

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

CIVIL APPLICATION NO.8087 OF 2018 IN
SECOND APPEAL NO.656 OF 2016

Damodhar s/o Rambhau Kakade ...APPLICANT

VERSUS

Sakharbai w/o Ramrao Gaikwad ...RESPONDENT

.....
Shri A.S. Bajaj, Advocate for applicant
Shri Mobin Shaikh, Advocate holding for
Shri V.R. Dhorde, Advocate for respondent
.....

CORAM: A.M. DHAVALÉ, J.

DATED : 30th October, 2018.

ORAL ORDER :

1. Heard Mr. Bajaj, learned counsel for the applicant (original respondent in Second Appeal) and Mr. Shaikh, learned counsel for respondent (appellant in Second Appeal). The appellant is original defendant. Regular Civil Suit No.66/2002 was filed by the present respondent against him for redemption of mortgage and for recovery of possession. The said suit proceeded exparte and was decreed by the judgment dated 2.2.2006. The present applicant claimed that he was not served with any notice. Hence, instead of application under Order 9 Rule

13 of the Civil Procedure Code, he filed First Appeal along with Misc. Civil Application No.185/2008 for condonation of delay of 930 days and in spite of contention that the appellant was not served with the summons, the learned first appellate Court refused to condone the huge delay and the application was rejected. Hence this Second Appeal is filed.

2. Learned Advocate Mr. Bajaj submits that, there was another parallel proceedings in which the present appellant/defendant was the original plaintiff. He filed Regular Civil Suit No.1/1997 for declaration of ownership and perpetual injunction on the basis of sale deed executed in his favour on 8.2.1985. This proceeding had a roller coaster ride. The trial Court decreed the suit. The first appellate Court reversed the decree and dismissed the suit. The High Court again restored the decree and before the Apex Court, the decision of first appellate Court was restored, holding that the document was mortgaged by conditional sale. Learned Advocate Mr. Bajaj submits that, the said judgment of Apex Court will bind the defendant and he cannot claim any ownership right on the basis of the sale deed. It is proved to be a mortgage transaction and, therefore, this appeal has become infructuous.

3. It cannot be disputed that the said finding in the earlier suit, as per the Apex Court judgment will bind the parties

before me in this matter. However, it must be stated that, Regular Civil Suit No.66/2002 was a suit for redemption of mortgage. One of the defences of the present appellant that it was a outright sale has been shut out. Other defences may be available to challenge the claim for redemption of mortgage. In the circumstances, the appeal has not become infructuous. Therefore, this civil Application for disposing of the Second Appeal deserves to be rejected and same stands rejected.

(A.M. DHAVALA)
JUDGE

fmp/