



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

SECOND APPEAL NO. 478 OF 2025

1. DEVCHAND SHESHRAO EKHANDE
2. LAHU SHESHRAO EKHANDE
3. SANDESH DIVAKAR DONGAONKAR
4. PRABHAKAR APPASAHEB KINGRE
5. APURVA SANDESH DONGAONKAR
6. SWARAJ SANDESH DONGAONKAR

**Versus
NILAM PRALHAD RANDHVE**

- * Advocate for the Appellants : Mr. Ganesh M. Deshmukh
- * Advocate for the Respondent No.1 : Mr. Bhimrao G. Lathe

**CORAM : MEHROZ K. PATHAN, J.
RESERVED ON : 20th FEBRUARY 2026
PRONOUNCED ON : 26th FEBRUARY 2026**

JUDGMENT :

1. Being aggrieved by the judgment and decree dated 21.11.2025 passed by the learned Ad-hoc District Judge, Jalna in RCA No. 35/2025, whereby the order dated 18.09.2024 passed by the Civil Judge, Senior Division, Jalna rejecting the application filed by the Plaintiff against dismissal of the suit for non-prosecution under Order IX Rule 9 of the Civil Procedure Code, as per order dated 20.02.2025 passed by the 4th Civil Judge, Senior Division, Jalna, has been set aside, the Appellant-Original Defendant has filed the present appeal on the following facts and grounds.

FACTS : The Plaintiff filed a suit for partition and separate possession to the extent of 67.5 R land in Gat No. 87, admeasuring 1H 6R, with a further prayer that the sale deed be declared not binding and also sought a perpetual injunction against the Defendant. During the pendency of the said suit, RCS No. 126/2016, a sale deed was allegedly executed illegally in favour of Defendant Nos. 8 to 11, and therefore the purchasers were added as party Respondents/Defendants in the suit. The Plaintiff filed a separate application for injunction against Defendant Nos. 8 to 11. While the said application was pending and the reply of the Defendants was awaited, the Court framed issues and posted the suit for evidence on 18.09.2024. The Plaintiff and his Advocate continuously remained absent. On the same day, Defendant Nos. 6, 7, and 9 filed an application in the absence of the Plaintiff and his Advocate and obtained an order of dismissal of the suit.

2. The suit came to be dismissed in default by order dated 18.09.2024. The Plaintiff had filed MCA No.321/2024 on 07.10.2024 under Order IX Rule 9 of the CPC for setting aside the order of dismissal in default dated 18.09.2024. It was stated by the Plaintiff that the Plaintiff was attending the Court regularly. It was further stated that during pendency of the suit, the Defendant No.9 had assaulted the Plaintiff and as such an offence under Section 307 of IPC was registered against him. On 18.09.2024, the Appellant had been to the Bombay High Court at Aurangabad Bench for filing Vakalatpatra in bail matter. The Plaintiff thus could not remain present for hearing before trial

Court on the date fixed for hearing in the RCS No.126/2016 and as such said suit came to be dismissed in default. The Plaintiff had thus prayed for setting aside of the order dated 18.09.2024 passed by the learned trial Court thereby dismissing the suit in default.

3. The Defendants had opposed the application filed by the Plaintiff under Order IX Rule 9 of CPC for setting aside the order dated 18.09.2024, dismissing the suit in default. It was submitted by the Defendants (Appellants herein) that the Plaintiff was regularly present before the Registrar Cooperative Court as well as the District Court in other related proceedings. However the Plaintiff has avoided to appear in the suit for leading evidence. Thus the explanation given by the Plaintiff was not genuine and for want of sufficient cause, the application for setting aside may be rejected.

4. The learned trial Court considered the application filed by the Plaintiff under Order IX Rule 9 of the CPC, as well as the submissions made by the Defendants (Appellants herein). After examining the Roznama of the Registrar Cooperative Office, the Roznama in the Criminal Revision Application, the plaint before the Registrar Cooperative Office, Jalna, and the FIR under Section 307 IPC, along with various documents filed on record, the Court came to the conclusion that the Plaintiff and his Advocates were present before the Registrar Cooperative Court and the Court of the District Judge, Jalna, on various dates. However, they chose to remain absent in RCS No. 126/2016 on

the date fixed for evidence, i.e., 18.09.2024. Therefore, the reasons submitted in the application were not found to constitute sufficient cause for non-appearance in RCS No. 126/2016 during the period from 06.08.2024, 26.08.2024, and 18.09.2024, when the suit was posted for evidence. As such, the trial Court rejected the application filed by the Plaintiff under Order IX Rule 9 of the CPC for restoration of the suit, by order dated 20.02.2025.

5. Being aggrieved by the order dated 20.02.2025 rejecting the application filed by the Plaintiff under Order IX Rule 9 of CPC for setting aside the order dated 18.09.2024 vide which the trial Court has dismissed the suit RCS No. 126/2016 in default, the Plaintiff had filed a Regular Civil Appeal by filing RCA No.35/2025.

6. The learned Adhoc District Judge-1 Jalna had considered the grounds raised by the Plaintiff Appellant (herein) and had also considered the submissions made by the Defendants Respondent (herein) and after going through the record was pleased to allow the appeal by setting aside the order dated 20.02.2025 passed in Civil MA No.321/2024 rejecting the application under Order IX Rule 9 of CPC filed by the Plaintiff for setting aside the dismissing in default order dated 18.09.2024 passed by the trial Court dismissing the suit that is RCS No.126/2016 in default.

7. Being aggrieved by the said judgment dated 21.11.2025 passed by the Adhoc District Judge-1 Jalna in RCA No.35/2025,

the Appellant has filed the present Second Appeal. Heard the learned Counsel for the Appellants and Respondent. On perusal of the record and as per submission of the counsel for the appellants following substantial questions of law are involved in the present Appeal :

(a) Whether the learned Appellate Court was right in entertaining the Regular Civil Appeal, when the Section 141 of the CPC provides for a Miscellaneous Civil Appeal, against an order passed under Order IX?

(b) Whether the learned Appellate Court was right in entertaining the Regular Civil Appeal, in view of alternate statutory remedy of filing an appeal from order under Order 43 Rule 1 which provides for an appeal against the order under Rule IX of Order 9 rejecting an application for an order to set aside the dismissal of a suit?

(c) Whether the judgment and decree passed by the First Appellate Court in a Regular Civil Appeal can be set aside only in view of the wrong remedy exercised by the Plaintiff by not filing an appeal from order under Order 43 Rule 1 or Miscellaneous Civil Appeal under Section 141 CPC?

8. Before deciding the questions of law found to be involved in the present Second Appeal, it would be expedient to first refer to the findings of fact and examine whether the same are in accordance with the settled propositions of law.

9. The perusal of the record and *roznama* of the suit shows that the Plaintiff filed application Exh.37 on 27.04.2023 seeking a temporary injunction against Defendant Nos. 8 and 9. An order was passed directing issuance of notices to Defendant Nos. 8 and

9. Thereafter, the matter was kept pending for service of summons. On 16.07.2024, Defendant No.9 appeared through Advocate and filed V.P. at Exh.44, and subsequently filed a written statement at Exh.46 on 29.07.2024. On 01.08.2024, V.P. was filed by the learned Advocate appearing for Defendant Nos. 6 and 7 at Exh.49, and on the same day, an application Exh.51 under Section 11 of CPC was moved.

10. On 03.08.2024, issues were framed at Exh.53. On the same day, Defendant Nos. 6 and 7 filed application Exh.54 under Order IX Rule 8, and the Plaintiff filed pursis at Exh.55 seeking copies of applications Exh.51 and Exh.54 for filing a reply. However, it appears that the Plaintiff did not receive copies of those applications. Subsequently, on 06.08.2024, the Court immediately passed an order at Exh.51 without supplying copies of the application to the Plaintiff or affording an opportunity of hearing, despite the Plaintiff having sought copies by filing pursis Exh.55.

11. On 26.08.2024, the matter was listed, but on that day the Presiding Officer was on leave, and the case was adjourned for evidence. On 18.09.2024, the Plaintiff and his Advocate remained absent. Defendant Nos. 6, 7, and 9 again moved application Exh.57 under Order IX Rule 8 CPC. The Court recorded that no say was filed by the Plaintiff till 02:00 p.m. and passed an order below Exh.1, thereby dismissing the suit in default. It was noted that the Plaintiff and his Advocate were absent, while Defendant Nos. 6, 7, and 9 were present. The

record further shows that the Plaintiff had been absent for the last two dates and failed to lead evidence. As the Plaintiff did not file any say to the application Exh.57, it was found that his conduct indicated disinterest in prosecuting the matter. Accordingly, the suit was dismissed in default on 18.09.2024.

12. It could be from the record seen that the Defendants filed application Exh.51 under Section 11 of CPC on 01.08.2024, and on 03.08.2024 filed application Exh.54 under Order IX Rule 8 of CPC. The Plaintiff, however, filed pursis Exh.55 seeking copies of those applications for filing a say, but the copies were not supplied to him. On the same day, i.e., 03.08.2024, issues were framed at Exh.53. Thereafter, on 06.08.2024, the Court passed an order below Exh.51 without supplying copies to the Plaintiff or affording him an opportunity of hearing. Though the Plaintiff had earlier filed application Exh.37 seeking temporary injunction against Defendant Nos. 8 and 9, the same was not decided by the Court, which instead proceeded to frame issues and subsequently dismissed the suit in default. Notably, the Defendants had initially filed application Exh.54 under Order IX Rule 8 CPC on 03.08.2024, and again filed a similar application at Exh.57 on 18.09.2024 for reasons best known to them.

13. In-fact the Plaintiff was absent only on two dates, namely on the date of dismissal of the suit and on the immediately preceding date. The *roznama* shows that on the earlier date, i.e., 26.08.2024, the Presiding Officer was on leave. The suit thereafter came to be dismissed in default on the next date, i.e.,

18.09.2024. Prior to that, it appears that the Plaintiff was present and had taken steps from time to time in the matter. Issues were framed on 03.08.2024, and on 06.08.2024 application Exh.51 was decided without affording an opportunity to the Plaintiff. Ultimately, the suit was dismissed on 18.09.2024. From the record and proceedings, it does not appear that the Plaintiff was negligent or intentionally remained absent; rather, his conduct shows diligence in prosecuting the matter until the date of dismissal. The Plaintiff has specifically stated that he was present in this Court on the said date in connection with a bail application filed by the daughter of Defendant No.9 relating to an offence registered under Section 307 of IPC. This fact has been specifically mentioned by the Plaintiff in his evidence, and the Defendants have not challenged it during cross-examination. No suggestions were even put to the witness regarding his alleged absence before the Court. Hence, it can be inferred that the Plaintiff had sufficient cause, and for that reason did not remain present before the Civil Court. The matter pertains to immovable property and is required to be decided on merits after evidence is led by both parties. The Plaintiff has also moved an application for restoration of the suit immediately, well within the period of limitation. The Plaintiff was also required to attend another proceeding pending in another Court. Therefore Plaintiff cannot be said to be not interested to proceed in the matter. The Plaintiff has got sufficient cause for his non appearance on the date of dismissal of suit.

14. In support of the application, the learned Advocate for the

Plaintiff has relied upon the case of **Kusumben Indersinh Dhupia v. Sudharben Biharilalji Bhaiya and Another** (SC), decided on 09.01.2019, wherein the Hon'ble Apex Court observed that the Appellant-Plaintiff was present in almost all hearings before the trial Court, which indicates that he was genuinely pursuing the matter. The Appellant-Plaintiff, having filed the suit for declaration and injunction, and was rightly given an opportunity to pursue his suit by setting aside the order of dismissal of the suit.

. Thus there appears to be no error committed by the learned First Appellate Court in setting aside the order of dismissal of the suit.

15. The substantial question of law which are raised by the appellant during the course of his oral arguments is as mentioned herein before as question of law A(a), B(b), C(c), The learned counsel for the appellant vehemently argues that the aforesaid questions of law goes to the root of the matter pertaining to the maintainability of the Regular Civil Appeal. Learned counsel for the appellants submits that the Regular Civil Appeal ought not to have been entertained in view of of an alternate statutory remedy to the plaintiff to file a Miscellaneous Civil Appeal under Section 141 of the CPC. The appellant had further submitted that the other statutory remedy available to the appellant was filing an appeal against the order under Order 43 Rule 1 of CPC, which provides for an appeal against the order passed by the learned Trial Court under Order IX Rule IX rejecting the application to set aside the order of dismissal of the

suit. Thus, the only question of law involved in the present appeal is whether the judgment and decree passed by the First Appellate Court in a Regular Civil Appeal can be set aside only in view of the wrong remedy exercised by the plaintiff by not filing an appeal against the order under Order 43 Rule 1 or Miscellaneous Civil Appeal under Section 141 CPC.

. For answering the aforesaid questions of law, it would be apposite to refer to the pleadings of the parties made before the First Appellate Court. The perusal of the judgment of the First Appellate Court in Regular Civil Appeal does not show that any such objection was taken by the appellant before the First Appellate Court about maintainability of the appeal. On the other hand, the Plaintiff – Nilam had examined herself as PW 1 and filed evidence closing pursis at Exhibit 18. The evidence of the applicant was corroborating the reasons stated in the application mentioning grounds for not attending the dates during pendency of the suit. On the other hand, the present appellant Nos. 1 to 6, who were original defendant Nos. 6 to 11 have failed to adduce any evidence and relied upon the documents of the Registrar Cooperative Office, Jalna, Roznama of the CRA No. 26/2023, plaint before the Registrar Cooperative Office Jalna and the FIR Exhibit 29. Thus, it could be seen from the record that the original defendant Nos. 6 to 11 i.e. the present appellants Nos. 1 to 6 herein have failed to take objection about the maintainability of the Regular Civil Appeal before the learned First Appellate Court, which has resulted in the First Appellate Court deciding the appeal. Had the appellant taken the objection of maintainability of the appeal before the First Appellate Court, the

Appellate Court could have framed an issue about maintainability and if the appeal was found to be defective, the appeal would have been converted into Miscellaneous Civil Appeal or an appeal against order under order 43 rule 1 rather than entertaining the Regular Civil Appeal.

16. The Hon'ble Supreme Court in the case of Deepak Tandan and another Vs. Rajeshkumar Gupta; AIR 2019 SC 924, was pleased to hold as under :-

17. In our considered opinion, the High Court committed jurisdictional error in setting aside the concurrent findings of the two Courts below and thereby erred in allowing the respondent's writ appeal and dismissing the appellants' application under [Section 21\(1\)\(a\)](#) of the Act, 1972 as not maintainable. This we say for the following reasons.

18. First, it is not in dispute that the respondent (opposite party) had not raised the plea of maintainability of the appellants' application under [Section 21\(1\)\(a\)](#) of the Act, 1972 in his written statement before the Prescribed Authority.

19. Second, since the respondent failed to raise the plea of maintainability, the Prescribed Authority rightly did not decide this question either way.

20. Third, the respondent again did not raise the plea of maintainability before the First Appellate Court in his appeal and, therefore, the First Appellate Court was also right in not deciding this question either way.

21. "It is a settled law that if the plea is not taken in the pleadings by the parties and no issue on such plea was therefore framed and no finding was recorded either by the Trial Court or the First Appellate Court, such a plea cannot be allowed to be raised by the party for the first time in the third Court whether in appeal, revision or writ as the case may be for want of factual foundation or findings."

17. Thus, the Appellant cannot be allowed to raise the said plea of maintainability for the first time in the present second appeal during the course of arguments, particularly when the appellant has not taken up such plea before the First Appellate Court. Had the plea of maintainability in view of alternate statutory remedy under Order 43 Rule 1 of CPC or an alternate remedy of filing a Miscellaneous Civil Appeal under Section 141 CPC, being taken by the appellant, the learned First Appellate Court would have framed an issue to that effect and passed appropriate orders about maintainability of such application. The plea of maintainability, cannot be therefore allowed to be taken up by the appellant at the Second Appeal stage.

18. It is no doubt true that the question of law can be taken up at any stage of proceedings, however the present question of law sought to be raised goes to the very maintainability of the proceedings and it is almost settled law that an objection about maintainability of the proceedings had to be taken up at the earliest stage. The appellants have suffered the judgment passed by the First Appellate Court in Regular Civil Appeal, the appellant thus cannot be allowed now to take up the plea of maintainability which appears to be taken up by the appellants only with an intention to defeat the rights of the plaintiff whose suit came to be dismissed for want of prosecution without adjudication on merits. The said order of dismissal of the suit for want of prosecution, was set aside by the First Appellate Court, after considering in detail the *roznama* and the reasons stated by the plaintiff for not remaining present on the aforesaid dates.

The plea of maintainability in view of the alternate statutory remedy, at such a later stage in the second appeal, therefore, cannot be entertained, which would amount to defeat the rights of the plaintiff, without the same being allowed to be adjudicated on merits.

19. The filing of a Regular Civil Appeal at the most can be said to be an irregularity and not an illegality committed by the Plaintiff whose suit came to be dismissed in default and the application under Order IX Rule 9 of CPC for restoration of the suit also came to be rejected. The well-reasoned order of the First Appellate Court in setting aside the order of dismissal of the suit for want of prosecution, therefore cannot be set aside, merely on the ground that the Appellant has inadvertently filed a Regular Civil Appeal instead of Miscellaneous Civil Appeal under Section 141 CPC or an Appeal from Order under Order 43 Rule 1 of the CPC.

20. In view of the reasoning stated hereinabove, all three above questions of law (a), (b) and (c), as framed earlier stands answered. No other substantial question of law appears to be involved in the present Second Appeal. The appeal is devoid of substance and merits and is hereby dismissed.

**MEHROZ K. PATHAN
JUDGE**

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