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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 137 OF 2024
WITH
INTERIM APPLICATION NO. 7002 OF 2024
WITH
INTERIM APPLICATION NO. 6652 OF 2024
IN
SECOND APPEAL NO. 137 OF 2024**

Dnyaneshwar Sopan Shivarkar(Mali) and ... Appellants/Applicants
Ors

vs.

Baban Dashrath Shivarkar and Ors ... Respondents

Mr. Sushant Prabhune through VC for Appellants/Applicants.

CORAM : GAURI GODSE, J.

DATED : 27th NOVEMBER 2024

ORDER:

1. Heard learned counsel for the appellants. This second appeal is preferred by original defendants nos. 1 to 6 and 11 to challenge the concurrent judgements and decrees directing them to hand over possession of the suit property to respondents nos. 1 to 3 ("plaintiffs").

2. Learned counsel for the appellants submits that the suit proceeded ex-parte against the appellants. Hence, they were unable to put forth their defence. He submits that the appellants had

filed an application to set aside the ex-parte decree. However, the application was rejected. He submits that thereafter, the appellants preferred the first appeal along with the delay condonation application. He submits that the application for condonation of delay in filing the first appeal was rejected. Hence, the appellants had filed a second appeal in this court. He submits that the second appeal was allowed, and the delay was condoned. Thereafter the first appeal was decided on merits.

3. Learned counsel for the appellants submits that while allowing delay condonation application, this court accepted the appellants' contentions that since their advocate did not prosecute the suit, they were unaware of the decree. He submits that, thus, the appellants were unable to put forth their defense and the ex-parte decree for possession is confirmed by the first appellate court. Learned counsel for the appellants relied upon the Hon'ble Apex Court's decision in the case of *N. Mohan vs. R. Madhu*¹. He submits that in similar facts, the Hon'ble Apex Court permitted the defendants, in that case, to deposit the balance decretal amount as a condition for condonation of delay in filing the first appeal. He submits that by relying upon the said principles, the appellants are agreeable to file an undertaking in this court that they shall hand over possession of

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the suit property pursuant to the impugned decree subject to the appellants permitted to put forth their defence, by remanding the matter to the trial court..

4. On the merits of the impugned judgements, learned counsel for the appellants submits that both the courts erred in passing a decree for possession by holding that the defendants were trespassers. He submits that, as pleaded by the plaintiffs, the defendants were put in permissive possession of the suit property. Hence, the suit could not have been decreed by holding defendants as trespassers. He, thus, submits that even on merits, the second appeal would require consideration as the reasons recorded by both the courts are based on incorrect appreciation of the pleadings.

5. I have considered the submissions made on behalf of the appellants. The legal principles settled by the Hon'ble Apex Court in the case of ***N. Mohan*** are with reference to the prayer for condonation of delay in filing the first appeal against the ex-parte money decree. In the present case, the delay in filing the first appeal is already condoned by this court and the first appeal is decided on merits. Hence, the submissions made on behalf of the appellants by relying upon the legal principles settled by the Hon'ble Apex Court in the case of ***N. Mohan*** would not be of any assistance to the

appellants in this second appeal.

6. Both courts have accepted the plaintiffs' title based on the registered sale deed produced at Exhibit 24. Considering the document of title and the revenue records, both courts have accepted the exclusive title of the plaintiffs over the suit property. In view of accepting the plaintiffs' title over the suit property, the suit for possession is decreed by holding that the defendants are trespassers. In the absence of any rebuttable evidence, no fault can be found in the reasons recorded by both courts.

7. The grounds argued on behalf of the appellants to justify not appearing in the trial court were considered while deciding the application for condonation of delay in filing the first appeal. The first appeal is decided on merits after hearing the present appellants. The application to set aside ex-parte decree on similar grounds is dismissed. Hence, the grounds raised for giving an opportunity to put forth the defence are irrelevant in the second appeal.

8. I do not find any substance in the submissions made by the learned counsel for the appellants that as the plaintiffs pleaded that the appellants were in permissive possession, they cannot be held trespassers. I have perused the plaint. It is the plaintiffs' case that the appellants were permitted to use the suit property as the

appellants had no place to live and were in need of shelter. The appellants further pleaded that when the plaintiffs called upon the appellants to hand over possession, they refused; hence, the suit was filed seeking possession on the ground that the appellants were trespassers. Thus, the plaintiffs revoked the permission granted to the appellants to occupy the suit property and called upon them to vacate. Thus, the refusal of the appellants to vacate and continue to occupy the suit property without any permission amounts to them being in wrongful possession. Thus, the appellants' wrongful possession over the suit property rendered them trespassers. Therefore, the impugned judgments and decrees for possession against the appellants on the ground that they are trespassers cannot be faulted.

9. The reasons recorded by both courts for accepting the plaintiff's title are based on the registered document of the sale deed supported by the revenue records. There is no illegality or perversity in the reasons recorded by both courts. The second appeal does not raise any substantial questions of law. Hence, the second appeal is dismissed. In view of the dismissal of the second appeal, pending applications are disposed of as infructuous.

10. At this stage, learned counsel for the appellants seeks stay to

the execution and operation of the impugned decree. Learned counsel submits that appellant no. 1 has already handed over possession of the suit property described in paragraph no. 1a of the plaint. He submits that the rest of the suit property is still in possession of the appellant nos. 2 to 7.

11. To enable the appellant nos. 2 to 7 to approach the Hon'ble Apex Court, the impugned decree not to be executed for a period of four weeks subject to the appellants filing an undertaking in this court that they shall hand over possession of the suit property, in the event no favourable order is passed by the Hon'ble Apex Court. The undertaking shall also state that they shall not create any third party interest or part with the possession of the suit property. Necessary affidavit-cum-undertaking to be filed in this court within two weeks.

(GAURI GODSE, J.)