A stands attracted and, thus, in the given set of facts the re-trial of the suit is required, since the respondent original defendant nos. 1 to 6 could not file their written statement within time.

8. It appears that, the learned Judge of the trial court has passed almost the ex-parte decree since the contesting respondent

defendant nos. 1 to 6 failed to file their written statement. In view of the provisions of Order 41 Rule 23-A of the Civil Procedure Code, the lower appellate Court has rightly remanded the matter with certain directions. In view of those directions, I do not think that, the prejudice is likely to be caused to the appellants. No interference is required. There is no merit in the appeal. Thus the following order:

ORDER

- i) The appeal is hereby dismissed.
- ii) In the circumstances, there shall be no order as to the costs.
- iii) Civil application also stands disposed of.

(V.K. JADHAV)
JUDGE