

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

**FIRST APPEAL No. 88 OF 2020
WITH
INTERIM APPLICATION No.1 OF 2020**

Mr. Achlesh Daga and Ors.

**...Appellant/
Applicant**

Vs.

Mr. Nikhil Kumar Daga and Anr.

...Respondents

Mr. Pankaj Kowli a/w. Mr. Mitthal Munoth i/b. Kookada and Associates, for Appellant/Applicant

Ms. Sheetal Prakash a/w. Ms. Neha Pandya, for Respondent No.1

CORAM : R.D. DHANUKA, J.

DATE : 4th FEBRUARY, 2020

P.C.:

1. By this first appeal, the appellant has impugned the ex-parte decree dated 4th February, 2014 passed by the Court of City Civil Court judgment and decree dated 15th March, 2019 passed by the Bombay City Civil Court, thereby dismissing the application of the Appellant by way of chamber summons filed for setting aside the ex-parte decree passed in the summary suit.

2. At the threshold, learned counsel for respondent no.1 raises an issue regarding maintainability of the First Appeal on the ground that the learned trial court had already passed an ex-parte decree on the ground that the appellant has failed to appear despite due service of writ of summons. As against this, applicant had filed

application for setting aside the decree on the ground that the decree was obtained by the respondents (plaintiffs in the summary suit) by practicing fraud and deception upon the court. That application was also dismissed by the trial court.

3. Being aggrieved, the appellant has filed appeal from order being Appeal From Order (St) No. 12475 of 2019 and that appeal was withdrawn with liberty to adopt appropriate proceedings. The Appellant thereafter, filed writ petition before this Court bearing Writ Petition No. 9562 of 2019. On 3rd September, 2019, this Court after hearing both the parties at length and after going through the order passed by the trial court observed that when the judgment and decree was passed ex-parte on 4th August, 2014, the defendants were duly served with the suit summons. However, they failed to appear despite service. It was observed that so far as the appellants herein were concerned they were expelled from the partnership. If there was dispute amongst the partners, the appellants herein always could adopt appropriate remedy to get the dispute adjudicated before appropriate forum. There was a delay of three years for which there was no plausible explanation offered by the appellant. This court accordingly observed that it was not possible for this court to take any other view than one which has been taken by the trial court.

4. In paragraph 10 of the said order passed by this Court, this Court made it clear that it is always open for the appellants to file appropriate proceedings to get the decree set aside. The appellant, however, filed this First Appeal.

5. In my view, against the order passed by the trial court under Order 37 Rule 4 of the Civil Procedure Code, First Appeal is not maintainable. Be that as it may, this Court rendered a finding that the appellant has been duly served with writ of summons and, therefore, no interference is warranted with the order passed by the trial court. The said impugned order is not challenged before the Hon'ble Supreme Court.

6. First Appeal is accordingly dismissed. No order as to costs.

7. Application for ad-interim stay filed by the appellant is rejected. Pending civil application, if any, shall also be dismissed.

(R.D. DHANUKA, J.)