

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

APPEAL AGAINST ORDER NO.24 OF 2018

M/s Gandhi Builders and Developers, through its Proprietor Narendra s/o Dharnidharji Gandhi.
Vs.

Smt. Kusum wd/o Shyamlal Yadav (dead) Shri Ravindra s/o Shyamlal Yadav and others.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R. R. Srivastava, Advocate for appellant.
Mr. A. A. Naik, Advocate for respondent no.2.

CORAM : AVINASH G. GHAROTE, J.
DATE : FEBRUARY 03, 2020.

Heard Mr. Srivastava, learned counsel for the
appellant and Mr. Naik, learned counsel for respondent no.2.

2. By an order dated 3rd April 2018, the following
substantial question of law was framed while issuing notice to
the respondents.

*“Whether the learned District Judge is right in setting
aside the judgment and decree passed by the trial Court,
on the specious plea raised by the defendants that they
had not cross-examined by the plaintiff and three
witnesses and have not led evidence as they were under
bonafide impression that their presence is not required
in the proceedings of civil suit.”*

3. The office note dated 12.07.2018 indicates that

the respondents no.3 and 4 are served. By an order dated 23.07.2019, the appeal was directed to be put up for final hearing.

4. I have heard Mr. Srivastava, learned counsel for the appellant and Mr. Naik, learned counsel for the respondent no.2.

5. By the impugned judgment 06.01.2018, District Judge -11, Nagpur, has allowed the appeal and remanded the matter to the Trial Court, by setting aside the judgment and decree passed in Special Civil Suit No.234 of 2013 granting a decree for specific performance to the original plaintiff / appellant, by accepting the ground as raised in the appeal to the effect that the present respondents were prevented by sufficient cause in respect of their absence in cross-examining the witnesses. Before the the Trial Court the plaintiff had examined four witnesses. All of whom were not cross-examined by the respondents. The entire stage of evidence commenced from 21.07.2015 on which date an affidavit in lieu of evidence was filed by PW -1 Narendra Gandhi and ended on 26.10.2015 on which date the no-cross order was passed in respect of PW – 4 whose affidavit in lieu of evidence was filed on 19.10.2015. The defendants side was closed on 30.10.2015 and the judgment was pronounced on 23.11.2015.

6. The matter earlier at an interim stage had come to

this Court by virtue of Appeal Against Order No.102 /2014, challenging the rejection of the application for grant of interim injunction as filed by the original plaintiff before the Trial Court, which Appeal Against Order came to be rejected on 23.04.2015, in which the order of status-quo was directed to be continued for eight weeks. A review petition was filed in respect of the order dated 23.04.2015. In this review petition the parties were sent to mediation, which ultimately did not culminate into a settlement. The review ultimately came to be disposed of on 27.11.2015, by which time the entire process of recording of evidence before the Trial Court on behalf of the plaintiffs was over. The contention by the respondents before the Appellate Court that they were under the impression that since review was pending, they were not required to attend the Trial Court which resulted in no-cross order being passed against them and their side being closed, was accepted. Resulting the remand of the matter.

7. It is a matter of record, that the review petition was pending for the period as stated above, and therefore the impression carried by the counsel for the respondents as recorded in Para 23 in the impugned judgment cannot be ruled out. Even otherwise, the suit before the Trial Court being one for specific performance, was required to be decided on merits by affording and opportunity to the respondents to cross-examine the witnesses of the original plaintiffs and to tender their evidence. It is trite position of

law that matter should always be decided on merits as far as possible and not in default. That being the position, I do not see any reason to interfere in the impugned judgment which is a reasoned one, more so when the parties are at liberty to adduce evidence before the Trial Court. The appeal is dismissed no order as to costs.

8. The parties are directed to appear before the Trial Court on 18.02.2020. Considering the stage at which the matter, in Trial Court is directed decide the suit within a period of six months from the receipt of the order. The parties are requested to render all possible assistance to the Trial Court and ensure that the matter is decided within the time stated above. Record be sent to the Trial Court expeditiously.

JUDGE