

(2009) 07 BOM CK 0160

In the Bombay High Court

Case No : Appeal No. 59 of 2009 from Order Dated 5.12.2008 in Notice of Motion No. 3791 of 2007 in Suit No. 2633 of 2007

Hamida Haji Haroon, Munaf Haji Haroon, Saira Akthar Aziz
and Farina Shakil Sacrani

APPELLANT

Vs

Khairunnisa Haji Mohammed and Others

RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 15, Order 5 Rule 20, Order 5 Rule 20(1A), Order 5 Rule 9, Order 9 Rule 13

Citation : (2009) 5 BomCR 55 : (2010) 6 RCR(Civil) 733

Hon'ble Judges : Swatanter Kumar, C.J;S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : Janak Dwarkadas, Sharan Jagtiani and Sheetal Shah, instructed by Mehta and Girdharlal, for the Appellant; Pradeep Sancheti, Sachin Chandarana and Priyanka Vegad, instructed by M.K. Ambalal and Co. for Respondent No. 1, Chetan Kapadia and V.V. Kanade, instructed by Pushkar Patankar, for Respondent Nos. 2 to 8, Rajeev Kumar and A. Khare, instructed by Khare Legal Chambers for Respondent Nos. 12 to 17 and G.S. Patel and I.P. D'Cruz for Respondent Nos. 10 and 11, for the Respondent

Judgement

S.C. Dharmadhikari, J.—This appeal challenges an order passed by the learned Single Judge on 5th December, 2008 in Notice of Motion No. 3791 of 2008.

2. The undisputed facts are that, Civil Suit No. 2633 of 2007 is filed in this Court by the first respondent plaintiff .The appellants before us are the heirs and legal representatives of original defendant No. 8. The respondents to this appeal are the other defendants. The further undisputed fact is that the prayers in the suit are that the property, more particularly described in the schedule annexed and marked as Annexure "A" to the plaint, be partitioned by metes and bounds and vacant and peaceful possession thereof be handed over to the plaintiff in respect of her 6.25% share and the balance be distributed between the defendant Nos. 1 to 16. The other prayers are either in the alternative or in furtherance of the

main prayer for partition.

3. It is common ground that in a notice of motion being Notice of Motion No. 3536 of 2007 moved in the said suit, appeared before the learned Single Judge on 23rd September, 2008 and at the hearing of the same, the court proceeded to pass a decree of partition and separate possession in terms of prayer Clause (a) against the appellant (original defendant No. 8) and defendant Nos. 12 to 17. The court also proceeded to pass a decree in favour of the plaintiff in terms of prayer Clause (c), for possession. Thus, at the hearing of the notice of motion for interlocutory relief, the suit itself came to be decreed.

4. On 31st October, 2008, original defendant No. 8 predecessor in title of the appellant before us filed the instant notice of motion under Order 9 Rule 13 of the CPC on which the impugned order has been made. The prayer in the motion is of setting aside the exparte decree in the suit.

5. In the affidavit in support of this notice of motion, Defendant No. 8 contended that he has not been served with any papers, summons, pleadings or records in the matter. He learnt about an exparte decree only in the middle of October, 2008 when defendant No. 9 informed him about the same. After much persuasion, defendant No. 9 furnished him a copy of the exparte decree. He contended that after going through the records, it became apparent that the plaintiff made a false statement before the court that defendant No. 8 has been duly served with the notice of motion, writ of summons and the papers and records of the suit. However, upon inspection of the record, it revealed that the plaintiff and all defendants to the suit are aware that defendant No. 8 is a nonresident Indian settled in Leicester, England. Having acquired such a status, he was not available at any time in the address mentioned in the cause title of the suit. The plaintiff is a paternal aunt of defendant No. 8 and is fully aware of this fact. Despite this, by creating an impression that the writ of summons and related papers are duly served upon the defendant, the subject decree has been obtained by practicing a fraud on this Court. He has pointed out that the suit is for partition. The court has not ascertained the share of each of the defendants in the joint properties by passing a preliminary decree. He pointed out that on merits, there is an excellent case in as much as that a registered Gift Deed was made by father of defendant No. 8 and defendant Nos. 9 and 11 by which 1/2 undivided share in the suit property was gifted to defendant Nos. 8,9 and 11. By virtue of this Deed of Gift, the defendant No. 8 has become entitled to 1/3rd of half the undivided share in the suit property that is his share is to the extent of 16.66%. However, perusal of the decree shows that the share has been reduced to 9.1%. He has set out the further facts with regard to the Deed of Gift and pointing out that having been residing in England for the past 17 years, there is no question of any knowledge of the proceedings nor can it be said that there is any substituted service being effected nor can it be said that any occasion arises for effecting substituted service. For all these reasons, the decree in question be set aside.

6. On being served with this notice of motion and affidavit in support, the plaintiff filed a reply thereto and relied upon the fact that a chamber order was taken pursuant to the direction dated 23rd January, 2008 in Notice of Motion No. 3536 of 2007. In other words, this Court allowed the defendant No. 8 to be served afresh and pursuant to an order dated 4th March, 2008, notice was served by publication in Daily "Free Press Journal" dated 10th March, 2008, Urdu Times dated 11th March, 2008. An affidavit dated 18th March, 2008 proving publication is filed in court. Thus, there is no substance in the contention of defendant No. 8 that he was not served with the writ of summons nor that he did not receive any notice of the proceedings. It is alleged that defendant Nos. 9 to 11 are the brothers of defendant No. 8. They as well as alleged Power of Attorney, Mr. Abdul Gani Dawood reside at Mumbai. In such circumstances, the plea that the writ of summons was not served is false. In any case, the court has permitted substituted service and that order/direction has been complied with. In these circumstances, all allegations made in the affidavit in support are false.

7. All pleas in the affidavit in support were thus denied by the plaintiff.

8. It is pertinent to note that in support of the pleas raised by the defendant No. 8, an affidavit has been filed by defendant Nos. 10 and 11.

9. In paragraph Nos. 1 to 5 of this affidavit, this is what is stated:

1. We have read a copy of the affidavit in support of the Notice of Motion of Defendant No. 8 and also copy of the Notice of Motion taken out by Defendant No. 8.

2. We say that what is stated in the affidavit of Defendant No. 8 in support of the Notice of Motion is true to our knowledge. We say that it is absolutely false to suggest that at any point of time in any of the without prejudice meetings the Constituted Attorney of the Defendant No. 8 was present. We say that allegations in that behalf are absolutely false. We further say that it is true to the knowledge of plaintiff as well as Defendants No. 1 to 7 that Defendant No. 8 for last 1 year or more is residing at Leicester, U.K. and prior to that he was staying in Africa for over a decade. In the circumstances, we submit that plaintiff played fraud and obtained order for substituted service of notice of motion by giving public notice in Free Press Journal and Urdu Times knowing fully well that Defendant No. 8 is not residing at Bombay for a long time.

3. We further say that in fact after filing of the suit and taking out of notice of motion and after service thereof, plaintiff through Defendant Nos. 1 to 7 approached us and intimated not to worry about the suit and plaintiff and/or her advocate will look after their interest. We further say that since the present suit is filed for the purpose of partition of the suit property, and plaintiff & Defendant Nos. 1 to 7 had assured to look after our interests and they intimated that we should not incur unnecessary expenditure and they will appoint Advocate for us.

4. We say that relying upon the assurances and representations we as suggested

by the plaintiff and Defendant No. 1 to 7 appointed present advocate. In fact and in accordance with the assurances and representations the advocate was paid for by the plaintiff and/or defendant Nos. 1 to 7 even their fees.

5. We therefore believe and we were made to believe that plaintiff and Defendant Nos. 1 to 7 will look after our interest and that of Defendant Nos. 8 & 9.

10. Consistent with the above, it is urged that these defendants agreed to be represented by the advocate appointed by plaintiff and defendant Nos. 1 to 7 and relied and carried out the advice given by them. However, upon a reading of the decree, it is discovered that the share of these defendants has not been granted.

11. Thereafter, an affidavit in reply came to be filed by the plaintiff dealing with the allegations made by defendant Nos. 10 and 11.

12. The original defendant No. 8 filed a rejoinder affidavit and annexed thereto the affidavit of one Abdul Gani Dawood. While relying upon the Power of Attorney in his favour, he points out that although parties to the suit are aware that he is the Constituted Attorney of defendant No. 8, no attempt of any nature whatsoever has been made to serve the proceedings upon him and therefore, the allegations made are false.

13. It is this Notice of Motion for setting aside the *ex parte* decree which came to be placed before the learned Single Judge and by the impugned order, she has dismissed the same. Hence, this appeal by the aggrieved defendant.

14. Mr. Dwarkadas, learned Senior Counsel appearing for the appellants contended that the learned Judge is in complete error in dismissing the notice of motion. He submits that if the finding is that the writ of summons is not served, then, there was no alternative but to set aside the *ex parte* decree. No question arises of then considering the issue of any irregularity in service of summons or not. This is a clear case where the original defendant No. 8 was residing earlier in Africa for a decade and later on in U.K. The endorsement by the bailiff on the summons is that the defendant No. 8 is not residing at the address mentioned in the cause title of the plaint. If he is not so residing there and to the knowledge of the plaintiff he is abroad, then, obtaining a direction to serve by substituted service would not by itself mean that the summons is duly served. Mr. Dwarkadas was at pains to point out that an application under Order IX Rule 13 is maintainable and the defendant may apply to the court by which the decree was passed for an order to set aside the same and if he satisfies the court that the summons was not duly served or that there was sufficient cause for his failure to appear when the suit was called on for hearing, then the decree can be set aside. The second proviso is not attracted in this case because the court has not recorded its satisfaction in terms thereof. In any event, the finding of the learned Single Judge is contradictory on this aspect. Further, grave prejudice is caused to the appellants, as there is no preliminary decree passed by the learned Judge. The learned Judge has proceeded to pass a final decree of partition and the shares are not ascertained clearly. The matter was not placed for hearing but

at an interlocutory stage, the whole suit came to be decreed. Therefore, this is a clear case of injustice to the parties and the decree must be set aside.

15. On the other hand, Shri Sancheti appearing for the plaintiff supported the impugned order. He submits that on the affidavit of the parties before the Single Judge, it is apparent that at no stage, it can be said that the defendants were unaware of the institution of the suit. Once it is stated on affidavit that the defendant Nos. 1 to 7 and plaintiff assured the other defendants that their interest would be taken care of and therefore, no steps were taken by the defendant No. 8 and other defendants to defend the suit, it clearly demonstrates that they were aware not only of the institution of the suit but the date when the same would be placed before the court. In all such cases, the presumption of service can be raised and if at all there is any irregularity, then, in the absence of any prejudice being shown, the decree need not be set aside. In these circumstances, the conclusion drawn by the learned Judge that the application to set aside the decree is collusive and therefore, there is no reason to set aside the decree, requires no interference. Consequently, the appeal be dismissed.

16. With the assistance of the learned Counsel appearing for both sides, we have perused the Appeal paperbook including the impugned order. We have carefully perused the version of both sides placed on affidavits before the learned Single Judge.

17. Order IX Rule 13 of the CPC is very clear. The said provision as is applicable in the State of Maharashtra reads thus

13. Setting aside decree ex parte against defendant. In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also:

Provided also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation I. Where a summons has been served under Order 5, Rule 15, on an adult male member having an interest adverse to that of the defendant in the subject matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

Explanation II. Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.."(1.10.1983).

18. When the application for setting aside the decree is moved as per the above reproduced provision on the ground that the summons was not duly served, then, it is contemplated that the applicant satisfies the court in that behalf. From a perusal of the affidavit filed in support and the version therein as referred to hereinabove, it is clear that the original defendant No. 8 has satisfied the court that the summons was not duly served. The affidavit in support of the notice of motion in paras 3 and 4 asserts that the summons was not duly served. There is no denial of the fact that the original defendant No. 8 is a nonresident Indian settled in Leicester ,England. That is a statement made in para 4 of the affidavit in support. He has again reiterated that in para 10 thereof by pointing out that for the past one year he had been residing in England and for 17 years prior thereto, he was residing in Malawi, Central Africa.

19. Whatever may be the denials on record, one fact is apparent to us and that is if the summons had indeed been served on the defendant No. 8 at the address mentioned in the cause title, then, there was no occasion for applying for substituted service. The bailiff's endorsement on the writ of summons is that when he went to serve the writ of summons on defendant No. 8 at the address set out in cause title of the plaint, the premises were found locked, he was informed by the neighbours and others that defendant No. 8 is not residing therein. Based upon this bailiff's report, the plaintiff applied for substituted service. The application was made on the basis that at the address mentioned in the cause title, the defendant No. 8 was not found. Therefore, substituted service by publication of the notice/summons in the newspapers was effected. Two newspapers published in Bombay and particularly in India were chosen. However, it is apparent was that even this does not satisfy the requirement of service of writ of summons. If the clear assertion on affidavit is that the plaintiff was aware that the defendant No. 8 was not residing in India, then, substituted service by publication of the summons in the newspapers published and printed from Bombay would not satisfy the requirement in law. This is apparent from para 15 of the affidavit in reply of the plaintiff wherein the plaintiff does not set out as to on what basis the summons can be said to be duly served. While denying the averments in para 10 of the affidavit in support, it is stated that defendant No. 8 has appointed an Attorney to represent him and the said Attorney appears to be the resident of Mumbai. Thereafter it is stated that assuming that the Attorney is not validly authorized to represent defendant No. 8, still the Constituted Attorney had notice of the proceedings. All these without prejudice statements on affidavit are belied by the fact that the plaintiff tried to support the plea of knowledge of the proceedings and the date of the hearing by relying upon the fact that defendant Nos. 10 and 11 had notice and knowledge of the proceedings. However, even their affidavit completely falsifies the version of the plaintiff. That

apart, reliance was placed in the affidavit in rejoinder on a without prejudice meeting held on 26th September, 2007. The presence of the son of the Attorney thereat has been asserted. However, in the further affidavit, the defendant No. 8 denied this meeting and even the Attorney has filed an affidavit stating in clearest terms that the writ of summons was never served and he had no knowledge of the proceedings.

20. Order V of the CPC deals with the issue and service of summons. How the summons is issued is provided in the first part of Order V of the CPC whereas Order V Rule 9 onwards deals with service of summons. These provisions read with Bombay High Court, Original Side rules set out the complete procedure in this behalf. Unless and until there is adherence to the same, it cannot be said that the summons is duly served. Order V Rule 20 provides for substituted service and its effect. Substituted service is permitted when the summons could not be served in the ordinary way or that the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service. Order V Rule 20 (Sub-rule 1) provides for the mode of substituted service and if one of the modes adopted is service by an advertisement in the newspaper, then, requirement of Order V Rule 20(1A) must also be complied with. It is only then one can hold that the summons is duly served.

21. In the present case, when the defendant No. 8 has pointed out all the circumstances and the fact that he was not residing in India for the last 18 years or so is undisputed, then, in our view, the defendant No. 8 has satisfied the court that the summons was not duly served. If the summons was not duly served, then, there is no question of invoking the second proviso to Order IX Rule 13 as applicable in the State of Maharashtra. In a decision reported in *Sushil Kumar Sabharwal v. Gurpreet Singh and Ors.* AIR 2002 SC 2370, in somewhat identical circumstances, the Supreme court held that even for the second proviso to be applicable, the court must be satisfied that the defendant had knowledge of the date of hearing and not the pendency of suit. The following observations of the Supreme Court are pertinent:

11. The High Court has overlooked the second proviso to Rule 13 of Order 9, C.P.C., added by the 1976 Amendment which provides that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. It is the knowledge of the "date of hearing" and not the knowledge of "pendency of suit" which is relevant for the purpose of the proviso abovesaid. Then the present one is not a case of mere irregularity in service of summons; on the facts it is a case of no service of summons. The appellant has appeared in the witnessbox and we have carefully perused his statement. There is no cross-examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a

notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim which he did not avail and utilise.

12. The provision contained in Order 9, Rule 6 of the C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are: (i) when summons duly served; (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard *ex parte*. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being "proved" that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard *ex parte*. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an *ex parte* decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial Court would have been conscious of its obligation cast on it by Order 9, Rule 6 of the C.P.C., the case would not have proceeded *ex parte* against the defendant appellant and a wasteful period of over eight years would not have been added to the life of this litigation.

22. The learned Judge fell in clear error in attributing to the defendant No. 8 the knowledge of either institution of the suit or the date of hearing. The suit is not set down for hearing at all. On a perusal of the decree in question, it is apparent to us that the suit was not on board for hearing. What was on board on 23rd September, 2008 was a notice of motion for interlocutory relief in the said suit. On that date, the learned Judge took up the suit itself and decreed it. In such circumstances, knowledge of pendency of which proceeding is attributed to the defendant No. 8 is not at all clear to us. Further, the learned Judge in para 2 of the impugned order observes that the defendants were "ostensibly" being represented by defendant No. 9 who was present in court. The learned Judge is aware of the principles as is apparent from para 4 of the impugned order. The learned Judge is also aware of the clear assertion in the affidavit in support of the notice of motion praying for setting aside the *ex parte* decree as is apparent from paras 5 and 6 of the impugned order.

23. The conclusion drawn by the learned Judge in para 9 of the impugned order, is, with respect erroneous and confusing. If the defendant No. 8 was not residing in the suit property then it was for the plaintiff to find out the details of his residence. There is no question of the court assuming that the last known address is set out in the plaint and, therefore, service threat meets the

requirement of law. If that was meeting the requirement, then, plaintiff ought not to have applied for substituted service. The learned Judge should have been aware that when allegation of fraud being played on the court are made on oath, then, serious consideration ought to have been given and due cognizance ought to have been taken of the same. The allegations have been repeated in further affidavits. There are supporting affidavits also filed. In these circumstances, we are not in agreement with the view taken by the learned Judge that defendant No. 8 had knowledge of the suit and the interim application.

24. Apart from the fact that these observations are contrary to the record and ignore the statements made on oath, they are also not in consonance with the law laid down by the Supreme Court. If one is to apply the second proviso to Order IX Rule 13 then the satisfaction should be as provided therein. Admittedly, defendant No. 8 had no knowledge of the filing of the suit and the date of hearing. It was not for defendant No. 8 to have informed the plaintiff of his address at Malavi, Central Africa nor for his family members to inform the plaintiff of his whereabouts. If the plaintiff is suing the defendant No. 8 then it was for him to trace the whereabouts and furnish the details so that suit summons is properly served. The finding that defendant No. 8 could have been served only at the address mentioned in the title of the plaint and was duly served at that address is also *ex facie* erroneous and contrary to the record. The helplessness allegedly displayed by the plaintiff ought not to have been taken serious note of by the learned Judge and she fell in clear error in accepting that version. Paras 17 to 19 of the impugned order are, therefore, vitiated by an apparent error and cannot be sustained. Knowledge of defendant No. 9 or his appearance in person can by no stretch of imagination be taken as representation of the absentee defendant. The learned Judge should have accepted the argument that neither the suit was on board for hearing nor was the writ of summons properly served and looked at either which way the decree deserved to be set aside. That the decree is *ex parte* is clear. In such circumstances, there was no occasion to discuss the merits of the matter and once again all findings in that behalf are totally unjustified and uncalled for in law. If the prayer of the defendant No. 8 was to set aside a *ex parte* decree on the ground that the suit summons was not properly served, then, that grievance ought to have been examined and scrutinized and once the court was satisfied that the writ of summons is not duly served, its plain duty was to set aside the decree. There is no question of then considering the merits of the matter and justifying the act of passing an *ex parte* decree by resorting to Order XII Rule 6 of the CPC. This means that the learned Judge having satisfied herself that the summons was not duly served failed to carry out her duty in law to set aside the *ex parte* decree. With respect, there was no occasion and no need to justify the passing of the *ex parte* decree otherwise. The conduct of the parties also has been unnecessarily commented upon.

25. There is no basis for the finding in para 32 that the application to set aside the decree is collusive and that defendant No. 8 has been put up at the instance

of defendant No. 9. Even before us, Mr. Sancheti found it difficult to support this conclusion. Apart from the fact that there is no material to arrive at such a finding, the record would indicate that the version of defendant No. 8 on affidavit has not been controverted at all.

26. For the reasons aforesaid, we are of the view that the order of the learned Single Judge is erroneous and unsustainable in law. Consequently, we have no alternative but to set aside the same. We proceed to quash and set aside the impugned order and make Notice of Motion No. 3971 of 2008 absolute in terms of prayer Clause (a).

27. What remains for consideration is whether the decree should be set aside only against defendant No. 8 or as a whole. The suit in question is a partition suit. Order XX of the CPC deals with the judgment and decree. In the instant case, the suit was not on board but what the court was required to consider was the request of the plaintiff to grant interim relief. The court proceeded to decree the entire suit on that day itself. The decree is a final decree. Further, the decree proceeds to declare the shares and direct partition and separate possession. Now, apart from defendant No. 8, the other defendants are also raising the pleas with regard to execution of the Gift Deed. They are not in agreement with the shares as determined in the decree. Considering the nature of the controversy and the decree passed by the learned Single Judge, we are of the view that the exparte decree in the present case will have to be set aside as a whole. It is not as if the law does not take care of this aspect. Order IX Rule 13 in terms states that if the decree is of such a nature that it cannot be set aside as against one defendant/applicant only, then it may be set aside against all or any of the other defendants also. It may be that some of the defendants are supporting the plaintiff but now it is apparent that defendant Nos. 8 to 11 have contested not only the motion but the Appeal. They do not agreeable to the shares determined in the decree. In these circumstances, we are in agreement with Mr. Dwarkadas that the case is covered by the first proviso to Order IX Rule 13. Consequently, the decree is set aside as a whole.

28. The natural consequence of the above is that the suit is restored to its file for being tried afresh and in accordance with law. Since the suit itself is revived, it would be open for the plaintiff to apply for such interlocutory and final reliefs therein as are permissible in law. However, we record the statement of Shri Dwarkadas that the advocate appearing for the heirs and legal representatives of defendant No. 8, who unfortunately expired on 11th December, 2008, would accept service of the writ of summons on their behalf. It would not be necessary, therefore, for the plaintiff to issue and serve the writ of summons all over again on these defendants. Since the appellants are the only heirs and legal representatives of the deceased defendant No. 8, the plaintiff can carry out necessary amendments in the suit by impleading them as defendants. Needless to clarify that all observations made in this order are for the purposes of disposal of the application to set aside the exparte decree and shall not influence the

court while trying the suit. Similarly, all observations made by the learned Single Judge in the judgment and decree which is set aside shall also not bind the judge trying the suit. All pleas on merits as well as on maintainability of the proceedings are kept open. In the peculiar circumstances of this case, there shall be no order as to costs.