



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

SECOND APPEAL NO. 373 OF 2023

1. Vitthal s/o Baburao Gat (Dead)
2. Vijay s/o Vitthal Gat
age 55 years, occ. Agril.,
3. Rajendra s/o vitthal Gat,
age 52 years, occ. Agril.,
4. Krushna s/o Vitthal Gat
age 50 years, occ. Agril.
5. Kausabai w/o Prabhakar Jadhav
age 82 years, occ. Housewife
r/o Parner, Tq. Parner,
Dist. Ahmednagar.
6. Indrayani w/o Vitthal Gat(Dead)
age 55 years, occ. Agril.

Appellants No. 1 to 4 and 6 are
r/o Gatewadi, Tq. Parner,
Dist. Ahmednagar

7. Ushabai Kisan Hande
age 71 years, occ. Housewife
r/o Kanherohol, Tq. Parner
Dist. Ahmednagar
8. Asha Rambhau Bhise
age 69 years, occ. Housewife
r/o Warkhademala, tq. Parner
Dist. Ahmednagar
9. Lata Kisan Pawar
age 67 years, occ. Housewife
R/o Wangdari, Tq. Parner
Dist. Ahmednagar

10. Shobha Bhaskar Thokal
age 63 years, occ. Housewife,
r/o Wangdari, Tq. Parner,
Dist. Ahmednagar

11. Sulbha Ashok Soble
age 61 years, occ. Housewife
r/o Jamgaon, Tq. Parner,
Dist. Ahmednagar

.. Appellants

Versus

1. Tarabai Dnyandeo Auti
age 70 years, occ. Agril

2. Indubai Prabhakar Modhve
age 65 years, occ. Agri.

Both r/o Parner, Tq. Parner,
Dist. Ahmednagar.

3. Radhabai Kushaba Gat (Dead)

.. Respondents

Smt. Madhveshwari S. Mhase, Advocate for the appellants.

Mr. Shaikh Mazhar Abdul Hamid, Advocate for respondents no. 1 and 2.

CORAM : R. M. JOSHI, J.

RESERVED ON : 4th January, 2024.

PRONOUNCED ON : 9th January, 2024.

PER COURT :

1. This appeal filed under Section 100 of Code of Civil Procedure takes exception to the judgment and decree dated 4th May, 2023 passed in Regular Civil Appeal No. 106/2020 confirmed by judgment and decree passed

by Civil Judge Junior Division, Parner in Regular Civil Suit No. 7/12 dated 3rd July, 2019.

2. Parties are referred to by their nomenclature in the original proceeding for the sake of convenience.

3. Plaintiffs filed suit for partition and separate possession of the suit properties on the ground that the suit properties are ancestral properties and that they are having share therein which is refused by defendants. Suit came to be filed on 3rd January, 2012. Defendants were duly served with summons. Defendant No. 1 died during the pendency of suit and his LRs were brought on record. Though they appeared did not file written statement. So also defendant No. 2 chose not to file his pleadings. Other defendants inspite of service of notice on them, chose not to cause appearance in the suit. The suit went uncontested and decree came to be passed on 3rd July, 2019. Defendants preferred appeal against the said judgment by contending that the Trial Court has failed to take into consideration the issue about maintainability of suit and that no fair opportunity was given to them to contest the suit. It is vaguely stated in ground No. 13 that due to illness of family members, defendants could not appear before the Trial Court and therefore, it went ex-parte against them.

First Appellate Court, after taking into consideration facts and circumstances of the case, has observed that the suit was filed on 3rd January, 2012 and defendants were duly served with notice. It is also contended that except for the LRs of defendant No. 1 and defendant No. 2, other defendants preferred not to appear before the Trial Court. Those who appeared failed to file written statement. It is further observed that there is no haste shown by Trial Court in deciding the suit as it was filed on 3rd January, 2012 whereas decided after about seven years i.e. on 3rd July 2019.

4. Learned counsel for defendants submits that an opportunity needs to be given to the defendants to lead evidence. It is her contention that the issue of maintainability of suit is involved in the present case as plaintiff had no right in the suit properties and thus cannot seek partition in the suit properties on account of death of their father prior to coming into force of Hindu Succession Act, 1955.

5. Undisputedly, defendants were duly served with summons but except for defendant No. 2 and LRs of defendant No. 1, other defendants failed to appear before the Trial Court. In spite of appearance of LRs of defendant No. 1 and defendant No. 2, they failed to file written statement as such there is no pleading of the defendants on record. Perusal of appeal

memo filed before the First Appellate Court indicates that a vague statement has been made therein claiming about illness of family members. Apart from the fact that the statement is as vague as possible, there is absolutely no evidence placed on record before Appellate Court to substantiate the said ground.

6. Order IX Rule 13 of Code of Civil Procedure provides for setting aside of ex-parte decree against defendants. Defendants other than LR of defendant No. 1 and defendant No. 2 could have preferred an application under Order IX Rule 13 of Code of Civil Procedure for setting aside ex-parte decree or appeal under Section 96 of Code of Civil Procedure. These defendants chose to file appeal. Order IX Rule 13 provides that if the Court is satisfied that the summons was not duly served or that the defendant has provided by sufficient cause for their non-appearance when the suit was called for hearing, the Court shall make an order to set aside decree against the defendants. Defendants who failed to appear have not claimed about summons being not served upon them. Similarly, there is no cause shown much less sufficient cause for non-appearance before the Trial Court. In such circumstances, there was no case made out for setting aside ex-parte decree against them.

7. As far as LR's of defendant No. 1 and defendant No. 2 are concerned, though they appeared in the proceeding, did not file written statement. Nothing is shown as to what prevented them from filing written statement. As recorded by learned Trial Court in its judgment defendants No. 1 to 4 instituted suit for partition against other defendants, being Regular Civil Suit No. 750/2011, which is filed during pendency of the present suit. This fact also abundantly shows that there was no impediment for defendants either from appearance or from filing written statement. This also confirms the fact that there was no partition of ancestral properties of parties in this litigation. Having regard to all these facts, this Court finds no perversity in the judgment of Trial Court and refusal by First Appellate court to cause interference therein.

8. It is sought to be argued on behalf of appellants that father of the plaintiffs died prior to 1955 and this fact disentitles them to seek any right in suit properties. This contention of defendant raised now for first time does not get support from material on record. No doubt, it could have been open for the defendants even to agitate now pure substantive question of law, provided there was material on record to support such argument. Admittedly, there is no pleading to that effect, for want of written statement of defendants. Moreover, even there is no admission/evidence on record of

plaintiffs in order to consider these arguments. This Court, therefore, finds no substantial question of law involved in the present appeal. As a result, appeal is dismissed.

9. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb