

SGPunde

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 854 OF 2022
WITH
CIVIL APPLICATION NO. 17316 OF 2022
IN
SECOND APPEAL NO. 854 OF 2022

Meenabai Ram Kate @ Meenabai Mahadev Shinde,
Age : 44 years, Occu: Household,
R/o. Gajanan Nagar, Nalwandi Road,
Beed, Tq. And Dist. Beed. ...Appellant

Versus

Ashabai Mahadev Shinde,
Age : 48 years, Occu. Household,
R/o. Nalwandi Road, Beed,
Tq. & Dist. Beed. ...Respondent

...
Mr. Hrishikesh V. Tungar – Advocate for appellant
Mr. Shashikant E. Shekade – Advocate for respondent
....

CORAM : GAURI GODSE, J.
DATE : 22ND FEBRUARY, 2023

ORAL JUDGMENT :

1. This Second Appeal is preferred by the original defendant for challenging the concurrent decree of injunction passed in favour of the plaintiff.
2. The respondent (“plaintiff”) had filed Regular Civil Suit No. 217 of 2018 in the Court of 4th Joint Civil Judge Senior Division, Beed, for injunction restraining the appellant

(“defendant”) from disturbing the possession of the plaintiff over the suit property. By the judgment and decree dated 17th February, 2021, the said suit was decreed. Being aggrieved by the said decree, the appellant preferred Regular Civil Appeal No. 41 of 2021. By the judgment and decree dated 12th September, 2022, learned District Judge-4, Beed, dismissed the said appeal. Hence, the defendant has preferred the present second appeal.

3. By order dated 11th January, 2023, notice for final disposal was issued by framing questions of law, which reads thus:

[i] Whether it was necessary for the first appellate court to exercise powers under Order XLI Rule 23A of Code of Civil Procedure, after the documents produced by the appellant were examined?

[ii] Whether it was necessary for the first appellate court to decide the challenge in the appeal against order of no written statement and order of no cross examination?

4. The respondent is served with notice for final disposal of the appeal and respondent is represented through advocate. Hence, this Second Appeal is taken up for final disposal.
5. It is the case of the appellant that there was an order of ‘no written statement’ as well as ‘no cross-examination’ passed by

the trial court. Hence, in the Regular Civil Appeal, a specific ground was raised in clause nos. 4 and 7 of the appeal memo with respect to challenge to the order to proceed with the suit without written statement of the appellant. The learned counsel for the appellant further submitted that the first appellate court in paragraph no. 3 of the impugned judgment has referred to the submissions made on behalf of the appellant on the orders of 'no written statement' as well as 'no cross', however, the first appellate court has not dealt with and not decided the said challenge which is specifically made on behalf of the appellant. The learned counsel for the appellant, therefore, submits that this is a fit case to exercise the powers under Order XLI Rule 23A of the Code of Civil Procedure and remand the matter back to the first appellate court for deciding the challenge that is specifically recorded by the first appellate court in paragraph no. 3 of the impugned judgment.

6. Learned advocate for the appellant further submitted that the decree is passed for injunction restraining the appellant from disturbing the possession of the respondent over the suit property. He further relies upon paragraph no. 11 of the impugned judgment of the first appellate court wherein it is recorded that the notice of the first appeal could not be served

on the plaintiff on the address of the suit property as she was not found residing on the suit property. Hence, there was service by way of substituted service. Thus, the learned counsel for the appellant submitted that, there is no merit in the case of the plaintiff that she is in possession of the suit property and therefore she will not be entitled to decree of injunction. Thus, it is submitted on behalf of the appellant that considering these facts of the case it is necessary that the appeal be remanded back to the first appellate court for deciding the specific challenge to the 'no written statement' and 'no cross' order.

7. The learned counsel appearing for the respondent submitted that there was never any attempt made on behalf of the appellant for getting 'no written statement' and 'no-cross order' set aside in the trial court. The learned counsel further submitted that this attempt on behalf of the appellant is only to avoid the decree that is passed by the trial court in favour of the respondent. Learned counsel further submitted that the trial court on examining the evidence on record produced by the plaintiff passed the decree in favour of the plaintiff. He submitted that there is no merit in the submissions made on behalf of the appellant and hence there is no case made out for remanding the matter back to the first appellate court.

8. I have considered the submissions made on behalf of both the parties. Perusal of the record of the second appeal shows that there is a specific ground raised for challenging the order of “no written statement” and “no-cross examination” passed against the appellant. In the ground nos. 4 and 7 of the first appeal memo, it is specifically stated that due to pandemic situation in the year 2020, the appellant was unable to contact her advocate. The submissions made on behalf of the appellant are very specifically recorded by the first appellate court in paragraph no. 3 of the impugned judgment. However, there is absolutely no finding on the said submissions.
9. In such circumstances, considering the reasons recorded by the first appellate court for dismissing the appeal by ignoring the submissions made by the appellant with respect to the order of “no written statement” and “no-cross examination” in my opinion, this is a fit case to remand the appeal to the first appellate court for the purpose of deciding the challenge raised by the appellant as recorded in the impugned judgment in paragraph no. 3.
10. Plain reading of Order XLI Rule 23A of the CPC provides that, where it is found that a re-trial is required in the facts of the case, the decree can be reversed in appeal and re-trial can be

considered to be necessary. Thus, it was expected from the first appellate court to consider whether this was a fit case to exercise powers under Rule XLI Order 23A read with Section 107 of CPC by considering merits of the submissions on behalf of the appellant as raised in clauses 4 and 7 of first appeal memo and as recorded in paragraph no. 3 of the impugned judgment.

11. There is no merit in the submission made on behalf of the respondent that no attempt was made by the appellant to get the orders of “No Written Statement” and “No Cross” set aside. The appellant has raised specific challenge to the said orders in the first appeal memo. The appellant was entitled to raise the said challenge as provided under Section 105 of CPC. However, the first appellate court has not examined the merits of the said grounds of challenge.
12. Hence, in such circumstances, the questions of law formulated by order dated 11th January, 2023, are answered as stated above and I find that this is a fit case to remand the matter to the first appellate court for deciding the challenge raised by the appellant to the orders of “no written statement” and “no cross examination” as stated herein above. Hence, the following order is passed.

ORDER

- [i] The judgment and decree dated 12th September, 2022 passed by the learned District Judge-4, Beed in Regular Civil Appeal No. 41 of 2021, is set aside.
 - [ii] Regular Civil Appeal No. 41 of 2021 is restored to the file of the concerned District Judge, Beed.
 - [iii] The parties will appear before the concerned District Judge, Beed on 20th March, 2023.
 - [iv] No formal notice for appearance of the parties will be necessary.
 - [v] Parties will cooperate for expeditious hearing of the appeal and no unnecessary adjournments will be sought.
13. Second Appeal is partly allowed in the above terms.
14. In view of disposal of the appeal, pending civil application is disposed off as infructuous.

[GAURI GODSE]
JUDGE