



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

**APPEAL FROM ORDER NO. 29 OF 2025
WITH
CIVIL APPLICATION NO. 10459 OF 2024 IN AO/29/2025
WITH
CIVIL APPLICATION NO. 9497 OF 2025 IN AO/29/2025**

- 1) Sarlabai w/o Bhagchand Bhawar
Age 51 years, Occ. Household.
- 2) Kiran d/o Bhagchand Bhawar,
Age 30 years, Occ. Household.
- 3) Ganesh s/o Bhagchand Bhawar,
Age 24 years, Occ. Student.
- 4) Rani d/o Bhagchand Bhawar,
Age 20 years, Occ. Student,
All r/o. Aurangpurwadi, Tq. Paithan,
Dist. Chhatrapati Sambhajinagar

... **Appellants**
(Orig. Plff/Resp. No. 1
to 4 in RCA)

VERSUS

- 1) Bhagchand s/o Kadu Bhawar,
Age 56 years, Occ. Agriculture,
R/o Aurangpurwadi, Tq. Paithan,
Dist. Chhatrapati Sambhajinagar
- 2) Bapurao s/o Kadu Bhawar,
Age 61 years, occ.Agriculture,
R/o. Taherpur, Tq. Paithan, Dist.
Chhatrapati Sambhajinagar
- 3) Kalyan s/o Kadu Bhawar,
Age 66 years, Occ. Service,
R/o. Vitthalnagar Galli, Ramnagar,
Tq. & Dist. Chhatrapati Sambhajinagar

... Orig. Deft. no.1.

... Orig. Deft. No. 2.

... Orig.deft. No. 3

... **Respondents**

...

Advocate for Appellants : Mr. C.K. Shinde.
Advocate for Respondent no. 3 : Mr. A.P. Ghule-Patil

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 29.09.2025

PRONOUNCED ON : 03.10.2025

PER COURT :

Heard both sides finally. The substantial questions of law were framed and it was indicated that matter shall be decided finally at the admission stage vide my earlier order dated 11.08.2025. Parties are aware of the substantial questions of law and accordingly they agreed to work out the matter.

2. Appeal is directed against order of remand dated 03.01.2024 passed by District Judge-4 Aurangabad in Regular Civil Appeal No. 141/2021. The appellants are original plaintiffs and respondents are original defendants. The respondent no. 3 Kalyan Kadu Bhawar was unable to cross-examine the witnesses and adduce his evidence weighed with Lower Appellate Court to remand the matter for extending an opportunity to him.

3. The appellants had filed Regular Civil Suit No. 210/2008 for partition and possession. The relationship is not disputed by the parties. The subject matter was 55-Are land from Gat No. 105. It is stated to be undivided joint Hindu family property. Respondent no. 1 Bhagchand is the husband of appellant no. 1 and father of appellant nos. 2 to 4, who was allotted suit land in partition of 1988. It is contended that respondent no. 1 Bhagchand was addicted to vices and without there being any legal necessity sold part of the suit land to respondent no. 2 Bapurao, his brother by different sale-deeds. Respondent no. 3 Kalyan is said to have purchased 42-Are from respondent no. 2 on 26.05.2001. Respondent no. 2 is said to have reconveyed 12-Are to respondent no. 1. The alienations are said to have been bad in law. Hence reliefs of partition and possession are sought.

4. Respondent nos. 1 and 2 did not appear before the Trial Court. No

written statement was filed by them. The suit proceeded *ex parte* against them. Respondent no. 3 Kalyan appeared and filed written statement but did not cross-examine the plaintiffs' witness. He also did not lead any evidence. Considering the oral evidence of the plaintiff and the documentary evidence the suit was decreed partly vide judgment dated 19.07.2013, awarding 1/5th share each to the appellants as well as respondent no. 1. The sale-deeds are declared to be not binding on the plaintiffs. Being aggrieved, only respondent no. 3 filed Regular Civil Appeal No. 141/2021, in which impugned order of remand was passed.

5. Learned counsel Mr. Shinde for the appellant submits that respondent no. 3 had ample opportunity to participate in the proceeding and to lead evidence but he remained absent without assigning any convincing reasons. It is submitted that sympathy shown by the Lower Appellate Court for granting opportunity to respondent no. 3 is misplaced, which is perversity. It is further submitted that respondent no. 3 had filed an application under Order IX Rule 13 of the Code of Civil Procedure (CPC) but it was rejected by the Trial Court. Then he had preferred Miscellaneous Appeal before the Lower Appellate Court, which was withdrawn by him. In this backdrop, reliance is placed on the judgment of the Supreme Court in the case of **Bhanu Kumar Jain Vs. Archana Kumar and another; (2005) 1 Supreme Court Cases 787** to contend that Lower Appellate Court committed patent illegality in remanding the matter. It is further submitted that respondent no. 3 did not raise any ground before the Lower Appellate Court as to what prevented him in participating in the proceedings and he was being represented by a lawyer. Lastly, it is submitted that adequate opportunity was given to respondent no. 3 and he was consistently absent and casually the suit is remitted to the Trial Court, which is flagrant error of jurisdiction.

6. Per contra, learned counsel for the respondents submits that impugned order is equitable one granting opportunity to both the sides, hence, no prejudice can be said to have been caused to the appellants. The

appellant no. 1 was witness to the sale-deeds. It is submitted that the decree has been executed and appellants have been handed over possession of 54-Are land. It is further submitted that respondent no. 3 has been sufficiently punished by imposing costs by the Lower Appellate Court while condoning delay as well as by the impugned order. Respondent no. 3 was being given wrong advice. Due to his indisposition he could not participate in the suit. It is submitted that order of remand needs to be confirmed.

7. Having considered the rival submissions of the parties and having gone through the paper book placed on record by the appellants, it is evident that respondent no. 3 filed written statement in the suit. He was being represented by a lawyer. Roznama shows that from 18.11.2008 constantly respondent no. 3 and his lawyer remained absent. Already the suit had proceeded *ex parte* against respondent nos. 1 and 2. It was proceeded *ex parte* against respondent no. 3 also. He did not conduct cross-examination of the plaintiffs' witness. Neither any evidence was led by him.

8. Respondent no. 3 had filed MARJI No. 63/2013 under Order IX Rule 13 of the CPC. It was rejected by the Trial Court on 09.02.2017. Being aggrieved, he preferred Misc. Civil Appeal No. 40/2017, which was dismissed by a reasoned order on 06.09.2017. The grounds for not participating in the suit pressed into service by respondent no. 3 are answered in negative by both the Courts below by distinct reasoned orders. Belatedly, Regular Civil Appeal No. 141/2021 was filed on or about 07.12.2021 with application for condonation of delay. The delay was condoned and thereafter the Lower Appellate Court passed impugned order of remand.

9. The impugned order reflects that merely to extend an opportunity to respondent no. 3, as he was unable to conduct cross-examination and adduce his evidence, the matter is relegated to the Trial Court. The Lower Appellate Court totally overlooked that respondent no. 3 failed to make out

a case for not participating in the proceedings. The Roznama of the Trial Court, order dated 09.05.2017, passed in MA(RJI) No. 63/2023 and further judgment and order of the Lower Appellate Court dated 06.09.2017 in Misc. Civil Appeal No. 40/2017 are overlooked. The respondent had opportunity to participate in the proceedings and there are lapses on his part. The Lower Appellate Court has committed error of jurisdiction.

10. It is impermissible for the Lower Appellate Court to remand the entire matter to the Trial Court just because respondent no. 3 did not participate in the proceeding. The grounds of objection in the appeal memo do not spell out the circumstances for remaining absent. This approach is casual because no convincing reasons are assigned by respondent no. 3. The stray submissions of the learned counsel for the respondents that his client was indisposed of and unable to attend for unavoidable circumstances is absurd and without any foundation. It is perversity for the Lower Appellate Court to remand the matter, which is deprecated by the Supreme Court in the matter of **Syeda Rahimunnisa vs Malan Bi (Dead) By Lrs. & Anr.; AIR 2016 Supreme Court 4653**.

11. Respondent no. 3 was unsuccessful in M.A. (RJI) NO. 63/2013 filed under Order IX Rule 13 of CPC. His Misc. Appeal No. 40/2017 was also met with dismissal on merits on 06.09.2017. After having failed in earlier attempt, he approached the Lower Appellate Court under Section 96 read with Order XLI of CPC. In this backdrop, the learned counsel Mr. Shinde has invited my attention to law laid down by the Apex Court in the matter of **Bhanu Kumar Jain (supra)**. Following are the relevant extracts:

“37. We have, however, no doubt in our mind that when an application under Order 9 Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against viz. to prefer an appeal in terms of Order 43 Rule 1 of the Code. Once such an appeal is dismissed, the

appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions which is not contemplated in law.

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for *ex parte* hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in **Rani Choudhurys, P. Kiran Kumar and Shyam Sundar Sarma v. Pannalal Jaiswal.**"

12. In view of the authoritative pronouncement the impugned judgment and order is unsustainable. Respondent no. 3 is estopped from contending the same grounds for not adducing evidence and participating in the proceeding, which have already been discarded by concurrent findings in his proceedings under Order IX Rule 13 of CPC. The sympathy shown by the Lower Appellate Court by observing that for granting opportunity to him, the matter needs to be relegated to the Trial Court would amount to overreaching the findings recorded in earlier round of under Order IX Rule

13 of CPLC. In my considered view, the impugned order is flagrant abuse of process of law.

14. The impugned order is unsustainable. Both the substantial questions of law are answered in negative. I, therefore, pass following order.

ORDER

- (I) Appeal from Order is allowed. Impugned judgment and order is quashed and set aside.
- (II) Consequentially the proceedings undertaken by the Trial Court after order of remand are vitiated.
- (III) Regular Civil Appeal No. 141/2021 is restored and the Lower Appellate Court shall decide it on merits, on the basis of existing material on record.
- (IV) Pending Civil Applications are disposed of.

(SHAILESH P. BRAHME, J.)

mkd/-