

Vidya Amin

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 181 OF 2019
WITH
CIVIL APPLICATION NO. 217 OF 2019**

Laxman Genba Bondre ... Appellant/Applicant

Versus

Sunil Shankar Patil (Gujar) & Ors. ... Respondents

Mr. Abhijit B. Kadam for the appellant/applicant.

Mr. Shivaji P. Yadav a/w. Mr. Omkar S. Mayekar i/b. Corps Legal for
respondent nos. 1, 9A, 9B, 9C, 10 and 12.

CORAM: G. S. KULKARNI, J.
DATED: 22 February 2023

ORAL JUDGMENT

1. This Appeal from Order is filed assailing an order dated 9 August, 2018 passed by the learned District Judge-1 at Malshiras whereby Regular Civil Appeal No. 30 of 2017 filed by respondent no. 1/defendant no. 2 was allowed thereby the judgment and decree in Special Civil Suit no. 6 of 2013 passed by learned Civil Judge Senior Division, Malshiras on 17 September, 2016 was set aside and the suit was remanded to the trial Court for a fresh adjudication.

2. Learned counsel for the appellant has submitted that the only reason as recorded by the learned District Judge in setting aside the judgment and decree passed by the learned trial Judge was on the ground that respondent no. 1/defendant no. 2, (appellant in the appeal before the learned District Judge),

was not served with the suit summons. Learned counsel for the appellant has placed reliance on the decision of a co-ordinate Bench of this Court in case of *Shobha wd/o. Suresh Kurekar vs. Mohan s/o. Suresh Kurekar, 2017 (3) Mh. L.J. 334* in which this Court has observed that an appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed only on two grounds, namely, the material on record in the ex parte proceedings in the suit by the plaintiff would not entail a decree in his favour; and, secondly, the suit could not have been posted for ex parte hearing.

3. Learned counsel for the appellant submitted that admittedly in the present proceedings, no steps were taken by respondent no. 1/defendant no. 2 to file any proceedings under Order IX Rule 13 of the Code for setting aside of the ex-parte decree. His submission is that once a recourse is taken to the provisions of Section 96(2) of the Code in filing Regular Civil Appeal assailing the judgment and decree passed by the learned trial Judge, then the scope of the proceedings was to assail the decree on merits and not on the limited issue that respondent no.1/defendant no. 2 was not served by the suit summons. He submits that the approach of the learned District Judge in remanding the matter on a defective service of the suit summons could not have been adopted being contrary to law.

4. Considering the contentions as urged on behalf of the appellant, I had directed the learned advocate for the plaintiff to place on record a copy of the appeal memo as filed by respondent no. 1 before the learned District Judge. On a perusal of the appeal memo, it is quite clear that respondent no. 1/defendant no. 2 had not raised any ground in regard to the non-service of the suit summons on him. However, learned District Judge has proceeded to adjudicate the appeal only on the ground that respondent no. 1 was not served with the suit summons and accordingly has remanded the proceedings to the learned trial Judge.

5. Considering the above facts, in my opinion, the learned District Judge has ex-facie erred in considering the grounds in the appeal memo. All the grounds in the appeal memo were assailing the judgment and order passed by the trial Court on merits, there was no ground taken in regard to service of suit summons. Even assuming that such ground was to be raised, the learned District Judge was required to adjudicate the appeal on its merits as the law would mandate. In this view of the matter, the impugned order cannot be sustained. It is required to be set aside with a further order that the learned District Judge shall take up Regular Civil Appeal No. 30 of 2017 and decide the same as expeditiously as possible on its own merits.

6. All contentions of the parties on merits of the Appeal are expressly kept open.
7. Disposed of in the above terms. No costs.
8. In view of disposal of Appeal from Order, Civil Application would not survive. It is accordingly disposed of.
9. At this stage, it is informed that the appellant is a senior citizen. The appellant is permitted to make an application before the learned District Judge praying for early hearing of the appeal.

(G. S. KULKARNI, J)