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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.208 OF 2022
WITH
INTERIM APPLICATION NO.1558 OF 2022
IN
SECOND APPEAL NO.208 OF 2022

Baban Shankar Bukate ...Appellant
Versus
Rajaram Vishwanath Bukate & Ors. ...Respondents

- Mr. Shrishail Sakhare, for the Appellant.
- Mr. P.D. Pise, for the Respondent No.1.

CORAM : MADHAV J. JAMDAR, J.
DATE : 25th JULY 2023

PC. :

1. Heard Mr. Shrishail Sakhare, learned counsel appearing for the Appellant and Mr. Pise, learned counsel appearing for the Respondent No.1.

2. It is settled legal position that the act of the Court shall prejudice no one and in such a fact situation, the Court is under an obligation to undo the wrong done to a party by the act of the Court (*Bhupinder Singh vs. Unitech Limited*¹). The Supreme Court in *South*

1. 2023 SCC OnLine SC 321

*Eastern Coalfields Ltd. vs. State of M.P. & Ors.*², has observed that one of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression, ‘the act of the court’ is used, it does not mean merely the act of the primary court, or of any intermediate Court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case. This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it. This settled legal position squarely applies to the present case.

3. In the present Second Appeal, the impugned order is order dated 16th July 2021 passed by the learned Additional Sessions Judge, Sangli in Regular Civil Appeal No.326 of 2009 passed below Exh.1 by which the proceedings filed in said Regular Civil Appeal No.326 of 2009 are disposed of. The said proceedings are in the nature of cross-objections filed by the original Respondent No.2 i.e. the present Appellant.

4. As set out hereinabove, it is settled legal position that the mistake of the Court should not prejudice any party to the

2 (2003) 8 SCC 648

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proceedings. This is a matter where mistake committed by the Court has adversely affected the present Appellant who is the original defendant no.1 in the suit and Respondent No.2 in the Appeal filed before the learned First Appellate Court. The said Respondent No.2 has filed cross-objection in the Appeal and the said proceeding of Appeal (i.e. said cross-objection) are disposed of on the ground that the same are not on record.

5. The relevant factual position is as follows:-

- (I) The plaintiff i.e. the present Respondent No.5 filed Reg. Civil Suit No.19 of 2007 in the Court of Civil Judge, Junior Division, at Kavathe-Mahankal, Dist. Sangli seeking partition and separate possession. The said suit was decreed by judgment and decree dated 9th November 2009 by the learned Civil Judge, Junior Division, at Kavathe-Mahankal, Dist. Sangli.
- (II) An Appeal was filed challenging the said judgment and decree by the original defendant Nos.7 to 10 bearing Reg. Civil Appeal No.326 of 2009 before the District Judge, Sangli. In the said Appeal, the present Appellant was the Respondent No.2 and he filed cross-objection.

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(III) The said Appeal was withdrawn by the Appellants and therefore, by order dated 19th March 2019 passed below Exh.1 in Reg. Civil Appeal No.326 of 2009, the learned District Judge-7, Sangli disposed of the Appeal for want of prosecution as the Appellants expressed the desire to withdraw the Appeal. The said order dated 19th March 2019 reads as under:-

“The appellants have appeared through their Advocate Mr. Khemalapure and they desire to withdraw the appeal. The application [exh.45] is signed by all the appellants and the same is identified by Advocate Mr. Khemalapure. It is submitted that Respondent Nos.1 [plaintiff] died on 18 June 2018. His death certificate is produced on record. The suit was decreed. The other respondent Nos.2 to 4 called, even their Advocate Mr. Hingmire and Mr. R.B. Salunkhe absent, after repeated calls. The say of respondent nos.2 to 4 was called. They did not file their say. **There are no cross objections filed by respondent no.2 to 4.** The respondent no.5 to 7 are also died and their legal heirs are taken on record and they have appeared through Advocate Mr. J.V. Navale. They have no objection to allow the application for withdrawal. The matter is old

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one and all the respondents desire to withdraw the appeal. Hence, the appeal stands disposed off for want of prosecution. No order as to costs.”

(Emphasis added)

It is significant to note that while allowing withdrawal of the Appeal, it is specifically mentioned by the learned First Appellant Court that there is no cross-objection filed by the Respondent Nos.2 to 4. The Respondent No.2 is the present Appellant and he has filed cross-objection. Therefore, the said assumption of the learned First Appellate Court is incorrect.

(IV) In view of the above position, the present Appellant i.e. Respondent No.2 in said Reg. Civil Appeal No.326 of 2009 filed application for restoration of cross-objection filed in said Appeal. The learned District Judge -1, Sangli by order dated 17th March 2021 passed below Exh.1 in Misc. Civil Application No.265 of 2019 allowed the said application and restored the cross-objection filed in R.C.A. No.326 of 2009. The learned District Judge passed the following operative order:-

“ORDER

1] Misc. Civil Application No.265/2019 is allowed to the

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extent of restoration of cross-objection in R.C.A. No.326/2009 in following terms:-

- a) The cross-objection in R.C.A. No.326/2009 is restored on its original stage subject to condition that the cross objector shall not seek any adjournment in the cross-objection.
- b) Parties to appear before concerned Court on 26/03/2021 for first date of cross objection hearing.
- c) Both parties shall give a program of one month of hearing and disposal of cross-objection of the first date of appearance.
- d) The cross-objection will be heard and decided within one month from today.
- e) In the event of failure of the cross objector to taking hearing of the cross-objection within the time framed, this application will be deemed to be dismissed.”

Thus, by the said order dated 17th March 2021, cross-objections were restored and parties were directed to appear before the concerned Court on 26th March 2021 and certain directions were given for expeditious hearing of the said cross-objection.

- (v) In the above background, it is to be noted that when the

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matter was placed before the learned First Appellate Court for hearing of the said cross-objection, the learned First Appellate Court in the impugned order dated 16th July 2021 observed that the cross-objection is not on record and what is on record is only delay condonation application. The learned First Appellate Court further observed that as there is no cross-objection on record in the Appeal and the original Appeal itself is withdrawn, there is no purpose to keep the matter on board and accordingly, disposed of the proceedings. The said impugned order dated 16th July 2021 reads as under:-

- “1) Heard both sides.
- 2) It is seen that **this Court allowed Misc. Application No.265/2019 in a view to restore the cross-objection in RCA No.326/2009. However, when the original R. & P. was called, it is seen that no cross-objection is on record. Only application for delay condonation is filed. In the light of that order in M.A. 265/2019 was passed on the basis of the submissions and the assertions in the application that the cross-objection is on record. Since there is no cross-objection on record in this appeal and the original appeal is already withdrawn by the appellants, there is no purpose**

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to keep the matter on board. Hence, I pass the following order.”

ORDER

- 1] **The proceeding is disposed of.**
- 2] R. & P. is sent to the Record Room.”

(Emphasis added)

However, it is significant to note that to this Second Appeal, photocopy of certified copy of the cross-objection has been annexed. However, Mr. Pise, learned counsel appearing for the Respondent No.1 on earlier date stated that as per his instructions, the said cross-objection is not on record.

6. In the above background of the matter, it appears that on 19th July 2023 the present Appellant applied for the certified copy of the cross-objection and the Assistant Superintendent (Record) of District Court, Sangli has issued the certified copy on 20th July 2023 of the said cross-objections. The said certified copy dated 20th July 2023 of the cross-objections is taken on record of this Second Appeal. Thus, it is clear that the observation of the learned First Appellate Court that there was no cross-objection on record and therefore, disposal of the proceeding on that basis is not correct and in fact, is a mistake of the

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Court. It is apparent that the cross-objections on record are inadvertently not noted by the learned First Appellate Court.

7. Mr. Shrishail Sakhare, learned counsel appearing for the Appellant states that the Respondent No.1 is the only contesting Respondent who has been represented through Advocate. However, the Court has proceeded to dispose of the Second Appeal finally, as noted herein-above, the impugned order has been passed as a result of mistake committed by the Court by which the proceedings were disposed of on incorrect assumption that the cross-objections were not found on record. However, the cross-objections are on record as can be seen from the certified copy which is issued to the present Appellant on 20th July 2023. This Court is finally disposing of the Second Appeal to correct the mistake of the Court and as the said cross-objections are not decided on the merits.

8. By above-referred order dated 17th March 2021 passed by the learned District Judge-1, Sangli, cross-objection was restored to the file as no separate order was passed on cross-objection while disposing of the Appeal as withdrawn and directed the learned First Appellate Court to dispose of the said cross-objection in time bound manner and thereafter, the learned First Appellate Court by

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impugned order dated 16th July 2021 passed the order of closing the proceedings on the incorrect assumption that there is no cross-objection on record. Thus, this is a case where Appellant has suffered because of the mistake of the Court and therefore, Second Appeal deserves to be allowed.

9. Accordingly, for the above reasons, following order is passed:-

ORDER

- (i) The order dated 16th July 2021 passed by the learned Additional Sessions Judge, Sangli in Reg. Civil Appeal No.326 of 2009 is set aside. The said cross-objection filed in Reg. Civil Appeal No.326 of 2009 is accordingly restored to the file.
- (ii) The Appellant to produce copy of this order before the learned First Appellate Court on 28th August 2023. The learned Registrar (Judicial-I) to communicate this order to the concerned learned First Appellate Court. Accordingly, the matter be placed before the learned First Appellate Court on 28th August 2023.
- (iii) The Appellant and Respondent No.1 shall remain present before the learned First Appellate Court on 28th August

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2023. If other parties to the cross-objections are not present before the learned First Appellate Court then the Court to issue notice to those parties.

- (iv) The First Appellate Court is requested to dispose of the said cross-objections expeditiously after the service of notice of cross-objections on all the parties.
- (v) It is clarified that by the present order, what is sought to be done is just to restore cross-objections to the file of the learned First Appellate Court and the Second Appeal has not been decided on merits.
- (vi) It is made clear that the Second Appeal is disposed of only on the aforesaid ground and this Court has not examined the merits of the case and all the contentions on merits of the case including maintainability of the cross-objections are kept open.

10. In view of disposal of the Second Appeal nothing survives in the Interim Application and the same is accordingly disposed of.

[MADHAV J. JAMDAR, J.]