



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

**943 APEAL FROM ORDER NO. 46 OF 2017
WITH
CIVIL APPLICATION NO. 12281 OF 2017
IN AO/46/2017**

**VILAS WAMAN MAHAJAN AND ANOTHER
VERSUS
NANDKUMAR WAMAN MAHAJAN AND OTHERS**

...

Mr. Kadam Vikram S., Advocate for the Petitioners
Mr. Narayan Y. Chavan h/f Mr. Urgunde Suhas P., Advocate for
Respondent Nos.3 & 4

....

**CORAM : SANDIPKUMAR C. MORE, J.
DATED : 16/08/2024.**

P. C. :

1. Heard rival submissions.
2. The contesting respondent No.1, who is the original plaintiff, despite final disposal notice, remained absent. It appears that respondent Nos.3 & 4 to whom learned counsel Mr. Urgunde is representing, are not the contesting parties. Moreover, respondent No.2 despite service, remained absent.
3. The record shows that the present appeal is filed against the judgment and decree dated 10/07/2017 passed by the learned

District Judge-7 i.e. the learned first appellate court in RCA No.7 of 2014. Under the said decree, the learned first appellate court has remanded RCS No.666 of 2012 for deciding the same afresh.

4. The aforesaid suit was filed by respondent No.1 / plaintiff for perpetual injunction only. Further, the judgment and order dated 10/01/2014 passed in the said suit by the learned 8th Joint Civil Judge (Junior Division), Nanded, i.e. the learned trial court indicates that the respondent No.1 / plaintiff had not led the evidence but still the learned trial court did not dismiss the suit in default but made certain observation on merit and then dismissed the suit with cost. However, the learned appellate court though was of opinion that the learned trial court should have dismissed the suit in default, but ultimately set aside the said decree and directed to decide the suit afresh.

5. It is evident from both the judgments that the respondent No.1 / plaintiff had in fact filed a substantial suit i.e. Special Civil Suit No.530 of 2011 for cancellation of gift deed made in favour of the present appellant and also for an injunction on the basis of his alleged possession. The said suit is still going on. It appears that during the pendency of said suit, the respondent No.1 / plaintiff

filed another two proceeding and RCS No.666 of 2012 is one of them. Thus, it appears that when the substantial suit bearing Special Civil Suit No.530 of 2011 filed by respondent No.1 / plaintiff is already pending then the respondent No.1/plaintiff should not have filed subsequent suit for perpetual injunction on the basis of his alleged possession. The subsequent suit i.e. RCS No.666 of 2012 therefore, was not maintainable and could have been stayed under Section 10 of CPC.

6. It is extremely important to note that though the learned trial court committed mistake in dismissing the suit by making certain observations on merit instead of dismissing it in default, but the learned first appellate court also erred in remanding the matter back. The RCS No.666 of 2012 should have been dismissed by the learned first appellate court in default itself. Under such circumstances, the judgment and order passed by the learned first appellate court of remanding the matter for afresh trail, needs to be set aside when the alleged grievance of respondent No.1/ plaintiff can be decided in his substantial suit i.e. Special Civil Suit No.530 of 2011. Further, it is not necessary to give direction to the learned first appellate court to re-write the judgment on the basis of facts

as it was already of the opinion that the learned trial court should have dismissed the suit in default.

7. In view of the same, the appeal from order is hereby allowed and the judgment and order in RCA No.7 of 2014 dated 10/07/2017 is hereby quashed and set aside and RCS No.666 of 2012 filed by respondent No.1 / plaintiff stands dismissed in default. The appeal is disposed of alongwith pending Civil Application No.12281 of 2017.

(SANDIPKUMAR C. MORE, J.)