



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 564 OF 2023
WITH
CIVIL APPLICATION NO. 8685 OF 2018
AND
CIVIL APPLICATION NO. 7233 OF 2019

1. Ashok s/o Jandeo Hambarde
Age: 77 yrs. Occu. Agri.
2. Ayodhyabai w/o Ashok Hambarde
Age: 71 yrs. Occu. Household

Both R/o. Ashti, Tq. Ashti Dist. Beed.

...Appellants

VERSUS

- 1) Dilip s/o Jandeo Hambarde
Age: 44 yrs. Occu. Agri.
- 2) Mamtabai w/o. Jandeo Hambarde
Age: 71 yrs. Occu. Agri.
- 3) Suvarna w/o. Dilip Hambarde
Age: 39 yrs. Occu. Household
Resp. No. 1 to 3
R/o. Ashti, Tq. Ashti, Dist. Beed.
- 4) Suman w/o. Nagnath Shinde
Age: 54 yrs. Occu. Household
R/o. Chikhali, Tq. Ashti Dist. Beed.
- 5) Usha w/o. Dattatraya Shinde
Age: 50 yrs. Occu. Household
R/o. Chikhali, Tq. Ashti Dist. Beed.

6) Sushilabai w/o. Digambar Jagtap
Died through L.Rs.:

6(A) Digvijay s/o. Digambar Jagtap
Age: 38 yrs. Occu. Service
R/o. Tawalwadi, Jamgaon Post
Tq. Ashti, Dist. Beed.

6(B) Dilip s/o. Digambar Jagtap
Age: 35 yrs. Occu. Service
R/o. Tawalwadi, Jamgaon Post
Tq. Ashti, Dist. Beed.

...Respondents

Advocate for Appellants : Mr. V.D. Salunke

Advocate for Respondent No. 1 : Mr. H.V. Tungar

Advocate for Respondent Nos. 4 and 5 : Mr. N.L. Jadhav

Advocate for Respondent Nos. 6-A and 6-B : Mr. A.Y. Pandule

CORAM : SHAILESH P. BRAHME, J.

CLOSED FOR JUDGMENT ON : 23rd JULY 2025

JUDGMENT PRONOUNCED ON : 29th JULY 2025

JUDGMENT:

1. Being aggrieved by judgment and decree dated 23.06.2017 passed by Learned District Judge, Beed in R.C.A No.123 of 2010 confirming the judgment and decree dated 18.06.2010 passed by Learned Civil Judge Senior Division, Ashti in R.C.S No.244 of 2006, present second appeal is filed by original defendant Nos.2 and 4.

2. Respondent No.1 is the original-plaintiff who had filed suit for partition and separate possession in respect of various properties mentioned in the plaint. His suit proceeded ex-parte against present appellants as well as other defendants. In the absence of any written statement, oral evidence of plaintiff himself was led. He produced few documents. Trial court decreed the suit partly awarding 1/6th share to plaintiff, his mother/defendant No.3 and siblings. Further directions were issued to refer the matter for effecting partition by metes and bounds.

3. Being aggrieved present appellants preferred Regular Civil Appeal No.123 of 2010. Lower appellate court dismissed it on 23.06.2017. Pertinently appellants did not resort to Order 9 Rule 13 of C.P.C against ex-parte judgment passed by the trial court.

4. In the trial court when the appellants and other defendants did not cause appearance, suit was directed to proceed ex-parte vide order dated 17.03.2007. Appellants had preferred application Exhibit-45 to set-aside order to proceed ex-parte against them. It was rejected by order dated 04.08.2009. It was not challenged before any forum. On this premise, present appeal has been argued pointing out substantial questions of law.

5. Learned counsel for the appellants submits that there are eight substantial questions of law which are tendered on record separately. In pursuance of that submissions are canvassed. The judgment of the trial court is void because no issues were framed. So also the judgment and decree passed by lower appellate court framing only three points is argued to be against Order 41 Rule 31 of C.P.C. No points for involving facts in issue are formulated, though grounds of appeal memo discloses various pleas raised by the appellants. It is submitted that self-acquired properties of the appellants i.e Sy. No.36 and Sy. No.605/1/B were included in common hotchpot. Without extending any opportunity, decree of partition is passed. It is further contended that there were contentious issues involved in the matter which were agitated by the appellants before lower appellate court in ground Nos.1 to 7, which were simply overlooked and only submission of remand was considered. It is further submitted that when suit was dismissed for default against defendant No.6 vide order dated 18.07.2007, entire suit ought to have been dismissed or ought to have been abated against remaining defendants also.

6. Learned counsel Mr. Salunke for the appellants submits that lower appellate court committed patent illegality in relying on the judgment of Nagpur Bench. It is submitted that the observations in

paragraph No.11 that appellants did not apply for review or file any application for setting aside ex-parte decree is perverse because application Exhibit-45 was filed and it was rejected. Both the courts below failed to appreciate that there were talks of settlement and appellants were under bona-fide impression that the suit was likely to be settled which prevented them from filing written statement or contesting the suit. It was a fit case to remand the matter for extending opportunity to the appellants. It is submitted that Respondent No.1 did not lead any evidence to show that suit properties are joint family properties. In the absence of any material, no decree could have been passed in his favour. It is further contended that in the second appeal, Respondent No.1 has filed Civil Application No.7233 of 2019 for bringing couple of properties in common hotchpot and thereby seeking amendment to the plaint which is indicative of the fact that suit filed was for partial partition or all properties were not brought in common hotchpot.

7. *Per contra*, learned counsel Mr. Tungar for Respondent No.1 repels submissions on the ground that appellants were given adequate opportunity after service of summons and they remained absent and hence suit proceeded ex-parte. Neither order dated 17.03.2007 passed by the trial court was challenged nor order dated

04.08.2019 below Exhibit–45 was challenged before any forum. It is vehemently contended that both the courts below have rightly passed the judgment and considered necessary pleadings and material on record. The manner in which points for determination are framed would not vitiate the judgment. It is submitted that the judgment of the trial court is not vitiated for want of framing of issues in view of Order 8 Rule 10 of C.P.C. Learned counsel Mr. Tungar has clarified in Civil Application No.7233/2019 that father of the siblings Jandeo died on 02.12.2007 and Two lands bearing Sy.No.36 and Sy.No.712 exclusively purchased by him merged into joint family property. Jandeo died intestate and his properties culminated into joint family. He seeks to rely on following judgments.

- i) **The Gujarat Maritime Board vs. G.C.Pandya** reported in 2015 ALL SCR 2257.
- ii) **Smt.Shobha Suresh Kurekar vs. Mohan Suresh Kurekar** reported in 2017(4) ALL MR 21
- iii) **Tertuliano Renato de Silva and Anr.Vs. Francisco Lourenco Betterncourt de Silva**, reported in 2019(1) ALL MR 86.

8. I have considered rival submissions of the parties. With the assistance of the lawyers I have gone through both judgments and the substantial questions of law pressed into service by the appellants. Learned counsel Mr. Salunke does not press into service substantial questions of law during his arguments pertaining to

dismissal of the suit for default as against defendant No.6 when it is pointed out that order of dismissal dated 18.07.2007 was later on recalled vide order dated 21.08.2009. During the course of arguments, parties have placed on record certified copies of plaint, various orders passed thereon, applications below Exhibit Nos.45,49,51, orders passed thereon and *Roznama*.

9. The relationship *inter se* between the parties is not disputed. Appellants and other defendants who were defendant Nos.1 to 5, 7 and 8 did not appear before trial court despite service of summons. Trial court passed order to proceed ex-parte against appellants and those defendants on 17.03.2007. Appellants did not challenge order dated 17.03.2007 either approaching High Court or any other Court. They preferred to file application Exhibit-45 on 24.04.2009 which was rejected on 04.08.2009. It was not also challenged before any forum. I have gone through appeal memo of R.C.A. No.123 of 2010 which does not contain any specific challenge to either of the order passed during pendency of the suit. In such a scenario, appeal is preferred by the appellants under Section 96(2) of C.P.C.

10. Appellants have raised various issues on facts regarding inclusion of the Sy.No.36 and 605/1/B in the subject matter which were self-acquired properties and the manner in which those were

acquired by the Appellant No.2. Before lower appellate court also grounds of objection were raised pertinently regarding entitlement of female heirs to receive equal share, the property acquired by female becomes her absolute property, movable properties were not brought in common hotchpot etc. In the absence of any pleadings in the trial court, no enquiry can be embarked upon these issues. When interim orders of passed against the appellants became final, it is not permissible for them to raise above pleas.

11. During the course of submission in the present appeal and in the lower appellate court also, it is agitated that appellants were unable to file written statement because talks of compromise were going on. Even in High Court also the terms of settlement were presented. The Respondent No.1 is alleged to have deceived the appellants in proceeding with the suit and securing decree before the trial court. Those aspects of the matter can not be agitated when appellants did not challenge order dated 17.03.2007 passed by the trial court either before lower appellate court in R.C.A No.123 of 2010 or independently in the High Court. Similarly, order dated 04.08.2009 rejecting application Exhibit-45 was also not challenged. Now there is no alternative for the appellants than to be content with whatever pleadings and material brought on record by the Respondent No.1.

12. The observations recorded by lower appellate court in paragraph No.11 that appellants did not challenge order dated 17.03.2007 is not correct because application Exhibit-45 was filed but that mistake is inconsequential and would not vitiate the judgment.

13. I have gone through Order 8 Rule 10 of C.P.C. In the absence of written statement, it would be open for the trial court to pronounce the judgment against the defaulting party or make such order as it thinks fit. Trial court called upon the plaintiff to lead evidence. Plaintiff examined himself. There was no cross-examination. The documents were produced on record. In the absence of any contest to the pleadings and the material on record at the instance of Appellants, decree of partition was passed. There was no requirement of framing any issues. Trial court examined plaintiff's case and thereafter passed decree by assigning reasons. No fault can be found in said judgment. The substantial questions of law tried to be argued in that regard holds no water.

14. The judgment of the lower appellate court contains only three points for determination. Merely framing incorrect points or inadequate points for determination would not vitiate the judgment if in the texts, the necessary aspects of the matter is dealt with by the

appellate court. Appellate court assigned the reasons as to how the case is not made out for remand in the absence of any contest to the pleadings and the evidence. At the cost of repetition, it is observed that the issues raised by the appellants regarding entitlement of female heirs, not bringing of properties in common hotchpot and not including movable properties could not have been dealt with for the first time. Appellants preferred not to take recourse to Order 9 Rule 13 of C.P.C so as to enable them to file written statement. In such a scenario, there was no need to frame any other points for determination. I find no illegality or perversity in the judgment of the lower appellate court.

15. The reliance is placed by lower appellate court in the judgments of **Smt. Shoba Suresh Kurekar Vs.Mohan Suresh Kurekar** reported in 2017(3) Mh.L.J.334 and **Bhanu Kumar Jain Vs. Archana Kumar and another** reported in 2005(2) MH.L.J 839, is apposite. In that matter also defendant remained absent and suit proceeded ex-parte. Without taking recourse to Order 9 Rule 13 of C.P.C, appeal under Section 96 of C.P.C was filed. In paragraph No.6, the question for consideration was stated. Thereafter, following are the relevant paragraphs :

“9. In **Bhanu Kumar Jain v. Archana Kumar & another** [2005 (2) Mh.L.J.

839], the Honourable Supreme Court considered the question as to whether an appeal under Section 96 of the Code was maintainable despite the fact that an application under provisions of Order-IX, Rule 13 of the Code was dismissed. In that context, the following observations made in paragraphs 24 and 25 of the said judgment are required to be taken into consideration :-

"24. An appeal against an ex parte decree in terms of Section 96 (2) of the Code could be filed on the following grounds:

(I) the material on record brought on record in the ex parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) the suit could not have been posted for ex parte hearing.

"25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date."

10. From the aforesaid observations, it can be seen that in the appeal filed under provisions of Section 96 (2) of the Code, it could be urged that the material brought on record by the plaintiff was not sufficient for passing a decree in his favour and that the suit could not have been posted for ex parte hearing. On the other hand, under provisions of Order-IX, Rule 13 of the Code, the defendant can urge that he had sufficient and cogent reasons for not attending the hearing of the suit on the relevant date. There is, therefore, material difference between the scope of both the proceedings. In the present case, as the appeal was filed under provisions of Section 96 (2) of the Code, the appellate Court ought to have decided the same in the light of the law as laid down."

16. I propose to follow the judgment referred above. Only course available for the appellants was to urge that material brought on record by plaintiff was not sufficient for passing decree and the suit could not have been posted for ex-parte hearing. I find that appellants failed to make out a case. My view is fortified by further judgment of Division Bench of Madhya Pradesh High Court in the matter of **Ramlal Chaubasia and others Vs. Rewa Coal fields Ltd., Calcutta** reported in 1966 J.L.J. 820.

17. It is useful to refer to judgment of the Supreme Court in the matter of **G. N. Babu Vs. B. C. Muthappa and Ors.**, AIR 2022 SC 4213. The Respondents before the Supreme Court had filed suit for declaration and removal of structure erected illegally. Appellant did not appear and contest the suit. A decree was passed for declaration and injunction against the Appellant before the Supreme Court. The decree was confirmed by the High Court. Against that, appeal was preferred in the Supreme Court raising various contentions on merits. Simultaneously grievance of want of valid service of summons was also raised. In that context, judgment of **Bhanu Kumar Jain** (supra) referred above is also relied on and after quoting the relevant observations of the Supreme Court, following observations are made in Paragraph Nos. 7 and 8 :

“7. We have given careful consideration to the submissions. Firstly, we will deal with the scope of adjudication in an appeal preferred under Section 96 of CPC by a defendant against whom the trial court has proceeded ex parte and a decree has been passed. In the case of **Bhanu Kumar Jain**¹ a Bench of three Hon’ble Judges of this Court dealt with a case where an application for setting aside ex parte decree was filed by a defendant under Rule 13 of Order IX of CPC. The said application was dismissed. Even an appeal preferred against the order of dismissal of the said application was dismissed. An appeal under Section 96 of CPC was also preferred by the said defendant. The submission before this Court was that the subject matter of the application under Rule 13 of Order IX of CPC and the subject matter of the appeal against decree being the same, it is against the public policy to allow two parallel proceedings to continue simultaneously. In paragraph 23 of the decision, this Court noted that the question before it was whether an appeal against ex parte decree was maintainable despite the fact that an application under Rule 13 of Order IX of CPC was dismissed. Paragraphs 24 to 27 of the said decision read thus :

"24. An appeal against an ex parte decree in terms of Section 96 (2) of the Code could be filed on the following grounds:

(I) the material on record brought on record in the ex parte proceedings

in the suit by the plaintiff would not entail a decree in his favour, and

(ii) the suit could not have been posted for ex parte hearing.

"25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date."

26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of an interlocutory order passed in the suit, subject to the conditions laid down therein."

[Emphasis added]

. This Court held that though after dismissal of an appeal under Section 96 of CPC against ex parte decree, application under Rule 13 of IX of CPC will not be maintainable, there is no bar on unsuccessful defendant adopting both the remedies simultaneously. In such a case, if the regular appeal against the decree is dismissed, obviously the application under Rule 13 of Order IX of CPC cannot proceed. The reason is that explanation to Rule 13 of Order IX of CPC lays down that where there has been an appeal against a decree passed ex parte and the appeal has been disposed of on any ground other than withdrawal, application for setting aside ex parte decree will not lie. However, in the event an application under Rule 13 of Order IX of CPC is dismissed, the defendant can prosecute the appeal against the decree as a right to prefer appeal under Section 96 cannot be taken away in absence of any express provision to the contrary in CPC. In paragraph 38 of the aforesaid decision, this Court held that when application under Rule 13 of Order IX of CPC filed by a defendant is dismissed, the defendant cannot be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing and/or existence of a sufficient cause for non appearance of the defendant.

8. In this case, the question is when the defendant did not avail the remedy under Rule 13 of Order IX of CPC, whether it is open for him to agitate in the regular appeal against the decree that the trial court had no justification for proceeding ex parte against the appellant. In such a case, though the appellant would not be entitled to lead evidence in appeal for making out a sufficient cause for his absence before the trial court, he can always argue on the basis of the record of the suit that either the suit summons was not

served upon him or that even otherwise also, the trial court was not justified in proceeding ex parte against him. The reason is that under Section 105 of CPC, when a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case can be set forth as a ground of objection in the Memorandum of Appeal. Thus, in such a case, the appellant can always urge in an appeal against the decree that an interim or interlocutory order passed during the pendency of the suit affecting the decision of the case was illegal. Therefore, the appellant, while challenging ex parte decree by filing an appeal, can always point out from the record of the trial court that the order passed to proceed with the suit ex parte against him was illegal. As held in the case of Bhanu Kumar Jain¹, only when the application made by a defendant under Rule 13 of Order IX of CPC is dismissed that such a defendant cannot agitate in the appeal against ex parte decree that the order directing that the suit shall proceed ex parte was illegal or incorrect. However, in this case, the appellant has not filed application under Rule 13 of Order IX of CPC. Therefore, such a contention can be raised by him.”

18. Respondents further relied on the judgment of **The Gujarat Maritime Board** (supra) to buttress that if the written statement is not filed then civil court has jurisdiction to proceed under Order 8 Rule 10 of C.P.C and the court should not act mechanically. Applying the principles laid down therein, I am of the considered view that the trial court did not act mechanically. It examined pleadings, material on record and then pronounced the judgment.

19. The Respondent No.1 has filed Civil Application No.7233 of 2019 contending that Jandeo died on 07.12.2007. He was defendant No.1. He had purchased Sy.No.36 and open plot out of Sy.No.712. He died intestate and his properties merged and partakes the joint family properties. Respondent No.1 should have brought to notice these facts either in the trial court or lower appellate court but that is mere

irregularity. Delay in bringing these facts to the notice of the court would not change the legal position. The contention of the appellants that few left out properties are tried to be brought in common hotchpot by seeking amendment to plaint, is incorrect. It is permissible for the executing court or in further stages of the proceedings of partition decree to take cognizance of subsequent developments.

20. For the reasons assigned above, I find no substance in the substantial questions of law and in the Second Appeal.

21. Second Appeal is dismissed.

22. Civil Application No.7233 of 2019 is disposed of with a liberty to the parties to agitate the factual aspects contained in the application either before executing court or at further stages of proceedings.

23. Civil Application No.8685 of 2018 is disposed of.

SHAILESH P. BRAHME
JUDGE

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