

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2589 OF 2020

SAYYED ISMILE SAYYED KASIM AND OTHERS
VERSUS
USHADEVI RAJENDRA ANAND

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Advocate for Petitioners : Shri Badve J.C.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 24, 2020
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PER COURT :-

1. The petitioners are the original plaintiffs in RCS No.111 of 1973. Sayyed Lal was defendant No.4 and the owner of the suit property. The suit was filed for possession of land S.No.12/1 admeasuring 3 acres 4 gunthas, land revenue Rs.2.50 Ps. known as Kalyan Watch Number, situated at village Kalegaon, Tq. Jalna.

2. By judgment dated 28.8.1998, the suit was decreed and it is apparent from the record that the trial Court merely relied upon the oral testimony of the plaintiffs and there was no contest by the defendants.

3. One Sau. Ushadevi wife of Rajendra Anand filed Misc. Civil Application No.119 of 2005 before the trial Court praying for recalling of the judgment and decree dated 28.8.1998. By order

dated 27.4.2007, the application was rejected. She preferred Misc. Appeal No.119 of 2005, by which, the said proceeding was rejected. She preferred Writ Petition No.8746 of 2010 before this Court. By order dated 2.5.2011, this Court recorded in paragraph Nos.5 to 10 as under:-

“5. In so far as the last argument of the learned Counsel for the respondents is concerned, Regular Civil Suit no. 111 of 1973 appears to have been filed on 11.06.1973 and that suit has been decreed on 28.08.1998. Copy of the judgment as placed on record shows that suit was proceeded ex parte against some of the defendants or their legal heirs. This contention that the said judgment is not ex parte was not raised before the trial Court or the appellate Court. In view of the material available on record, I am not inclined to look into it for the first time. Same can be raised by the petitioner as preliminary objection before the trial Court again.

6. Civil Procedure Code permits filing of appeal against order vide its Order XLIII. As per Order XLIII Rule 1(d) , the appeal against order passed on application under Order 9 Rule 13 is maintainable. That appeal was accordingly filed by the present petitioner vide Misc. Civil Appeal no. 36 of 2007 and it has been rejected on 30th March, 2009. Order XLIII does not prescribe any appeal against appellate judgment. It is therefore obvious that present Petition is maintainable.

7. Reliance upon the judgment reported at " 2008 SAR (Civil) 448 Supreme Court"- Usha Sinha V/s Dina Ram and

others (Supra) to contend that petitioner lacks locus is misconceived. There, the status of transferee pendente lite in execution proceedings has been looked into in the background of provisions of Order XXI Rule 102 of the Civil Procedure Code with Bombay Amendment thereto. Here, the petitioner contends that initially after receipt of the notice of execution proceedings, an objection under Order 21 Rule 97 was filed as third party but after realizing the position, recourse was taken to Order 9 Rule 13 of the Civil Procedure Code.

8. *The Judgment of the Hon'ble Apex Court reported at " 2004 SAR (Civil) 181 Supreme Court"- Raj Kumar V/s Sardari Lal and others (Supra) clearly shows that when the decree is exparte, the purchaser from defendants therein can move application under Order 9 Rule 13 of the Civil Procedure Code. In this view of this clear verdict, application moved by the respondents for setting aside the order passed by the trial Court and the appellate Court is sustainable. Grievance made by the petitioner needed to be looked into on merits.*

9. *Writ Petition no. 8746 of 2010 is accordingly allowed. Orders dated 27.04.2007 in Misc. Application no. 119 of 2005 and appellate judgment dated 30.03.2009 impugned therein are quashed and set aside. Proceedings in Misc. Application no. 119 of 2005 are restored back to the file of Joint Civil Judge, Junior Division, Jalna for taking fresh decision in accordance with law.*

10. *Parties are directed to appear before that Court on 8th*

June, 2011. Trial Court shall look into the objections being raised by the present respondents in accordance with law and thereafter shall consider the grievance of present petitioner and attempt to decide the controversy as early as possible and in any case by 31st October, 2011.”

4. In view of the above, the lower appellate Court was directed to consider, whether Order IX Rule 13 of the CPC would apply to the proceedings filed by Sau. Ushadevi. Order IX Rule 13 permits the filing of an application for setting aside an ex-parte decree, if the defendant was not duly served or that he was prevented by any sufficient cause from appearing in the matter.

5. With the above directions, the lower appellate Court had to decide whether the Misc. Civil Application filed by Ushadevi deserve consideration. The whole issue revolved around the appearance of Sayyed Lal as he was the landowner, who had sold the land to Ushadevi. The appellate court concluded on the basis of the record that Sayyed Lal was an illiterate person and he had put his thumb impression upon the sale deed indicating that he could not sign and he used to apply his thumb impression.

6. Before the trial Court, as per the record available, Sayyed Lal supposedly appeared and entered a Written Statement with his signature. The appellate Court noticed that as Sayyed Lal could not

sign and used to affix his thumb impression, the suspicion about his appearance in Court becomes further stronger as his Written Statement contained admissions favouring the plaintiff. The appellate Court, therefore, noted that even the L.Rs. of Sayyed Lal have not appeared before the trial Court after his death, inspite of notice / summons and the oral statement of the plaintiff was accepted as gospel truth by the trial Court and the suit was decreed. As such, neither Sayyed Lal defended his right in the suit land, nor did Sau. Ushadevi, the purchaser, got an opportunity of participating in the litigation to safeguard her interest.

7. Considering the above, I find that the lower appellate Court has delivered a just and proper order, dated 17.12.2019 in the light of the directions of this Court dated 2.5.2011. In the factual backdrop of the case, Ushadevi, therefore, has a right to contest the suit to safeguard her interest in her share of the suit property, which she has purchased from the deceased Sayyed Lal.

8. This petition, being devoid of merits, is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

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