



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL No. 587 OF 2019
WITH
CIVIL APPLICATION No. 13066 OF 2019
WITH
CIVIL APPLICATION No. 4058 OF 2024

1. Bhaskarrao s/o Gopalrao Deshmukh,
Age : 76 years, Occ. : Agri.,
R/o Kranti Chowk, Parbhani,
Tq. & Dist. Parbhani
2. Smt. Sumanbai w/o Bhaskarrao Deshmukh,
Age : 70 years, Occ. : Household,
R/o Kranti Chowk, Parbhani,
Tq. & Dist. Parbhani
3. Pratap s/o Bhaskarrao Deshmukh,
Age : 50 years, Occ. : Agri.,
R/o Kranti Chowk, Parbhani,
Tq. & Dist. Parbhani
4. Ramesh s/o Bhaskarrao Deshmukh
Died through his L.Rs.,
- 4/1.Meena w/o Ramesh Deshmukh,
Age : 36 years, Occ. : Household,
R/o Kranti Chowk, Parbhani,
Tq. & Dist. Parbhani
- 4/2.Harsharaj Rameshrao Deshmukh,
Age : 15 years, Occ. : Education
Minor under the Guardianship
of his real mother, i.e.
Meena w/o Ramesh Deshmukh,
R/o Kranti Chowk, Parbhani,
Tq. & Dist. Parbhani

4/3. Utkarsha s/o Ramesh Deshmukh,
 Age : 12 years, Occ. : Education
 Minor under the Guardianship
 of his real mother, i.e.
 Meena w/o Ramesh Deshmukh,
 R/o Kranti Chowk, Parbhani,
 Tq. & Dist. Parbhani

**...APPELLANTS
 (Orig. Plaintiffs)**

VERSUS

1. Subhash s/o Sakharam Deshmukh,
 Age : 65 years, Occ. : Agri.
 R/o Mali Galli, Parbhani,
 Tq. & Dist. Parbhani
2. Suresh s/o Sakharam Deshmukh,
 Age : 60 years, Occ. Agri.
 R/o Nandkheda Road, "Athwan Niwas"
 Parbhani, Tq. & Dist. Parbhani
3. Girish Alias s/o Rajesh Bhausahab Deshmukh,
 Age : 35 years, Occ. : Agri.
 R/o Mali Galli (Gadhi), Parbhani,
 Tq. & Dist. Parbhani
4. Vijay s/o Bhausahab Deshmukh,
 Age : 30 years, Occ. : Agri.
 R/o Mali Galli (Gadhi), Parbhani,
 Tq. & Dist. Parbhani

**...RESPONDENTS
 (Orig. Defendants)**

Advocate for Appellants : Mr. Milind M. Patil (Beedkar)
 Advocate for Respondent Nos. 1 to 4 : Mr. V. D. Salunke

...
CORAM : Y. G. KHOBRAGADE, J.

DATE : 22.04.2024

JUDGMENT :

1. Heard both sides at length.
2. The present appeal is directed against the Judgment and Decree dated 11.06.2019 passed by the learned Principal District Judge,

Parbhani, in Regular Civil Appeal No. 134/2017 thereby the learned First Appellate Court confirmed the Judgment and Decree dated 09.10.2017 passed by the learned 2nd Joint Civil Judge, Senior Division, Parbhani in Regular Civil Suit No. 174/2006 whereby dismissed suit of present Appellants/Original Plaintiff for recovery of possession of suit property admeasuring 2 Acres 19 Ares out Land Gat No. 21/1.

3. The present Appellants are original Plaintiffs and Respondents are original Defendants in suit bearing R. C. S. No. 174/2006. For the sake of brevity, I would like to refer the parties to the present appeal in their original capacity as plaintiffs and defendants.

4. In the present case, short point is involved as to whether the learned First Appellate Court can pass the Judgment and Decree on merit in absence of Counsel for the Appellant or whether appeal can be dismissed under Order 41 Rule 17 ?

5. It is not in dispute that, the plaintiffs have filed a suit bearing R. C. S. No. 174/2006 and thereby prayed for decree of recovery of possession of agricultural land admeasuring 2 Acres 19 Ares out of S. 21 total admeasuring 23 Acres 36 Guntha as shown in red

colour in the suit map prepared by the T. I. L. R., Parbhani.

6. It is a matter of record that, on 9th October, 2017, learned II Joint Civil Judge, Senior Division, Parbhani dismissed the suit of the Plaintiffs and recorded the findings that, the Plaintiffs have failed to prove that Defendants had encroach upon 2 Acres 19 Are land out of S. No. 21/1. Being dissatisfied with said Judgment and Decree, the Appellants/original Plaintiffs have preferred an appeal bearing R. C. A. No. 134 of 2007 along with application for stay, however, said Application for stay was rejected. Therefore, the Appellants/original Plaintiffs had approached before this Court by preferring an Appeal No. 80/2018 along with Civil Application No. 2546/2019. Indeed, while deciding said appeal, this Court has observed that, the Plaintiff would not be justified in seeking injunctory Orders against the Defendants and the Plaintiffs' were directed to furnish private paper book before the First Appellate Court on or before 25.03.2019 with direction to First Appellate Court to decide the Appeal on or before 15.06.2019, but on that day, the Plaintiffs and their counsel remained absent. However, an application was filed on behalf of the plaintiffs for engagement of senior counsel for conducting their case. Accordingly, 10 days time was granted because of this Court given time schedule to decide the same

and matter was fixed on 25.04.2019. But again on that day also the Appellants and their counsel remained absent and had passed 'no instruction Pursis'. Thereafter, again matter was fixed on 29.04.2019, and thereafter on 30.04.2019. Still the Appellants and their counsel remained absent. Thereafter, due to vacation, the matter was posted on 03.06.2019. On that date also appellants remained absent. Ultimately, the learned First Appellate Court passed the impugned Judgment and Decree on merit and dismissed the Appeal.

7. The learned counsel appearing for the Appellants canvassed that as per provisions of Order 41 Rule 17 of Code of Civil Procedure, when the Appellant and his counsel remained absent in that event, the learned First Appellate Court required to dismiss the appeal for want of prosecution and not on merit. However, learned First Appellate Court passed the impugned Judgment and Decree in absence of the Appellants' counsel on merit without appreciating the oral as well as documentary evidence available on record. Therefore, the impugned Judgment and Decree is illegal and bad in law, hence, prayed for quashing and setting aside of same.

8. In support of these submissions, learned counsel appearing for the Appellants placed reliance on the following cases :-

(i) Prabodh Ch. Das and another Vs. Smt. Mahamaya Das and others; AIR 2020 SUPREME COURT 178,

(ii) Abdul Rahman and others Vs. Athifa Begum and others; (1997) 1 MhLJ 566 and

(iii) Benny D'souza and ors. vs. Melwin D'souza and ors; 2023 LiveLaw (SC) 1032.

9. Per contra, Mr. Salunke, learned counsel appearing for present Respondents vehemently submits that, present appeal does not involve substantial question of law and no specific substantial question of law has been formulated by the Appellants. Both the Courts below concurrently held that, the Plaintiffs have failed to prove exchange of land between Gopalrao and Sakhabapu under which 2 Acres 18 Gunthas of land out of Survey No. 21 was given to Sakhabapu and 2 Acres 12 Gunthas of land out of Survey No. 22 was given to Gopalrao. So also, the Plaintiffs failed to prove that encroachment made by the Defendants over 2 Acres 19 Gunthas of land in Survey No. 21/1.

10. In support of these submissions, the learned counsel appearing for the Respondents /original Defendants has placed reliance on the case of *Kirpa Ram (Deceased) Through Legal Representatives and others vs. Surendra Deo Gaur and others; 2020 SCC Online SC*

935. wherein it has been observed as under :

“23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.”

11. Having regard to the submissions canvassed on behalf of both the parties, I have gone through the record. The grievance of the Appellants / original Plaintiffs is that, on 11.06.2019, the learned First Appellate Court has passed the impugned Judgment and Decree and thereby dismissed the appeal by discussing evidence available on record, though they (Appellants) and their counsel were remained

absent, therefore as per Order 41 Rule 17, the learned First Appellate Court could have dismissed their appeal for want of prosecution and ought not to have recorded findings on merit by discussing the evidence available on record.

12. It is further submitted that while passing the impugned Judgment and Order dated 11.06.2019, the learned First Appellate court has observed in Paragraph No. 11 as under :

“Being aggrieved and dissatisfied with the judgment and decree, present appeal is preferred by the appellants along with the stay application. Stay application was rejected by this Court. This order is challenged by the plaintiffs before the Hon’ble High Court in appeal No. 80/2018 by filing civil application No.2546/2019. Hon’ble High Court observed that plaintiff would not be justified in seeking injunctory orders against the defendants. Plaintiffs are directed to furnish a private paper book before the appellate Court on or before 25/03/2019. This Court was directed to decide the appeal on or before 15/06/2019. After receipt of the direction from the Hon’ble High Court, this Court has fixed the date for hearing on 15/04/2019 by issuing notices. On 15/04/2019 plaintiffs remained absent. Application is filed on behalf of the plaintiffs that they want to engage senior advocate for conducting their case. This Court has given time by observing that matter is time bound as per the order of Hon’ble High Court and 10 days time is granted and matter is fixed on 25/04.2019. Appellants remained absent. Their advocate have passed the pursis of no instruction. Thereafter, matter was fixed on 29/04/2019, 30/04/2019 appellants remained absent. Due to the

summer vacations, matter is fixed on 03/06/2019, appellants remained absent on 3/06/2019.” (Emphasis supplied).

13. Therefore, it *prima facie* appears that the learned First Appellate Court has passed the impugned Judgment and Order and thereby discussed the entire evidence available on record and the grounds set out in the Appeal and dismissed the Appeal of the Appellants/Original plaintiffs on merit.

14. Order 41 Rule 17 provides dismissal of appeal for want of prosecution or to adjourn the hearing for appellants’ default. The amendment which came into force with effect from 1-2-1977 gives explanation which makes it explicit that the Court cannot dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing.

15. In the case of ***Prabodh Ch. Das***, (supra), the Hon’ble Supreme Court has explained Sub Rule 1 Rule 17 of Order 41 and observed in Paragraph Nos. 9 and 10 as under :

“9. Explanation to sub-rule (1) of Rule 17 was added by Act 104 of 1976. Prior to 1976 conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 of CPC. Therefore, the explanation was introduced w.e.f 01.02.1977, to clarify the law by making an express provision that where the appellant does not

appear, the Court has no power to dismiss the appeal on merits. Thus, Order 41 Rule 17(1) read with its explanation makes it explicit that the Court cannot dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing. In other words, if the appellant does not appear, the Court may if it deems fit dismiss the appeal for default of appearance but it does not have the power to dismiss the appeal on merits.

10. This position has been clarified by this Court in [Abdur Rahman and others v. Athifa Begum](#) and others 1996(6)SCC 62 : (AIROnline 1996 SC 621) wherein it was held that High Court cannot go into the merits of the case when there was non-appearance of the appellant. In [Ghanshyam Dass Gupta v. Makhan Lal](#) 2012 (8) SCC 745 : (AIROnline 2012 SC 322) this Court has reiterated the legal position as under:

“Prior to 1976, conflicting views were expressed by the different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of [Order 41 CPC](#). Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for the appellant’s default. Conflicting views raised by the various High Courts gave rise to more litigation. The legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, the Explanation to sub-rule (1) of Rule 17 of [Order 41 CPC](#) was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of [Order 41 CPC](#) should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left unrepresented on the day fixed for hearing the appeal. The reason for introduction of such an Explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if

the courts decide the appeal on merits in absence of the counsel for the appellant.”

16. In case of **Abdul Rahman and others Vs. Athifa Begum and others** as well as in case of ***Benny D’Souza & others vs. Melwin D’Souza and others*** (supra), it has been held that the Explanation to Order XLI Rule 17(1) of C. P. C. empowers the Court to dismiss the appeal for non-prosecution and not on merits.

17. Since, learned First Appellate Court has passed the Judgment and Decree dated 11.06.2019 in absence of Appellants and their counsel, therefore, as per provisions of Order 41 Rule 17 Sub Rule (1) of the C. P. C., the learned First Appellate Court ought to have dismissed the appeal for non-prosecution and ought not to have have adverted on merits of the case. Therefore, considering the ratio laid down in case of ***Prabhodh Ch. Das*** (supra), provisions of Order 41 Rule 17 as well as case laws cited hereinabove on behalf of Appellants, I am of the view that the impugned Judgment and Decree passed by the learned First Appellate Court on 11.06.2019 in R. C. A. No. 134/2017 needs to be quashed and set aside and the matter needs to be remanded back to the First Appellate Court for decision on merits after giving opportunity to the parties to the appeal. Accordingly, I proceed to

pass following order :

ORDER

1. The present Second Appeal stands allowed.
2. The impugned Judgment and Decree dated 11.06.2019 passed by the First Appellate Court in Regular Civil Appeal No. 134/2017 is hereby quashed and set aside.
3. The matter is remanded back for afresh decision after giving opportunity of hearing to both the sides.
4. The parties to the present appeal shall appear before the learned Principal District Judge, Parbhani on 24.06.2024 at 11.30 a. m., and then either the Ld. Principal District Judge shall hear the matter on merit or may assign the same to another Court.
5. Thereafter the learned First Appellate Court shall decide the appeal on its own merit on or before 30.10.2024.
6. It is made clear that no unnecessary adjournment shall be granted unless it is found bonafide .
7. Accordingly, C. A. No. 13066 of 2019 and C. A. No. 4058 of 2024 are disposed off.
8. Parties to bear their own costs.

(Y. G. KHOBRAGADE, J.)

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