

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.276 OF 2018

BABAR S/O DADARAO KOTHAWALE AND OTHERS
VERSUS
DATTATRAYA S/O MADHAVRAO KOTHAWALE AND OTHERS

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Advocate for Appellants : Mr. S. P. Salgar h/f Mr. R. D. Thorat
Advocate for Respondents : Mr. V. P. Sawant

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 15-09-2021.

ORDER :

1. Present appellants are the original defendants and the present respondents are the original plaintiffs. The appellants are challenging the concurrent Judgment and decree passed against them. Present respondents/original plaintiffs filed Regular Civil Suit No.74 of 2003 before 2nd Joint Civil Judge, Junior Division, Kaij District Beed, for possession of the property. The said suit came to be decreed on 28-03-2012. Present appellants challenged the said decree in Regular Civil Appeal No.105 of 2012. It was dismissed by learned District Judge-3, Ambajogai, District Beed, on 30-01-2018. Hence, this second appeal.
2. Heard learned Advocate Mr. S. P. Salgar holding for Mr. R. D.

Thorat for appellants and learned Advocate Mr. V. P. Sawant for respondents.

3. It has been vehemently submitted on behalf of the appellants that the appellants could not get proper opportunity to contest the suit. They had filed their written statement. Issues were framed, however, thereafter their Advocate did not remain present. Appellants No.4-A to 4-C had filed application Exhibit 85 in the suit for setting aside the no-cross order and allowing them to take cross-examination of the three witnesses examined on behalf of the plaintiff, however, that application came to be dismissed on 26-03-2012. Even in the first appeal, they have made a request for remand of the matter and grant of permission to take the cross-examination of the plaintiffs' witnesses and allowed them to lead evidence. However, the learned First Appellate Court rejected their request on the ground that the appellants ought to have made application under Order 9 Rule 13 of the C.P.C. before the same Court which pass the decree in order to avail the opportunity to cross-examine and lead evidence. In fact the remand was sought under the scope of Order 41 Rule 23 of the C.P.C. Reliance has been placed on the decision of this Court in *Mujahidmiya @*

Mansabmiya s/o Yakubmiya Deshmukh vs. Yakubmiya @ Nizammiya s/o Jahedmiya Deshmukh, in Second Appeal No.651 of 2016 with Civil Application No.12103 of 2015 wherein this Court by Judgment dated 29-04-2017 had permitted the appellants therein to lead the evidence as well as take cross-examination by restoring the suit. The matter was remanded to the Trial Court. The appellants want to lead vital evidence, however, they could not lead the same as opportunity was not given to them. They could not point out as to how the map drawn by the Court Commissioner cannot be relied upon. The appellants possess the suit land since last 50 years and they have perfected their title by adverse possession. Under such circumstances, the substantial questions of law are arising in this case requiring admission of the second appeal.

4. Per contra, learned Advocate appearing for respondents No.1 to 3 supported the reasons given by both the Courts below and submitted that proper opportunity was given to the present appellants to contest the matter, however, they remained absent. They have not given cogent reason for not appearing so also they did not challenge the order passed by the Trial Court below Exhibit 85, under such circumstances, there is no question of remand. The

power of remand is required to be sparingly used. There was remedy available to the appellants under Order 9 Rule 13 of C.P.C., however, instead of utilizing that opportunity, they had come in appeal. Under such circumstances, there was no scope for the First Appellate Court to exercise its power under Order 41 Rule 23 of C.P.C.

5. At the outset, it is to be noted that the plaintiffs had come with a case that they are the owners of the suit property and the defendants have made encroachment on the suit land to the extent of 55 R. Defendants filed their written statement and denied the contentions of the plaintiff. However, it is to be noted that their main defence was that they have become owners by adverse possession. The issues were framed and, thereafter, the matter was posted for leading evidence. Prior to that by application Exhibit 38, the plaintiffs prayed that T.I.L.R., Kaij be appointed as Court Commissioner to measure the disputed land. That application came to be allowed on 17-04-2006. Perusal of the said order by the learned Trial Judge would show that in spite of giving several chances, the defendants had failed to file their say. In fact, when they were properly represented by Advocate and if they had any

objection to appointment of Court commissioner, they ought to have filed their say. Thereafter, the T.I.L.R. visited the site and measured the land. He has categorically deposed that defendants No.6, 3, 1, 9 were present at the time of drawing panchanama and measurement. When they could remain present when the measurement was going on, they would have had knowledge about the progress in the suit, still it appears that they remained absent. Only the defendant No.4's legal heirs i.e. 4-A to 4-C at a late stage of the proceedings gave application Exhibit 85 stating that they could not remain present during the hearing of the matter before the Court. Defendant No.4-A is widow and defendant No.4-B and 4-C are the minors and they reside at Pune. Important point to be noted is that along with their application they have not filed any evidence to prove that they had shifted to Pune. When earlier they had appeared and filed written statement, they had given address of Kalegaon to the address pursis. The learned Trial court by holding that the defendants were negligent in prosecuting the case, rejected the said application.

6. Important point to be noted is that order below Exhibit 85 was not challenged by original defendants No.4-A to 4-C before this

Court but it appears that along with other defendants they preferred appeal under Section 96 read with Order 41 of C.P.C. In the entire appeal memo they have not given any reason as to why they were absent on various dates after the matter was posted for hearing i.e. leading evidence. The learned First Appellate Court has rightly held that the power under Order 41 Rule 23 of C.P.C. will have to be exercised sparingly, that is only in extreme cases if the concerned party seeking remand explains the absence. In fact if we consider the appeal memo before the First Appellate court, there is no specific prayer of remand as contemplated under Order 41 Rule 23 of C.P.C. Under such circumstances, when the reason itself is not shown for the absence of the defendant before the Trial Court, the decision in *Mujahidmiya @ Mansabmiya s/o Yakubmiya Deshmukh vs. Yakubmiya @ Nizammiya s/o Jahedmiya Deshmukh (Supra)* cannot come to the rescue of the appellants.

7. Apart from the plaintiff, he has examined the T.I.L.R. The Court has considered the maps drawn. Sheet 'A' and Sheet 'C' has been compared and, therefore, the decision arrived at by the T.I.L.R. that the defendants have made encroachment to the extent of 55 R on the land belonging to the plaintiffs has been proved.

8. The defendants have not put any other defence and had not claimed their exclusive ownership by any legal source but they wanted to rely on the defence of adverse possession. For adverse possession they will have to admit the title of the plaintiffs over the suit encroached portion. As the defendants did not lead any evidence to support their contention regarding adverse possession, both the Courts have rightly held that the defendants have not become the owners of the suit property by an adverse possession. Under these circumstances, no case is made out to frame any issue as contemplated under Section 100 of the C.P.C. and, therefore, the second appeal deserves to be dismissed at the threshold, accordingly it is dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-