IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.185 OF 2019
WITH
CIVIL APPLICATION NO.14626 OF 2017
IN SA/185/2019

VENKAT GIRJAPPA KASTE
VERSUS
SANJIVANI BHAGWAN TOHKALE AND OTHERS
...
Advocate for Appellant/Applicants : Mr. M. B. Kolpe
Advocate for Respondent No.1 : Mr. V. R. Dhorde
Advocate for Respondents No.2, 3, 5 and 6 : Mr. S. Y. Patil
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 06-08-2021.

ORDER :

1. The present appeal has been filed by the original defendant No.1 challenging the Judgment and decree passed in Regular Civil Appeal No.16 of 2016 by the learned District Judge-1, Omerga on 29-04-2017 thereby confirming the Judgment and decree passed by learned Joint Civil Judge, Senior Division, Omerga in Regular Civil Suit No.304 of 2007 dated 15-01-2013. Present respondent No.1-original plaintiff had filed the said suit for partition and separate possession of her 1/7th share and to get a declaration that the transaction between defendant No.1 and defendant No.7 is not binding on her share.

2. Heard learned Advocate Mr. M. B. Kolke for appellants, learned Advocate Mr. V. R. Dhorde for respondent No.1 and learned Advocate Mr. S. Y. Patil for respondents No.2, 3, 5 and 6.

3. Learned Advocate for the appellant vehemently submitted that the present appellant could not get proper opportunity to contest the suit. It proceeded ex-parte against him. He had filed an application for setting aside ex-parte order against him on 10-01-2010 along with his affidavit and written statement, however, that was not considered and the application was rejected on 03-02-2010. Unfortunately, that order of rejection of his application was not communicated to him and, therefore, he lost the right to challenge the said order. In his appeal, his first prayer was to remand the matter and give an opportunity to him to lead the evidence by filing a written statement. Further, it was his case that when the plaintiff had demanded partition he had already given piece of land i.e. admeasuring 1 H 22 R towards the Northern side of the suit land to her by executing sale deed, it was without consideration. Now apart from that land, the plaintiff would get more land which will not make that partition by metes and bounds. This fact he wants to bring it on

record and, therefore, the matter deserves remand.

4. Per contra, the learned Advocate for respondent No.1 supported the reasons given by the First Appellate Court for not remanding the matter to the Trial Judge. He also relied on the reasoning given by both the Courts on the merits regarding proof of entitlement of the plaintiff for partition.

5. At the outset, it can be seen that the suit was filed on 17-08-2007, suit summons was served on defendant No.1 on 16-11-2018. He appeared through his Advocate by filing a pursis at Exhibit 15 and then assured to file the address memo and Vakalatnama on the next date. However, no such act was done subsequently and, therefore, the learned Trial Judge passed an order proceeding the matter ex-parte against defendant No.1. Technically it could have been the order for proceeding the matter without a written statement. However, it appears that the Trial Court considered that since Vakalatnama was also not filed on behalf of defendant No.1, it was not taken that he had appeared through Advocate. But then it is further to be noted that the suit was still pending and after defendant No.1 executed the sale deed in favour of defendant No.7 then the plaintiff filed an application for temporary injunction on

21-01-2010 restraining defendant No.1 from selling any portion of the suit land. Though the matter proceeded ex-parte against defendant No.1, the learned Trial Judge had issued a fresh notice of the said perpetual injunction application to defendant No.1, but he avoided to accept that notice. Therefore, substitute service of the notice by publishing the same by way of public notice dated 12-01-2011 in the local newspaper has been done. It further appears that in the meantime defendant No.1 filed application Exhibit 35 for setting aside ex-parte order and alllowing with them to contest the suit. But that application was rejected by the Trial Court on 03-02-2010. That order was not challenged by defendant No.1 and, thereafter, he did not remain present to contest the suit. That means, even after rejecting his application Exhibit 35 on 03-02-2010, yet he was called upon by the concerned Court by public notice published on 12-01-2011. Thus, when sufficient opportunity was given to defendant No.1 to contest and he remained absent, the learned Trial Judge was justified in proceeding with the matter ex-parte against him. There is no question of remand of the matter. The present appellant has not given any reason as to why he remained absent For all those years. Without giving any sufficient reason he cannot seek remand of the matter. The prayer for remand

of the matter by the appellant has been rightly rejected by the First Appellate Court. Even at this stage also in the second appeal, no substantial question of law has been shown which would allow this Court to remand the matter.

6. Alternatively, it can also be seen that defendant No.1 is not disputing the fact that the suit property was the ancestral property. The relationship between the parties is not denied. Defendant No.1 wants to contend that he had given 1 H 22 R land out of the suit land to the plaintiff when the plaintiff was demanding money from time to time. He is not denying the fact that he had executed a sale deed in her favour, but then he now wants to come with a case that it was without consideration and it was towards her share. Defendant No.1 i.e. present appellant had not taken any legal action after he was served with the suit summons, that is after coming to know that plaintiff is now claiming partition, the present appellant should resist the same when according to him that share of the plaintiff was already carved out by him. He has not taken the suit filed by the plaintiff seriously and for whatever the transaction had arrived at it appears that he wants to give a different colour. There appears to be no merit in the contention of the appellant.

7. No substantial questions of law are pointed out by the appellant as contemplated under Section 100 of the Code of Civil Procedure, the appeal deserves to be dismissed, accordingly, it is dismissed. No order as to the costs. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE VIRENDRA J

Digitally signed by GAWADE VIRENDRA J
Date: 2021.08.21 14:41:57 +0530