

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 531 OF 2017
WITH
CIVIL APPLICATION NO. 461 OF 2017

Noorji Jafar Bagwan since
deceased through legal heirs & ors. ..Appellants.
v/s.

Sou Noorjahan Malang Bagwan. ..Respondent.

Mr. I.M. Khairdi, advocate for appellants.

Mr. Priyal G. Sarda, advocate for respondent Nos. 1 to 3.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : JANUARY 9, 2020.

P. C. :

1 Heard respective Counsel.

2 The appeal is admitted on the following substantial questions of law :

Whether the appellant/defendant deserves an extension of right for remand of the matter to the trial court ? in the alternative, whether the appellant deserves to be extended an opportunity to contest decree on merits before the appellate court. The answer to the first issue would be in the negative and answer to the second issue would be in the affirmative.

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3 The appellant herein impugns order dated 1/4/2016 passed by the District Judge, Solapur, thereby rejecting the appellants' application seeking condonation of delay in filing first appeal challenging the Judgment and Decree passed by Joint Civil Judge, Junior Division, Solapur in RCS No. 863 of 2012 dated 24/1/2013. The principal contention of the learned Counsel for the appellant is that the Judgment and Decree in RCS No. 863 of 2012 was an *exparte* decree as he had not received the summons for the same. It is contended that the appellant had got knowledge of passing of the decree only after he received notice in darkhast on 29/9/2013. It is seen from the records that pursuant to the decree dated 24/1/2013 the decree holder who are the original plaintiffs had filed execution proceedings on 4/7/2013.

4 The learned Counsel has placed on record the photo copy of the roznama in RCS No. 863 of 2012. It is contended that the summons were not served upon him and there was a direction to take appropriate steps and the said stage had continued till 4/12/2012. The next date was 7/12/2012. Learned Counsel for the appellant vehemently submits that there is interpolation in the proceedings dated 7/12/2012 wherein initially, the matter was kept for taking steps, same was scored

of and subsequently learned Judge has posted the matter for evidence on 8/1/2013. It would be necessary to take into consideration that on 27/10/2012 bailiff had filed a report stating therein that the appellant herein had refused to accept summons. The report to that effect was filed on 29/10/2012 and the said report was sent by the learned Judge on 4/12/2012. According to the learned Counsel, summons were never served upon the appellant and therefore, decree was passed ex parte and period of limitation would begin from the date of knowledge after receiving the notice in the proceedings i.e. 29/9/2013. Learned Counsel initially prayed for remand of the matter to the trial court.

5 In fact, the appellant herein could have taken recourse to filing an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 by praying before the trial Court to set aside decree which was passed ex-parte. Order 9 Rule 13 of the Code of Procedure, 1908 reads as under :

13. Setting aside decree ex-parte against defendant.

—In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons

was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also: [Provided further than no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

[Explanation .—Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has

withdrawn the appeal, no application shall lie under this rule for setting aside that ex-parte decree.]”

6 The appellant herein had chosen to file first appeal challenging the said judgment and decree and had waived his right to lead evidence or remand the matter before the trial court. The learned Appellate Court has not assigned the said reason. However, Appellate Court was of the opinion that since appellant is in possession of the suit property, he was making frail attempt to protract the proceedings.

7 Learned Counsel for respondent has vehemently submitted that on 7/12/2012 initially Court Sheristedar had written remark that steps be taken. However, it was pointed out to the Learned Judge that on 4/12/2012 learned Court had seen that he has seen bailiff report of 4/12/2012 and therefore, Learned Judge had posted the matter for recording of evidence on the next date. It is also submitted that in fact, summons were served, however, since the appellant had refused to accept the summons he cannot claim that it is an exparte decree. In the eventuality that the appellant had filed an application under Order 9 Rule 13, there was every opportunity for the original defendant i.e. the present appellant to examine the bailiff who

had filed the report on 27/10/2012. And therefore, as on today, the bailiff report has gone on record and there is no reason to remand the matter to the trial court. It is seen from the record that the appellant happens to be the possessor of the property and the plaintiff happens to be his niece i.e. daughter of his deceased brother and that they had filed suit for partition and possession after the demise of their father. In view of this, the appellant deserves an opportunity to contest Judgment and Decree passed in RCS No. 863 of 2012. Hence, in the interest of justice, the matter is remanded back to the Appellate Court i.e. to District Judge, Solapur. Learned Judge shall decide the application in view of the above discussion. Learned Counsel at this stage, gives an undertaking that he would not seek any unwarranted adjournment in the matter and cooperate with the Court to the best of his capacity and that hearing of the appeal be expedited.

8 In view of this above undertaking given to the court, the matter is remanded back to the Appellate Court and the District Court, Solapur is requested to conclude the hearing in the said first appeal within 6 months from the date of receipt of this order.

9 Second Appeal is allowed in the above terms. Order

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dated 1/4/2016 is quashed and set aside. Interim protection granted to the appellant by this court shall remain in force till passing of the Judgment and Order by the Appellate Court. Both the parties to remain present before the Appellate Court on 3/2/2020.

10 In view of this, Second Appeal is disposed of. Civil Application is also disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]