



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 125 OF 2021
WITH CIVIL APPLICATION NO. 2593 OF 2021

SUNIL APPASAHEB PAWAR AND ANOTHER

.... APPELLANTS
(Ori. Defendants No.18 and 19)

VERSUS

MUKUND BALARAM PARDESHI
(DECEASED THROUGH HIS LR'S) AND OTHERS

... RESPONDENTS
(Ori. Plaintiffs and Defendants No. 1 to 17)

Mr. V. S. Bedre, Advocate for the appellants
Mr. S. S. Bora, Advocate h/f Mr. V. S. Badakh, Advocate for respondent
Nos. 1-A to 1-C and 3 to 8.

CORAM : R. M. JOSHI, J.
DATE : 9th JANUARY, 2024

P.C. :-

1. This appeal takes exception to the judgment and order dated 29/02/2020 passed in Regular Civil Appeal No. 53/2019 whereby the judgment and decree passed in Regular Civil Suit No. 207/2009 dated 09/03/2016 is confirmed.
2. For the sake of convenience parties are referred to by their nomenclature in original proceeding.
3. Facts which led to the filing of the present appeal can be narrated

in short as follows:

(i) Plaintiffs filed suit for partition and separate possession with specific averment that the suit properties are ancestral properties of the plaintiffs and defendants except purchasers of the properties. There is specific case of no previous partition and denial by defendant No.1 to partition the suit properties. There is further allegation that the defendant No.1 without any authority sold 50 R land from Survey No. 167 to defendant No. 17 on 16/12/2003. He further sold portion of the suit property by sale deed 17/12/2009 in favour of defendant Nos. 18 and 19 (appellants). It is claimed that the said sale is without any authority and as such not binding on the plaintiffs.

(ii) Defendant Nos. 18 and 19 appeared before the Trial Court but failed to file written statement and further contest the suit, suit came to be decreed. Appeal preferred by these defendants was dismissed, hence this appeal.

4. Learned counsel for the defendants/appellants submits that the appellants were not intimated about the stage of the proceeding before the Trial Court by their Advocate and hence the proceeding could not be attended by them. In order to support his submissions he placed reliance on the certified copy of pursis filed by the Advocate before the Trial Court

indicating that he has not received instructions for the purpose of filing of written statement. According to him in such circumstances for want of intimation from the Advocate, the learned First Appellate Court ought to have granted an opportunity these defendants to contest the suit. He placed reliance on the judgment of this Court in case of ***Sarjabai wd/o Narayanrao Manmode Vs. Dhanraj s/o Pandurang Manmode, 2017(6) Mh.L.J 869.***

5. In the instant case there is no dispute about the fact that defendant Nos. 18 and 19 had received due notice / summons of the Trial Court and their Advocate caused appearance in that proceedings. As per the pursis filed by the Advocate written statement could not be filed for want of instructions from the defendants. It is thus clear from the said pursis that the non filing of the written statement before the Trial Court is attributable to the conduct of the defendants themselves. Admittedly, appearance was not withdrawn by Advocate from proceeding. In any case when the suit is decided ex-parte against the defendants the only remedy available for them is to prefer an application under Order IX Rule 13 or to file appeal under Section 96 of Code of Civil Procedure. In both cases the defendants have to prove that either summons was not duly served upon them or there was sufficient cause for their non appearance. In the instance case defendants preferred to file appeal. On

filing of the appeal the said requirement of proof of non receipt of summons or showing sufficient cause for non appearance never gets dispensed with. The defendants have not shown any sufficient cause for their non appearance in the suit before the Trial Court. Since they were admittedly served with the summons, first ground provided under this provision is not available to them. In absence of any sufficient ground being shown by the defendants for their non appearance, it was not within the jurisdiction of the First Appellate Court to set aside the impugned judgment and remand the proceedings to the Trial Court.

6. In this regard it would be relevant to take note of the provisions of Order XLI Rule 23 and 25 of CPC which deal with the remand of the suit. Rule 23 provides that if the suit is disposed of on the preliminary issue without deciding other issues and the finding on preliminary issue are reversed by the First Appellate Court, it is open for the First Appellate Court to remand the suit for decision on other issue not already decided by the Trial Court. Rule 25 contemplates that if any suit is tried without framing issues which are essential for the decision of the suit, it is open for the First Appellate Court to frame the issue and call upon the Trial Court to answer the same by remanding the suit to the Trial Court. Both these situations are not available in the present case.

7. Apart from this the defendants have failed to make out any exceptional case in order to cause interference in the impugned judgment and decree passed by the First Appellate Court. If the Court has proceeded ex-parte, owing to the indiligence of laches on the part of defendants and they are unable to bring the case within provisions of Order IX Rule 13, then they must suffer for consequences. This Court, therefore, does not find any substantial question of law being involved in this appeal. In absence of any such substantial question of law, the appeal is not entertainable under Section 100 of CPC. Consequently, appeal stands dismissed. Pending application, if any, stands disposed of.

(R. M. JOSHI, J.)

ssp