

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 23 OF 2018

PRABHATKUMAR RADHAKISHANJI KHEMKA
VERSUS
MRS. USHA SUNIL AGRAWAL AND OTHERS

Advocate for Appellant : Mr. A.S. Bajaj.
Advocate for Respondent Nos. 1 & 2 : Mr. S.V. Natu.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 09th January, 2019.

PER COURT :

1. When this matter was heard briefly on 19th September, 2018, I had passed the following order :

“1. Shri Bajaj, learned Advocate for the appellant submits that considering that the impugned judgment of the first Appellate Court in Regular Civil Appeal No.72/2014 is covered under Order 41 Rule 23-A of the Code of Civil Procedure as the judgment of the Trial court is set aside and the suit is remitted to the Trial Court, this Appeal from Order filed by the Appellant is perfectly maintainable under Order 43 Rule 1 (u) of the Code of Civil Procedure.

2. In addition thereto, he submits that as the Appellant is also challenging the order of

the first Appellate Court condoning the delay by its order dated 06.03.2014 and in view of Section 105(2) of the Code of Civil Procedure, this Appeal from Order can be entertained even to the extent of the challenge to the order of condonation of delay.

3. Shri Natu, learned Advocate for the Respondents, submits that this Appeal from Order cannot be entertained insofar as the order of condonation of delay is concerned. So also, there is no formal prayer made in the prayer clause seeking the quashing of the order dated 06.03.2014.

4. The learned Advocate for the Appellant prays for leave to add the prayer clause. Leave is granted. Addition be carried out within two weeks from today.

5. Stand over to 09.10.2018 in the supplementary board for considering, initially, the issue as regards the maintainability of this Appeal from Order to the extent of the order dated 06.03.2014."

2. Before dealing with the merits of the matter, it needs mention that there is no dispute in between the litigating sides that this Appeal from Order would be

maintainable in so far as the final judgment of the Appellate Court dated 20/11/2017 is concerned. The respondents contend that an Appeal from Order is not maintainable as against the order dated 06/03/2014, passed by the Appellate Court, by which, the delay of two years and eight days has been condoned and the Appeal has been registered.

3. I have heard the learned advocates on the final judgment of the first appellate Court dated 20/11/2017. Considering the view that I am taking in this order, I find that I am not required to deal with the legality of the order dated 06/03/2014, by which, the delay was condoned by the Appellate Court. Moreover, considering the law laid down by the Hon'ble Apex Court in the matter of Collector Land Acquisition Anantnag and another Versus Mst. Katiji and others [(1987) 2 SCC 107] and in the matter of Esha Bhattacharjee Versus Managing Committee of Raghunathpur Nafar Academy [(2003) 12 SCC 649], the delay does not appear to be inordinate or fatal to the Appeal preferred by the original defendants.

4. Considering the order that I am passing, I am not required to deal with the entire submissions for the reason that I find that the Appellate Court has rightly ordered the re-hearing in RCS No. 48/2001, as the judgment dated 11/01/2010, was delivered ex-parte.

5. Since I am convinced that the remand of the suit is justified, I have called upon the litigating sides to address the Court as regards any contentious issue that needs to be decided. After considering their submissions, I find that the document dated 05/04/1991, signed by the original allottee of the plot, in favour of defendant Nos. 1, is an admitted document. The defendants had entered their written statement in which they have admitted the document dated 05/04/1991. As such, this document is not required to be proved before the Trial Court.

6. I find from the record that they however, failed to participate in the hearing before the Trial Court. As a result, the ex-parte judgment was delivered by the Trial Court. An immovable property is at an issue and it would not be in the interest of justice and fair play that an ex-parte judgment be sustained on account of which the defendants could be deprived of the immovable property.

7. From the record, I do not find that the conduct of the defendants was so gross that they deserve no relief and that they deserve to suffer the ex-parte judgment. The Appellate Court has considered the entire fact situation revolving around the non participation of the defendants. After considering the said circumstances, the Court has concluded that the ends of justice would be met, if an opportunity is granted to the defendants to participate in the

adjudication of the suit before the Trial Court. These conclusions, in my view, are sustainable and are aimed at doing justice to the litigating sides. The direction of the appellate Court in remanding the suit to the Trial Court, therefore, does not call for any interference.

8. It also needs to be recorded that issues were cast by the Trial Court. The learned advocate for the defendants submits that based on the pleadings of the parties and keeping in view that it is the Court which is under an obligation to frame appropriate issue, the issue of limitation is likely to crop up as the agreement purportedly signed by the defendant on 30/07/1992, is made the basis of the suit that was preferred in the year 2001. On this count, I leave it to the wisdom of the Trial Court to consider this aspect and to decide whether the issue of limitation needs to be framed so as to be added to the existing issues.

9. Before parting with this matter, I wish to deal with a damaging observation made by the Appellate Court against the Trial Court in paragraph No. 18 of the impugned judgment. It is observed in paragraph No. 18 as under :

"In this respect on going through issues at Exh.34 it reveals that sorry state of affairs reveals in the manner in which issues were framed by learned trial court."

[Reproduced verbatim]

9. If the Appellate Court was convinced that issues were not framed properly, it could have passed an appropriate order specifying as to which issue needs to be cast. The Appellate Court has not concluded as to which issue should have been specifically cast and unnecessarily has made adverse observations /comments against the Trial Court which is reproduced as above. So also, I have concluded that except the issue of limitation, no other issue is required to be cast by the Trial Court, based on the pleadings of the parties and the material available as on date.

11. In view of the above, this Appeal from Order is partly allowed. The reproduced statement from paragraph No. 18 of the impugned judgment of the Appellate Court, is deleted from the said paragraph. So also, the direction of the Appellate Court to re-frame the issues, is also quashed and set aside.

12. The learned Registrar (Judicial) is directed to place a copy of this order before Shri S.H. Mahajan, District Judge and Shri S.A. Bafna, then 5th Joint Civil Judge, Junior Division, Aurangabad.

13. The learned advocates for the litigating sides submit that as the suit is of the year 2001, the same could be expedited. I find the said suggestion to be appropriate. The Trial Court, is therefore, directed to decide RCS No. 48/2001, in the light of the observations/directions set out herein above, as expeditiously as possible and in any case on/or before 31/12/2019. Needless to state, the plaintiff and the defendants are at liberty to adduce further evidence, if they so desire. The litigating sides would refrain from seeking adjournments on unreasonable or trivial grounds.

(RAVINDRA V. GHUGE, J.)

S.P.C.