

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

**CIVIL APPLICATION NO.965 OF 2017
IN
SECOND APPEAL NO.53 OF 2017**

WITH

SECOND APPEAL NO.90 OF 2017

Nivrutti Anna Lokhare (Deceased)
Through Lrs.

.. Applicant

vs.

Madan Shankar Bhoir

.. Respondents

Mr.Ambadas V. Chatuphale for the applicant in Civil Application No.965 of 2017

Mr.Bhushan Walimbe for the applicant in Civil Application No.107 of 2017

CORAM : K. K. TATED, J.

DATE : DECEMBER 18, 2017

PC.:

1. Heard learned counsel for the parties.
2. By this Civil Application No.965 of 2017, original respondent is seeking an order for setting aside common judgment and order passed by District Judge-4, Kalyan in Civil Appeal No.75/2015 and 76/2015

dated 1st October, 2016 and restore the same at the stage of admission immediately prior to passing of the impugned judgment and order dated 1st October, 2016.

3. The Learned Counsel for the applicant, original defendant, submits that in the present proceeding, applicant filed Regular Civil Suit No.248 of 2009 for declaration of ownership on the basis of adverse possession in respect of the suit property i.e. Land Survey No.91, Hissa No.8, Area No.0-05-0, Survey no.94, Hissa no.3, Area No.0-04-5, Survey No.94, Hissa no.4, Area No.0-04-05, Total area-14 ares at Mauje Nilje, Taluka Kalyan, District Thane whereas the applicant filed Regular Civil Suit No. 390 of 2008 for declaration of ownership and permanent injunction. The trial court, i.e. Joint Civil Judge, Junior Division, Kalyan, Dist. Thane by common judgment dated 15th July, 2015 dismissed Regular Civil Suit No. 248 of 2008 and partly allowed Regular Civil Suit No. 390 of 2008.

4. Being aggrieved by the judgment and decree passed by the trial court, original appellant, Madan Shankar Bhoir preferred Civil Appeals No. 75 of 2015 and 76 of 2015. Both those appeals were dismissed by District Court, Kalyan on 1st October, 2016.

5. The Learned counsel for the applicant submits that, being aggrieved by the dismissal of both the appeals, original appellant preferred Second Appeal No. 53 of 2017 and Second Appeal No.90 of 2017. He submits that both those Appeals are admitted by this Court by order dated 20th January, 2017 only on the ground that, lower

Appellate Court passed impugned common judgment and decree dated 1st October, 2016 when the matter was kept for hearing on interim application. Therefore applicant preferred present Civil Application in Second Appeal No. 53 of 2017 and Second Appeal No.90 of 2017. He submits that, applicant has no objection if, matter is remanded to the Appellate Court for deciding both the Civil Appeal Nos 75 of 2015 and 76 of 2015 on its own merits, after giving opportunity to both the parties. He submits that applicant is ready and willing to maintain status-quo in respect of the suit property as per the order passed by the Appellate court on 21.12.2016 being Exhibit-41 in Reg. Civil Appeal No. 76 of 2015. To that effect, he has filed Affidavit dated 18th December, 2017. The same is taken on record. He further submits that, if matter remains pending before this Court for hearing and final disposal on its own merits, it will take long time. Therefore, he has filed Civil Application and given undertaking dated 18th December, 2017. Therefore, in the interest of justice, this Hon'ble Court be pleased to allow the present Civil Application and remand the matter back to the Appellate Court for deciding on its own merits.

6. On the other hand, the learned counsel for the original plaintiff, vehemently opposed the present Civil Application. He submits that matter is already admitted by this Court and the same is required to be decided on its own merits. He further submits that, there is no notice for final hearing on the Second Appeal. Therefore, there is no question of allowing the present Civil Application.

7. I have heard both the sides at length. It is to be noted that in

the present proceedings, main contention of original appellant/plaintiff was that, the Appellate court passed common judgment and decree dated 1st October, 2016 in Civil Appeal No. 75 of 2015 and 76 of 2015 without hearing them. It was the main contention of the appellant, that on 1st October, 2016 before Appellate Court, matters were kept for orders on interim application. Instead of passing order on interim application, Appellate court decided both the Appeals finally and rejected the same without informing the plaintiff. It is to be noted that, applicant-original defendant fairly made a statement before this court and filed Affidavit that, they are ready and willing to maintain status-quo in respect of the suit property till the hearing and final disposal of Civil Appeal No. 75 of 2015 and 76 of 2015 on its own merits without giving full opportunity to both the parties. Bare reading of the order passed by this Court on 20th January, 2017 at the time of admitting both the Second Appeals show that, main contention of appellant, original plaintiff was about for not providing opportunity to argue the matter on its own merits. Considering these facts, I am of the opinion that, applicant, original defendant made out a case for remanding both the matters to the appellate Court for hearing on its own merits. Hence, following order is passed:

- a) Common judgment and decree dated 1st October, 2016 passed by the Learned District Judge-4, Kalyan in Civil Appeal No. 75 of 2015 and 76 of 2015 is set aside.
- b) Matter are remanded for hearing on its own merits after giving full opportunity to both the parties.

- c) Till the hearing and final disposal of Civil Appeal No. 75 of 2015 and 76 of 2015 on its own merits, status-quo order passed by the Appellate court on 21st December, 2016 below Exhibit-41 in Regular Civil Appeal No. 76 of 2015 to continue.
- d) Liberty granted to both the parties to make appropriate application before the Appellate court if they so desire for early hearing.
- e) Both the Second Appeal No. 53 of 2017, as well as, Second Appeal No.90 of 2017 stand disposed of accordingly.
- f) It is made clear that, lower Appellate Court to decide both the Appeals on its own merits without being influenced by the orders passed by this Court or earlier orders.
- g) Civil Application stands disposed off accordingly.

(K.K.TATED, J.)