

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

Second Appeal No.159/2021

Shri Padmakar s/o Haribhau Nagarale Vs. Shri Babarao s/o Ganpatrao Thool

Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's Orders

Ms.V.A. Dhobale, Advocate for the Appellant.

Shri U.J. Deshpande, Advocate for the Respondent.

CORAM : S.M. MODAK, J.

DATE : 12th AUGUST, 2021.

I have heard the learned Advocate for the appellant/original defendant. Learned Advocate for the respondent/plaintiff also appeared as he was served in delay condonation application.

Today, the matter is fixed for admission. The plaintiff's suit for removal of encroachment and possession was decreed by the trial Court. Though the defendant filed written statement, subsequently he remained absent. Trial Court decreed the suit on the basis of available evidence. The defendant have got an explanation to offer for not attending the trial Court. He was sick.

He filed Regular Civil Appeal No.12/2015. The first Appellate Court framed necessary points for determination. Then dismissed the appeal. The first Appellate Court has discussed the evidence. On the point of explanation offered by the defendant for his absence, first Appellate Court has also expressed his opinion.

In this second appeal it is submitted on behalf of the appellant that he went before the first Appellate Court only with a

limited request for remanding the matter to the trial Court. Similar request is made before this Court.

Learned Advocate for the plaintiff/respondent opposed the admission of the present appeal as no substantial question of law is involved. In support of his contention on the point of scope of second appeal, he relied upon a judgment in case of Dinesh Kumar Vs. Yusuf Ali reported in (2010) 12 SCC 740. According to him, the power of remand has not to be exercised in usual manner. For that purpose, he relied upon a judgment in case of Shivkumar and Others Vs. Sharanabasappa and Others reported in 2020 SCC OnLine SC 385.

It is true that even though defendant has not adduced any evidence, he can certainly challenge the judgment under Section 96 of the Code of Civil Procedure, 1908. He can very well agitate that the evidence adduced by the plaintiff is inadequate and insufficient. The copy of memo of first appeal is filed. One of the grounds taken in the appeal memo of appeal as—

“that the learned lower Court wrongly held the ownership of the disputed plot in favour of the respondent without going through the case of the appellant and came to wrong conclusion”

I have read the judgment of the first Appellant Court. What I find is that the first Appellate Court appreciated the evidence as well as also commented on the conduct of the defendant in not attending before the trial Court. The observation of the first Appellate Court finds place in paragraphs 22 to 25. The first Appellate Court gave observation—

“the defence is not specific regarding the period of his illness

that has moved the learned lower Court to exercise his rights of cross-examination and adducing evidence (para 25)".

It is an admitted fact that the defendant has not filed any document before the first Appellate Court about his illness. It is submitted that documents have been supplied to the learned Advocate by the defendant, however, he has not filed it and defendant should not suffer for that.

My attention is also brought to special pleadings of defendant in the written statement. Defendant has pleaded that he has agreed to purchase the property as per Issarchitthi dated 23rd March, 1989 from one Dharmadas Marotrao Fulzele and since then he is in possession. It is submitted that the sale-deed of the plaintiff is dated 25th June, 1991 and that is latter in point of time. The defendant wants to suggest that he is not encroacher but a lawful occupant of the plot of the land. These contentions are denied by learned Advocate for the plaintiff and it is submitted that sufficient evidence has been adduced before the trial Court including the evidence of T.I.L.R. (who is material witness in case of encroachment).

After considering the above submissions, I am not inclined to admit this appeal because I find that no substantial question of law is involved. The first Appellate Court can certainly remand the matter as per the provisions of Order XLI, Rule 23 or Rule 23-A of the C.P.C., but it has been held in number of cases that the power of remand is to be exercised not in a routine manner.

The first Appellate Court could have justified in remanding the matter provided the defendant who could have made

the ground before the Appellate Court by producing documents showing his absence before the trial Court. He could have succeeded in praying for remand if he could have sufficiently pointed out insufficiency of evidence adduced by the plaintiff. If the judgment of the first Appellate Court is read, I do not think that the first Appellate Court committed error in not remanding the matter. The contention raised about not producing the documents of medical illness by the learned Advocate for the defendant before the first Appellate Court could have been considered if the case to that effect could have been made out by supporting materials. I hold that this is not the fit case, so I do not find any merit in this appeal.

Hence, the appeal is dismissed.

Civil Application (CAS) No.969/2019

Learned Advocate for the appellant prayed for staying the judgment under execution. It is opposed by learned Advocate for the respondent.

The judgment of the trial Court as well as the first Appellate Court is stayed for two months.

The civil application is disposed of.

JUDGE