

(1)

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

**CIVIL APPLICATION NO.383 OF 2017
IN
SECOND APPEAL NO.545 OF 2015**

Ashok Govind Suryawanshi & ors. ..APPLICANTS

VERSUS

Yashwant Soma Dhake & ors. ..RESPONDENTS

Mr V.Y. Patil, Advocate for applicants;
Mr S.B. Kakade, Advocate for respondent no.1;
Mr P.R. Patil, Advocate for respondents no.1, 2A to 2D;
Mr P.R. Katneshwarkar, Advocate for respondent no.5

CORAM : N.W. SAMBRE, J.

DATE : 18th July, 2017

ORAL ORDER

This is an application preferred by original defendants no.4 and 6 seeking their transposition from respondents no.5 and 6 as appellants no.2 and 3 to this Second Appeal.

2. According to the learned Counsel appearing on behalf of the applicants, since the remedy of questioning the judgment of the first appellate court and that of the trial court is very much available to the present applicants under the law, the present application needs to be allowed.

(2)

3. The prayer is objected by the respondents-plaintiffs.

4. Having considered rival submissions, it is required to be noted that the suit against the present applicants went ex parte, against which they have already initiated proceedings for setting aside the said ex-parte decree under the provisions of Order IX, Rule 13 of the Code of Civil Procedure (for short "CPC"), vide Civil Misc. Application No.117 of 2007, which I am informed, is pending adjudication. Apart from above, the applicants have not questioned the decree of the Trial Court before the first appellate court. Remedy against the rejection of application under Order IX, Rule 13 of the CPC is an appeal under Order XLIII, Rule 1(d) of CPC. In such eventuality, whether the provisions of Section 100 of CPC are available to the present applicants is one of the questions which is required to be addressed.

5. The provisions of Section 100 of CPC read thus :-

"Second appeal -(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3)

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.]”

The provisions of Section 100 CPC can be invoked only in case an appeal is required to be preferred against the decree passed in an appeal by any court subordinate to the High Court. The decree passed in the appeal, which is questioned in this Second Appeal, is questioned by defendant no.3 to the suit, whereas the applicants were never before the first appellate court questioning the decree of the Trial Court. The applicants rather have chosen to approach before the Trial Court questioning the *ex parte* decree under Order IX, Rule 13 of CPC, which proceedings I am informed is pending.

(4)

6. In view thereof, in my opinion, the prayer of the applicants for their transposition as appellants is liable to be rejected as same is not in tune with the provisions of Section 100 CPC. Civil Application as such stands rejected.

7. Place Second Appeal for admission tomorrow at 10.30 a.m.

(N.W. SAMBRE, J.)

amj