

rrpillai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 14816 OF 2024
IN
SECOND APPEAL NO. 106 OF 2021

Digitally
signed by
RAJESHWARI
RAMESH
PILLAI
Date:
2024.12.02
07:27:27
+0500

Balasaheb Antu Alias Antoba ... Appellant
Darekar

Vs.

Banter Sayaji Darekar and Others ... Respondents

Mr. Siddharth C. Wakankar for the Applicant.

CORAM : GAURI GODSE, J.

DATE : 26th NOVEMBER 2024

ORDER :

1. This application is for bringing on record names of heirs and legal representatives of the sole appellant. There is delay of 844 days in filing this application.

2. The Second Appeal arises out of an order passed allowing objections filed by respondent no. 1 in execution proceeding filed by the present appellant. The execution proceedings are arising out of a decree for partition and separate possession filed by the appellant.

3. Objections filed by respondent no. 1 is allowed on the ground

that the decree for partition is not executable against him as the suit was dismissed in default against respondent no.1. The objection was dismissed by the trial court. Initially appeal was also dismissed confirming the dismissal of the objection of respondent no.1.

4. This court passed an order in Second Appeal preferred by respondent no. 1 and the matter was remanded to the First Appellate Court. After remand the First Appellate Court has allowed the objection filed by respondent no. 1 and it is declared that the partition decree in favour of the present appellant is not executable against him.

5. Second Appeal is pending since 2017. Hence, I called upon the learned counsel appearing for the appellant to point out whether Second Appeal raises any substantial question of law. Learned counsel for the applicant submitted that respondent no. 1 has filed a suit for declaration of his independent right and partition in respect of the suit property. He thus submits that since a substantive suit seeking partition filed by respondent no. 1 is pending, the First Appellate Court ought to have dismissed the objection filed by respondent no.1. He thus submits that second appeal would raise substantial questions of law on the fact that pendency of respondent no. 1's suit would disentitle him to raise the objections in execution

proceeding.

6. I have perused the papers of the Second Appeal. There is no dispute that the partition decree under execution was not passed against respondent no. 1. Though respondent no. 1 was made a party to the suit, summons were not served upon him and the suit was dismissed against respondent no.1. Admittedly, no steps were taken to prosecute the suit against respondent no.1. Hence, partition decree is admittedly not passed against respondent no.1. In view of these admitted facts the reasons recorded in the impugned judgment cannot be faulted. If the decree under execution is not passed against respondent no. 1, the same cannot be executed against him.

7. Learned counsel for the applicant has tendered copy of the plaint in Regular Civil Suit No. 89 of 2003 filed by respondent no. 1. Perusal of the plaint indicates that respondent no. 1 has prayed that the suit property Gat No. 1000/2 is an independent property of respondent no. 1 and defendant no. 2 to 6. In the said suit the present appellant is arraigned as defendant no. 1. Prayer clause (b) of the suit is for declaration that present appellant i.e. defendant no. 1 in the said suit has no right, title or interest in the suit properties which are subject matter of the decree for partition under execution.

8. Thus, from the perusal of the plaint it appears that respondent no. 1 claims that the present appellant has no right, title or interest in the suit properties. Hence, pendency of the separate suit filed by respondent no. 1 cannot be a ground to dismiss his objection in the present execution proceedings.

9. Admittedly, the decree in execution is not passed against respondent no.1. Hence the grounds raised on behalf of the applicant would not require any consideration by this court. For the reasons recorded on the merits of the Second Appeal, I do not find it necessary to issue any notice in the Interim Application No. 14816 of 2024.

10. In the facts and circumstances of the case delay is condoned. Interim Application No. 14816 of 2024 is allowed in terms of prayer clause (a) and (b). Learned Advocate for the applicant is permitted to amend the Second Appeal within three weeks from today.

11. Learned counsel for the applicant was called upon to argue the Second Appeal on merits. For the reasons recorded above Second Appeal does not raise any question of law. Hence, Second Appeal is dismissed.

12. In view of the dismissal of the Second Appeal, Civil Application No. 1238 of 2018 is disposed of as infructuous.

[GAURI GODSE, J.]