

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

SECOND APPEAL NO.701 OF 2018

1 Shri Chandrakant Sampat Kamble
Age 59 years, Occ: Business

2 Shri Vasant Sampat Kamble
(Deceased)

Through Legal Heirs:-

- 2a) Smt. Anjana Vasant Kamble,
Age 63 Years, Occ: Household,
- 2b) Shri Balasaheb Vasant Kamble,
Age 53 years, Occ: Service,
- 2c) Shri Sanjay Vasant Kamble,
Age 44 years., Occ: Service,
- 2d) Shri Amol Vasant Kamble,
Age 39 years, Occ: Business,
- 2e) Shri Ravikant Vasant Kamble,
Age 37 years, Occ: Business,

All R/at-Kalamb, Tal: Indapur,
Dist. Pune.

... Appellants

Vs

- 1) Shri Suresh Hiralal Kamble,
Age: Adult, Occ: Labourer,
- 2) Shri Ramesh Hiralal Kamble (Deceased)
Through Legal Heirs,
 - 2a) Smt. Chayya Ramesh Kamble,
Age: Adult, Occ: Household,

- 2b) Shri Vaibhav Ramesh Kamble,
Age: Adult, Occ: Labour,
2c) Shri Pravin Ramesh Kamble,
Age: Adult, Occ: Labour,

3) Shri Mukesh Hiralal Kamble,
Age: Adult, Occ: Labourer,

4) Shri Satish Hiralal Kamble,
Age: Adult, Occ: Labourer,

5) Sou. Bela Yashwant Kamble,
Age: Adult, Occ: Household,

Nos.1 to 5- R/at Behid Prabhat Talkies,
Vakil Chawl, Solapur, Dist: Solapur.

6) Sou. Ujwala Satling Ingole,
Age Adult, Occ: Household,
R/at-Indapur, Dist. Pune

... Respondents

...

Mr. S.M.Oak I/by Mr. Sagar A. Joshi for the Appellants.
Mr. Surel S. Shah for the Respondent Nos.1 to 6.

CORAM : SANDEEP K. SHINDE J.

DATE : 8 MARCH, 2019

JUDGMENT :

This appeal is preferred by the plaintiffs, in the Special Civil Suit No.9 of 2007 against the judgment and order dated 29th September, 2016 passed by the Ad-hoc District Judge-2, Baramati, Dist. Pune in Regular Civil Appeal No.42 of 2011. I will

refer the parties by their status in the suit.

2 Plaintiffs had filed the suit, for partition and separate possession of the suit house property, declaration, that they have right to worship of God 'Narsinha' and the sale deeds dated 8th May, 2000 and 15th September, 2000 were null and void.

3 Defendant Nos.1 to 4 filed their Written Statement. Plaintiffs' examined in all six witnesses, were cross-examined by the defendant nos.1 to 4. At that stage, plaintiffs learnt that defendant no.5 was not served with suit summons. Thus, the learned trial Judge issued suit summons and thereupon defendant no.5 appeared and filed his Written Statement. Later, defendant no.5 moved an application and prayed that plaintiffs be directed to produce his witnesses for cross-examination. The learned trial Judge vide order dated 7th February, 2009 directed the plaintiffs to produce their witnesses for cross-examination by defendant no.5 at their cost.

4 It appears plaintiffs had filed an application under Section 114 of the Code of Civil Procedure, 1908 and sought review of the order dated 7th February, 2009 but it was rejected by the learned Judge. The learned trial Judge vide order dated 12th October, 2010 directed plaintiffs to deposit the process fees and the witness bhatta. Plaintiffs vide separate application expressed their inability to pay the process fees, however, application was rejected by the learned trial Judge. The Defendant No.5 thereupon moved an application below Exhibit 82 on 19th January, 2011 and prayed for dismissal of the suit as plaintiffs refused to comply with the orders passed by the Court from time to time. Plaintiffs filed their reply on 19th May, 2011 and agreed to pay bhatta for issuing summons and process fees and also the cost for issuing warrant if at all their witnesses failed to respond to summons.

5 The learned trial Judge vide order dated 19th January, 2011 allowed the application of the defendant no.5 (below Exhibit 82) and pass the following order:

“ None has appeared from Plaffs. Whenever called repeatedly and time to time till 4.50 p.m. Heard learned counsel for Defts. Perused application, say and record particularly order passed below Exh.66, 80 and 81. Had it been fact that PW No.2 to 6 were not ready to attend the Court at the attempt of Plaffs., the Plaffs. Could have filed application to issue them summons on P.F. and depositing T.A.D.A. Besides this, the specific order was passed on Exh.80 on dated 12/10/10 directing Plaffs. To pay P.F. and deposit T.A.D.A. of witnesses (PW 2 to 6) on dated 12/10/10 itself, however, the Plaffs. Have not complied the said order till date despite various opportunities given. This shows that Plaffs. Are not ready to obey the order and as such not ready to proceed with the suit. Hence application allowed. “

. Thus, vide order dated 19th January, 2011, the trial Court dismissed the suit.

6 Aggrieved by the order dated 19th January, 2011, the plaintiffs had preferred Regular Civil Appeal No.42 of 2011. The appeal was dismissed by the learned appellate Court on the ground that appeal was not maintainable. It is against the order passed in Regular Civil Appeal No.42 of 2011, this appeal is preferred.

7 Heard the learned counsel for the parties.

8 The question is, in exercise of which provisions of the Code of Civil Procedure, the learned Judge dismissed the suit, vide order dated 19th January, 2011. On the plain reading it appears for dis-obedience of the orders passed from time to time, the suit was dismissed. The appellate Court upheld and justified the order dated 19th January, 2011 in view of the provisions of Order XVII Rule 3(b) of the Code of Civil Procedure, 1908. The appellate Court held that though the plaintiffs and their advocate were present in the Court, the suit could not be proceeded with in absence of plaintiffs' witnesses, due to non-payment of process fees. The appellate Court was of the view that, mere physical presence of the plaintiffs and their advocate was not sufficient to proceed with the suit.

9 The learned Appellate Court held that, in view of the provisions of Order 17 Rule 2 read with Order 9 Rule 8, plaintiffs' remedy against the order dated 19th January, 2011 was under Order 9 Rule 9 and not substantive appeal.

10 Provisions of the Order 17 Rule 3 read as under:

“3. Court may proceed notwithstanding either party fails to produce evidence, etc. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, [the Court may, notwithstanding such default,-

- (a) if the parties are present, proceed to decide the suit forthwith, or*
- (b) if the parties are, or any of them is, absent proceed under rule 2.]”*

. It provides where parties to the suit fail to produce their evidence or fail to cause attendance of its witnesses to further progress of the suit, the Court may either proceed to decide the suit forthwith and if the parties or any of them is absent proceed under Rule 2

. Rule 2 reads as under:

“2. Procedure if parties fail to appear on day fixed.- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

[Explanation.- Where the evidence or a substantial portion of the evidence of any party has already been

recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.]”

. This sub-rule provides that if on a adjourned date, parties or any of them failed to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or makes such other order as it thinks fit. The appellate Court has held that though the plaintiffs and their advocate were present but in absence of the witnesses, the suit could not progress. Thus, taking into consideration facts of the case, the judgment and order of the learned Appellate Court cannot be faulted with.

11 This Court while exercising jurisdiction under Section 100 of the Code of Civil Procedure, 1908 read with provisions of Order 42 Rule 1 is empowered to exercise all the powers as if it is an appeal from the original decree. Rule 33 of Order 21 empowers appellate Court to pass such further or other decree or order as it requires.

. In this case, against the order of the learned trial Judge, remedy was to file an application under the provisions of Order 9 Rule 9 of the Code of Civil Procedure, 1908 but taking into consideration peculiar facts of the case, admission of this appeal may not serve or further the interest of the parties. Likewise relegating the appellants to the remedy under Order 9 Rule 9 may not be in the interest of the parties since suit is twelve years old. In this case, in the interest of both the parties and it would be just and appropriate to set aside the order dated 19th January, 2011 passed by the learned trial Judge and the order dated 29th September, 2016 passed in Regular Civil Appeal No.42 of 2011 and direct the appellants to secure the presence of the witnesses before the trial Court for their cross-examination by the defendant no.5 who is contesting defendant herein.

12 Provisions of Order 41 Rule 33 of the Code of Civil Procedure, 1908 are explained by the Apex Court in the case of **Mahant Dhangir v. Shri Madan Mohan & Ors. AIR 1988 SCC 54**

in the following words:

“15.....The appellate court could exercise the power under R. 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under R. 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in R. 33 of O. 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these: That the parties before the lower court should be therebefore the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under R. 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities.”

13 Thus, taking into consideration facts of the case and in exercise of the judicial discretion, in my view, instead, relegating the parties to appropriate proceedings for challenging the order dated 19th January, 2011 passed by the learned trial Court, the appropriate course is to direct appellants to secure the attendance of the

witnesses P.W.2, P.W.3, P.W.4 for their cross-examination by defendant no.5.

14 Thus, the following order:

(1) In exercise of the powers under Order 41 Rule 33 of the Code of Civil Procedure, 1908 read with Order 41 Rule 2;

(a) the order dated 19th January, 2011 passed in Special Civil Suit No.9 of 2007 by the Civil Judge, Senior Division, Baramati and the judgment and order dated 29th September, 2016 in Regular Civil Appeal No.42 of 2011 passed by the Ad-hoc District Judge-II, Baramati, Pune are set aside.

(b) The appellant is directed to secure the presence of P.W.2,3,4,5 and 6 at his own cost for cross-examination by the defendant no.5.

(2) The learned Civil Judge, Senior Division, Baramati shall schedule the dates on which the plaintiffs shall

keep the witnesses present before the Court for cross-examination by the defendant no.5.

(3) That the Special Civil Suit No.9 of 2007 is restored to the file of the Civil Judge, Senior Division, Baramati.

(4) The learned Civil Judge, Senior Division, Baramati shall commence proceedings by permitting defendant no.5 to cross-examine P.W.2 to P.W.6 and shall conclude the trial preferably before December, 2019 on its own merits.

(5) Parties to appear before the learned Judge on 1st April, 2019

15 The Second Appeal is disposed of in the aforesaid terms.

(SANDEEP K. SHINDE, J.)