

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 38 OF 2021

Uttam S/o Natha Bhalekar
Age : 72 years, Occu. : Agri.,
R/o. Borkhedi Chinch, Taluka-Jafrabad,
Dist. Jalna. .. Appellant

Versus

1. Vinayak S/o Natha Bhalekar
Age : 71 years, Occu. : Agril.,
R/o. Ambad, Taluka-Ambad,
Dist. Jalna.
2. Manikrao S/o Natha Bhalekar
Age : 57 years, Occu. : Agril.,
R/o. Pithori, Taluka-Ambad,
Dist. Jalna.
3. Baban S/o Natha Bhalekar
Age : 82 years, Occu. : Agril.,
R/o. Wadi, Taluka-Ambad,
Dist. Jalna .. Respondents

Mr. R. M. Deshmukh, Advocate for the Appellant.
Mr. A. S. Deshmukh, Advocate h/f Mr. A. D. Gadekar, Advocate for
Respondent Nos. 1 to 3.

CORAM : BHARAT P. DESHPANDE, J.

DATED : 26th AUGUST, 2022.

ORAL JUDGMENT :-

1. This is a second appeal filed on behalf of original defendant thereby challenging the orders passed by the learned Trial Court wherein suit filed by the respondents/plaintiffs was decreed whereas, appeal filed by the present

appellant was rejected.

2. Heard learned counsel for the appellant and learned counsel for respondent Nos. 1 to 3.

3. The present appeal is taken up for final disposal at the admission stage itself with consent of both the parties.

4. The only question of law which cropped up in the present matter is as under :-

“Whether the first Appellate Court under Section 96 (2) of the Code of Civil Procedure (for short “CPC”) is empowered to consider the powers under Order 9 Rule 13 of the CPC in case the appellant is making out ground for setting aside ex-parte judgment and decree ?”

5. Learned counsel for the appellant forcefully submitted that the suit for partition and separate possession was filed before the learned Trial Court. The present appellant being a defendant in the said suit was served on 31.07.2017. He appeared before the Civil Court on 29.08.2017 and sought time to file written statement. Again he appeared on 26.09.2017 and sought for adjournment to file written statement. Thereafter, the defendant failed to appear due to his agricultural activities as that he was to move from one place to another for harvesting sugarcane. Therefore, he was unable to contact with his learned advocate. The learned Civil Court passed an order

on 30.10.2017 that “proceed without W.S.” The evidence of plaintiff was adduced on 18.11.2017. The matter was closed for final arguments. The final arguments were heard on 25.01.2018 and the judgment was passed by the learned Trial Court on 27.02.2018.

6. Learned counsel for the appellant submitted that the defendant visited the Civil Court on the same day, but during afternoon time and got the knowledge about the judgment and decree passed against him. Accordingly, he approached the learned advocate who advised him to file appeal. Accordingly, appeal was filed before the District Judge, Jalna vide Regular Civil Appeal No. 46/2018. He submitted that while deciding the said appeal, the learned Court failed to consider that the provisions of Order 8 Rule 1 of the CPC are not mandatory and time could have been extended by the learned Trial Court for filing written statement. He then submitted that the learned first Appellate Court failed to consider the powers which can be exercised by the learned first Appellate Court under Order 9 Rule 13 of the CPC and arrived at wrong conclusion.

7. Learned counsel appearing for the respondents submitted that, no substantial question of law is involved in the present matter and therefore, appeal deserves to be rejected.

8. I perused the record as well as the findings of the learned first Appellate Court with regard to point No. 2 which starts from paragraph

No. 16 onwards. Part VII of the CPC deals with appeals. Section 96 of the CPC provided that appeal shall lie from every decree passed by any Court exercising original jurisdiction, to the Court authorized to hear appeal from the decisions of such Court. Order 41 of the CPC deals with appeal from original decrees. Rule 2 deals with grounds which may be taken in appeal wherein, it is provided that the appellant shall not, except by the leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the Appellate Court in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule. Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

9. Order 41 Rule 23 of the CPC reads thus :-

“23. Remand of case by Appellate Court – Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.”

10. Similarly, Order 41 Rule 33 deals with the powers of the Court of appeal which reads thus :-

“33. Power of Court of Appeal – The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees] :

[Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]”

11. In the present matter, it is clearly brought on record that the parties are relatives and the contention of the present appellant that he was out of the said village for the purpose of harvesting, was known to the plaintiff/respondents herein. It is also a fact that written statement was not filed by the present appellant and thereafter, he remained absent. Though the learned First Appellate Court has considered this aspect in the reasoning, he did not consider it proper to remand the matter for the purpose of giving opportunity to the appellant to file written statement and contest the suit.

12. Learned counsel for the appellant submits that in fact, the suit

property is the self acquired property and therefore the respondent/plaintiff is not having any right to claim partition and separate possession.

13. Admittedly, the parties are from village and they are not having knowledge about the procedure of law. When the learned first Appellate Court observed that the powers under Order 9 Rule 13 of the CPC could have been exercised, the appeal was dismissed only on the ground that the appellant failed to file such application before the Trial Court. In the present matter, it is a fact that the grounds were taken by the present appellant before the learned First Appellate Court which are available to him under Order 9 Rule 13 of the CPC. The observations of the learned first Appellate Court that he cannot sit in appeal with regard to the grounds available to the appellant under Order 9 Rule 13 of the CPC without filing such application are erroneous. As discussed earlier, the grounds available to the appellant under Section 96 of the CPC r/w Order 41 of the CPC are wide enough and includes the grounds available to the party under Order 9 Rule 13 of the CPC. Therefore, such observations of the learned first Appellate Court are contrary to the provisions of the CPC itself.

14. The appellant was having options either to file an application under Order 9 Rule 13 of the CPC or to file appeal under Section 96 of the CPC thereby challenging the findings with regard to not giving opportunity as well as on merit.

15. The grounds available to the appellant under Order 9 Rule 13 of the CPC are limited so as to show that he was prevented by sufficient cause from appearing before the Court and to give him opportunity to contest the matter whereas, the grounds under Section 96 of the CPC are wide enough which includes the grounds challenging the findings on merit as well as not giving opportunity to contest the suit. Therefore, such findings of the learned First Appellate Court needs to be quashed and set aside.

16. Learned counsel for the appellant placed reliance in the case of **Zolba Vs. Keshao and Ors.** reported in **AIR 2008 Supreme Court 2099** wherein the Hon'ble Apex Court has observed in paragraph Nos. 7 and 8 as under :-

“7. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8, Rule 1 of the CPC. After reading the provisions, in particular the proviso to Order 8, Rule 1 of the CPC, we are unable to hold that the provisions under Order 8 Rule 1 are mandatory in nature. In Salem Advocate Bar Association, Tamil Nadu vs. Union of India (AIR 2005 SC 3353), it has been clearly held that the provisions including the proviso to Order 8, Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word "shall" in Order 8, Rule 1 of the CPC by itself is not conclusive to determine whether the

provision is mandatory or directory. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the decision in that case, the same can be construed as directory. In paragraph 21 of the said decision, this court observed as follows : -

"The use of the word 'shall' in order 8, Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand-maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

8. Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that, in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8, Rule 1 of CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice. Keeping this principle as laid down by this court in the case of Salem Advocate Bar Association (supra) in mind and in view of our observations made herein above, we now look into the averments

made in the application for condoning the delay in filing the written statement. In the application, it has been stated that on instruction of his counsel in the trial court, the written statement was not filed within the period of limitation as the appellant was under bonafide belief that the written statement shall be filed after the decision of the appeal by the District Court. The written statement was, however, filed and the records of the case were called from his lawyer who has been conducting his case in the appeal pending before the District Court. The facts disclose that the misc. appeal has been filed against an order of injunction before the District Court Chandrapur whereas the suit is pending before the Civil Judge, Junior Division, Nagbhid. Since the appeal was pending, the records of the appellant were then lying with the lawyer at Chandrapur. Therefore, the file was not available with the lawyer of the appellant at Nagbhid and therefore, the written statement could not be filed within the period of limitation. Such being the position, in our view, the facts stated would constitute sufficient cause for condoning the delay in filing the written statement and it has to be taken that the non-availability of records at Nagbhid had prevented the appellant from filing the written statement within the period of limitation which in our view was an exceptional case constituting sufficient cause for condoning the delay in filing the written statement. In this view of the matter, in the facts and circumstances of the case and in view of the reasoning given above, we hold that the High Court as well as the trial court had erred in rejecting the application for condoning the delay in filing the written statement. Accordingly, the application for condoning the delay is allowed and the written statement filed by the appellant is accepted and consequent thereupon, the impugned order which affirmed the order of the trial court rejecting the application for condoning the delay in filing the written statement is set aside. The trial court shall now proceed with the hearing of the suit and dispose of the same positively within one year from the date of supply of a copy of this

order to it.”

17. Learned counsel for the appellant then placed reliance in the case of **M/s. R. N. Jadi and Brothers and Ors. Vs. Subhashchandra** reported in **AIR 2007 Supreme Court 2571** wherein, the Hon’ble Apex Court has observed that the time limit fixed under Order 8 Rule 1 of the CPC does not take away power of the Court to accept the written statement beyond such time.

18. Learned counsel for the appellant then relied upon the decision of this Court in the case of **Mahadeo Ramchandra Chikate Vs. Baliram Vithu Khaire** reported in **2017 (6) Mh. L. J. 313**. The above decision is also referring to the Hon’ble Apex Court decision cited above.

19. Learned counsel for the appellant also placed reliance in the case of **Sarjabai wd/o Narayanrao Manmode Vs. Dhanraj s/o Pandurang Manmode** reported in **2017 (6) Mh.L.J. 869** wherein, this Court observed that the powers of remand under Order 41 are wide enough. There is no dispute about such proposition.

20. Considering the submissions and the fact that the learned first Appellate Court committed error in not considering the grounds available to the appellant under Order 9 Rule 13 of the CPC and therefore, such decision needs interference.

21. It is a fact that the parties are having blood relations and there is

dispute with regard to the landed property. It is submitted that the appellant is in possession of the entire property whereas the respondents are claiming share in it.

22. Having said so, the second appeal needs to be allowed by answering the question of law framed above. The judgment and decree passed by the learned first Appellate Court as well as the judgment and decree passed by the learned Trial Court are required to be quashed and set aside. The civil suit is therefore required to be remanded to the concerned Civil Judge Junior Division, Jafrabad, District Jalna. R.C.S. No. 136 of 2017 needs to be restored. The appellant is given an opportunity to file written statement, within a period of one (01) month from the date of appearance before the Trial Court, subject to payment of cost of Rs. 10,000/- (Rs. Ten Thousand only). In view of the above, I pass the following order.

ORDER

(I) The second appeal stands allowed.

(II) The judgment passed in R.C.S. No. 136 of 2017 dated 27.02.2018 and judgment passed in Civil Appeal No. 46 of 2018 dated 31.01.2020 are hereby quashed and set aside. R.C.S. No. 136 of 2017 is restored to the file of Civil Judge Junior Division, Jafrabad.

(III) The appellant/defendant is granted permission to file written statement, within a period of one (01) month from the date of

appearance before the learned Trial Court and subject to payment of cost of Rs. 10,000/- (Rs. Ten Thousand only) to be deposited with the learned Trial Court. The respondents are permitted to withdraw such cost.

(IV) The parties shall appear before the learned Trial Court on 23.09.2022.

(V) The learned Trial Court shall allow the appellant/defendant to file written statement within a period of one (01) month from that date and subject to payment of cost as mentioned above. The learned Trial Court further directed to decide the civil suit as expeditiously as possible and within a period of six (06) months thereafter.

(VI) In view of the above, second appeal stands disposed of accordingly.

(VII) Record and proceeding be returned immediately to the learned Trial Court.

(BHARAT P DESHPANDE, J.)

P.S.B.