

(2002) 08 BOM CK 0106
In the Bombay High Court
Case No : First Appeal No. 474 of 1988

Khurshed Banoo (deceased by LRs)	Vs	APPELLANT
Vasant Mallikarjun Manthalkar (deceased by LRs.)		RESPONDENT

Date of Decision : 09-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 9 Rule 13, 96(2)

Citation : AIR 2003 Bom 52 : (2003) 1 ALLMR 42 : (2003) 2 BomCR 627

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : A.K. Abhyankar, Ajitkumar C. Shah and S.G. Vakil, for the Appellant;
K.Y. Mandlik, for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This appeal taken exception to the judgment and decree passed by the Bombay City Civil Court, Bombay dated 23rd November, 1977 in Suit No. 1020 of 1964. The said suit was filed by the predecessor of the respondents herein against the predecessor of the appellants herein for possession of a strip of land admeasuring 142 sq. yds. or thereabout as described in Exh. A and shown in plant Exh. G bearing Plot No. 596 of Bandra Town Scheme No, 3. In the alternative, it was prayed to determine the area encroached upon by the defendant in the said suit in respect of the said plot by joint measurement taken by and under the directions of the Court as per records of the Town Planning Scheme as declared in the year 1939 and decree be passed against the defendant and in favour of the plaintiff for possession of the strip of land so determined. Further relief of injunction was prayed in the said suit. The premise on which the suit proceeds is that the plaintiff was the owner of the piece of vacant land bearing Plot No. 596 whereas the defendant was the owner in respect of the adjoining piece of land bearing Plot No. 597. The Plot No. 596 owned by the plaintiff was admeasuring 1030 sq. yds. as mentioned in the Conveyance in his favour, whereas the plot owned and possessed by the

defendant admeasured only 800 sq. yds. But the defendant encroached upon portion of the plot which was owned and possessed by the plaintiff bearing Plot No. 596. It is not necessary to burden this judgment with how the matter proceeded before the trial Court. Suffice it to point out that both the parties filed consent minutes for appointment of the Commissioner who was to determine the boundaries of final Plot Nos. 596 and 597 of Bandra Town Scheme No. 3 in accordance with the said scheme declared in 1939-40 (and not as per present city survey record), and to determine the area of encroachment on Plot No. 596 if any. Pursuant to the said minutes, Mr. Nanavati B. H., Architect was appointed as Commissioner who has subsequently submitted his report dated 29-4-1977, which was submitted in the Court on 5-7-1977. After the submission of Commissioner's report, the Court proceeded to settle the issues on 11-7-1977. It is relevant to note that earlier on 16-12-1976, the matter was adjourned for recording of evidence to 7-2-1977. However, it is not in dispute that no evidence either oral or on affidavit was adduced on behalf of either party. Be that as it may, on 11-7-1977 the suit was adjourned to 18-7-1977. However on that day, the matter was adjourned to 8-8-1977 with clear understanding that no further date will be given for any reason. The roznama indicates that the suit was thereafter listed on 17-11-1977 when the defendant and his advocate were absent and in the circumstances the case was adjourned at the request of the Advocate for the plaintiff to 21-11-1977, but for final hearing. No doubt the order sheet indicates that on 21-11-1977 once again none appeared for the defendant. In the circumstances, the Court proceeded to place the matter for judgment on 23-11-1977 and once again on that day none appeared for the defendant. Accordingly, on that day i.e. 23-11-1997 the Court pronounced the judgment and decree, which is impugned in the present appeal

2. However, before institution of the present appeal, the appellant filed application on 13-12-1977, under Order 9, Rule 13 of C.P.C., after they came to know about the ex parte decree passed against them. That application was however, dismissed on 9-2-1979 on the ground that no sufficient cause was made out for setting aside the ex parte decree. That order has become final and has not been challenged. The respondents took out notice for execution of decree on 7-8-1980. In that proceedings objection was raised on behalf of the appellants that decree passed against them was nullity. That objection was however, rejected by even that notice for execution under Order 21, Rule 22 proceeded ex parte against the appellants and the Court negatived the objection raised on behalf of the appellant. The appellants thereafter took out Notice of Motion No. 5003 of 1980 on 11-11-1980 for recalling of the order dated 21-8-1980 passed on Notice of Motion under Order 21. Rule 22 in favour of the respondents. That application was dismissed by the Executing Court on 23-4-1981. Against that decision the appellants had filed appeal in this Court being appeal from order No. 599 of 1981. That appeal from order was converted into civil revision application No. 685 of 1985, as appeal was not maintainable. That revision application was, however, rejected by this Court on 18-12-1984.

3. In other words, the application taken out by the appellants for setting aside the ex parte decree under Order 9, Rule 13 of C.P.C. came to be dismissed and that order has become final. Even the objections raised on behalf of the appellants before the Executing Court in proceedings under Order 21, Rule 22 have been negatived right up to this Court. However, in the meantime the appellants had filed the present appeal on 13-8-1981 along with application for condonation of delay. Prayer for condonation of delay was granted by this Court on 8-4-1988 and the appeal came to be admitted. When the appeal was called out for hearing, the counsel appearing for the respondents raised preliminary objection regarding its maintainability.

4. According to Mr. Mandlik, learned Counsel for the respondents, once the application for setting aside the ex parte decree filed under Order 9, Rule 13 of C.P.C. by the appellants has been rejected, the appellants cannot be permitted to pursue the remedy of this appeal and the appeal should be dismissed as having become infructuous. To buttress this plea he has placed reliance on the decision of this Court reported in (1995) 2 Mah LJ 951 Kausabai Keshav Dushinge v. Revubai Daji Jare, and another decision of the Apex Court reported in Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, . He has also placed reliance on the decision of the Division Bench of the Madhya Pradesh High Court reported in Sumera Vs. Madanlal and Others, .

5. Mr. Abhyankar for the appellants, however, has distinguished the abovesaid judgments and contends that the appeal against ex parte decree is a substantive remedy provided u/s 96(2) of CPC and rejection of application under Order 9, Rule 13 filed by the appellants would be of no consequence. He submits that if it was a converse case then perhaps the decision relied upon by the respondents would be of significance. According to him, the defendant in such a situation, had concurrent remedy of filing application for setting aside the ex parte decree under Order 9, Rule 13 as well as of filing substantive appeal u/s 96(2) of CPC and it is only when appeal was rejected that remedy under Order 9, Rule 13 is barred by law in particular the explanation to that provision. He submits that however, when the defendant takes recourse to both these remedies and if the application under Order 9, Rule 13 was to be dismissed in anterior point of time then that would not affect the merits of the appeal and in particular the maintainability of the appeal filed u/s 96(2) of Code of Civil Procedure, which is a substantive remedy.

6. Insofar as merits, it is contended on behalf of the appellants that the trial Court has completely overlooked the relevant provisions of the C.P.C. while proceeding to decree the suit ex parte only on the basis of the Commissioner's Report. He submits that, on the basis of the scheme of various provisions of the Code of Civil Procedure, it was incumbent upon the trial Court to call upon the parties to produce evidence and in any case the suit could not have been decreed in absence of any evidence either oral or in the form of affidavit produced by the plaintiff to prove his case pleaded in the suit. He further contends that

Commissioner's Report by itself cannot be held as evidence to prove a fact unless the same was proved on record, and the defendant was given opportunity to cross-examine the concerned witnesses. He therefore submits that, there is material irregularity in the conduct of the trial on which Court alone, without going into the other issues, appeal would succeed and the matter will have to be remanded to the trial Court for de novo retrial from the stage of framing of issues. He submits that this can be done in exercise of powers u/s 99 read with Order 41, Rule 23A of Civil Procedure Code.

7. On the other hand, Mr. Mandlik contends that there is no infirmity either in the approach or the reasoning given by the trial Court. He submits that the Commissioner's report was prepared in the presence of all concerned including the defendants and therefore correctness of that report was not challenged at all. If that report has gone unchallenged, then no fault can be found with the trial Court for having decreed the suit essentially relying on the said document as having been proved. He, therefore, submits that the appeal is devoid of any merit.

8. Accordingly, two points would arise for my consideration; viz.

i) Whether the present appeal is maintainable in view of the dismissal of the application under Order 9, Rule 13 of C.P.C. filed by the appellants for setting aside the self same ex parte decree?

ii) Whether the trial Court could proceed to decree and the suit in absence of any evidence adduced by the plaintiff either oral or on affidavit to establish the case pleaded by him and, therefore, has not committed material irregularity? If the answer is yes, then what order?

9. Adverting to the preliminary objection referred to at point No. 1 to my mind, the same is without any substance. The decision of this Court in the case of Kasuabai Keshav Dushinge 1995 (2) M LJ 951 (supra) is not an authority on the proposition that once the application for setting aside ex parte decree under Order 9, Rule 13 is rejected, as a necessary consequence thereof the remedy of appeal u/s 96(2) of C.P.C. is barred. In that case, the Court was concerned with a converse situation where the appeal was disposed of and yet the remedy of application under Order 9, Rule 13 was being invoked. The Court observed that, having regard to the explanation to Rule 13, such a remedy was clearly barred. The said observations made in that judgment are only in the context of the fact situation of that case and would not apply to the present case. It is relevant to note that legislature has advisedly not made analogous provision as has been made in the form of explanation to Rule 13, so as to bar remedy of appeal if the application under Order 9, Rule 13 for setting aside the decree was to be rejected. It is well settled that defendants can take recourse to three different remedies, viz. (i) by way of application under Order 9, Rule 13 for setting aside the ex parte decree, (ii) by way of appeal against the ex parte decree u/s 96(2) of CPC and (iii) also by way, of review before the same Court against the ex

parte decree. In any case, it is well settled that concurrent remedy in the form of application under Order 9, Rule 13 as well as appeal u/s 96(2) of the Code against the ex parte decree is available to the defendant. However, the remedy under Order 9, Rule 13 is subject to the limitation that it cannot be perused once the appeal preferred by the defendant against the same decree is dismissed, except when it is withdrawn. But, no such limitation would apply to an appeal u/s 96(2) of C.P.C. even if the application under Order 9, Rule 13 was rejected. In the latter case, the remedy is a substantive remedy provided against the ex parte decree u/s 96(2) of C.P.C. which can be perused regardless of whether application for setting aside the ex parte decree under Order 9, Rule 13 is filed or for that matter rejected. However, it is only when the application under Order 9, Rule 13 is allowed that the appeal would become infructuous as the ex parte decree would be non est.

10. The next decision of the Apex Court in Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, is also an authority on the proposition as to whether the explanation to Rule 13 of Order 9 of the CPC bars the application against the ex parte decree when appeal u/s 96(2) against the same decree has been dismissed on any count, except when withdrawn. It will be apposite to advert to the observations made by the Apex Court in para 3 of this decision, which reads thus :--

"3. It has been observed earlier that a defendant intending to avoid an ex parte decree could apply to the trial Court for setting it aside and could also appeal to a superior Court against it. The Courts were open to a duplication of proceedings, and although the immediate relief claimed in the two proceedings was not identical both ultimately aimed at a re-decision on the merits. Moreover, on the two proceedings initiated by the defendant, the application under Rule 13 of Order 9 would subsequently become infructuous if the appeal resulted in a decree superseding the trial Court decree. It was also possible to envisage the appeal becoming infructuous if the trial Court decree was set aside on the application under Rule 13 of Order 9 before the appeal was disposed of. The plaintiff was in the unfortunate position of being dragged through two Courts in simultaneous proceedings. Public time and private convenience and money was sought to be saved by enacting the Explanation. The CPC (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under Rule 13 of Order 9 for setting aside an ex parte decree only if the defendant had opted not to appeal against the ex parte decree or in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to affecting it. It obliged the defendant to decide whether he would prefer an adjudication by the appellate Court on the merits of the decree or have the decree set aside by the trial Court under Rule 13 of Order 9. The legislative attempt incorporated in the Explanation was to discourage a two pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was

denied the right to apply under Rule 13 of Order 9. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation."

Much stress was placed on the following observations in the above passage :

"The legislative attempt incorporated in the Explanation was to discourage a two pronged attack on the decree and to confine the defendant to a single course of action."

Relying on these observations it was contended on behalf of the respondents that the legislature has permitted only one remedy to the affected person and even if the defendant files two separate remedies and any one of them is dismissed then the other would automatically become infructuous. This submission, to my mind, is complete misreading of the said authority. That observation cannot be read out of context, as is being suggested by the learned Counsel for the respondents. On the other hand, if para 3 is read as a whole, it would appear that in the said para the Apex Court has observed :

"The Courts were open to a duplication of proceedings, and although the immediate relief claimed in the two proceedings was not identical both ultimately aimed at a re-decision on the merits."

11. A priori, it is not possible to ascribe the meaning which is pressed by the respondents. Further, it needs to be noted that the question before the Apex Court in that case was very specific viz.. the appeal having been dismissed on the ground of limitation, can the application under Order 9, Rule 13 be allowed to proceed, or will it be barred by virtue of explanation to Rule 13. Therefore, to my mind, the observations on which much reliance has been placed would be no avail to the case on hand, which it is unquestionably a converse case.

12. Reliance was also placed on the decision of the Division Bench of Madhya Pradesh High Court in Sumera Vs. Madanlal and Others, wherein the Division Bench of Madhya Pradesh High Court relying on the above said observations of the Apex Court in Rani Choudhury's case held that remedy of appeal cannot be permitted once the remedy contemplated under Order 9, Rule 13 has been exhausted. With utmost respect to the Hon"ble Judges of the Madhya Pradesh High Court, the Apex Court in Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, has not gone that far. As mentioned earlier, the Apex Court was not called upon to examine the proposition that the appeal cannot proceed once the remedy under Order 9, Rule 13 has been exhausted. Needless to mention that since this decision is of the Madhya Pradesh High Court, the same will not be binding on this Court, though it is possible to suggest that the fact situation in that case was parallel to the one in the present case.

13. Having regard to the scheme of the provisions of the Code of Civil Procedure. I have no hesitation in taking the view that rejection of the application under Order 9. Rule 13 cannot bar the substantive remedy of appeal u/s 96(2) of the

Code.

14. Having held that the appeal is maintainable. I shall now deal with the second point which would arise for my consideration. The question is : whether the trial Court has committed any irregularity in the conduct of the trial? It is not in dispute that the trial Court has decreed the suit without there being any oral evidence or for that matter evidence in the shape of affidavit produced on record by the plaintiff to establish the case pleaded by him. In absence of proof, the trial Court could not have decreed the suit merely on the basis of the pleadings of the parties. After the pleadings are complete and issues are framed, from the scheme of the various provisions of Civil Procedure Code, it would appear that the parties should be called upon to produce evidence and only thereafter the suit can proceed and decided on merits. In absence of evidence or proof, it is not possible to comprehend as to how the issues as framed can be conclusively decided one way or the other by the Court as having been established.

15. The trial Court in the present case has proceeded to decree the suit essentially relying on the Commissioner's report and on the assumption that the said report has been proved. For assuming that the said report has been proved, the trial Court perhaps took note of the fact that defendant did not raise any objection with reference to the Commissioner's report. Merely because no objection was raised by the defendant to the Commissioner's report that does not mean that the report stands proved on record. There is established procedure known to law by which the Commissioner's report can be proved on evidence. That has not been done in the present case. In such a situation, the trial Court could not have decided the suit on merits. For, in absence of any oral evidence or for that matter evidence by way of affidavit of any party, the issues as framed cannot be decided as having been established one way or the other. In the circumstances, there is palpable and manifest material irregularity committed by the trial Court in the conduct of the trial in the present case. Indubitably, this would warrant exercise of powers u/s 99 read with Order 41, Rule 23A of the Code so as to remand the case to the trial Court for a de novo trial.

16. It is most distressing that the suit has been filed as back as in the year 1964 and this Court will have to do the pleasant task of relegating the parties to the trial Court for a de novo adjudication of the suit from the stage of framing of the issues, but that is inevitable.

17. In the circumstances, the impugned judgment and decree is set aside and the matter is remanded and restored to the file of the City Civil Court, Bombay for retrial in accordance with the law from the stage of framing of issues. As pointed out earlier, since the matter pertains to the year 1964, the trial Court shall decide this suit as expeditiously as possible and in any case not later than six months from the date of receipt of writ of this Court. The parties shall appear before the trial Court on 9-9-2002. It is made clear that the trial Court shall decide the suit without being influenced by any of the observations made in the impugned order or for that matter in the present order. At the same time it is

clarified that the contention raised on behalf of the appellants defendants in the proceedings under Order 21, Rule 22 and which have been rejected right upto this Court, whether the same is unavailable to the appellants on the principle of res judicata or not even that question may be examined by the trial Court on its own merit.

18. It is relevant to note that an unregistered application was produced before me at the time of hearing for enabling the appellants to take on record certain documents which have been appended to that application. This application has been duly served on the respondents and, the respondents in turn have filed their reply opposing this application. I am not expressing any opinion with regard to the correctness or otherwise of the said application. Since I have already remanded the matter to the trial Court, all questions which would arise for consideration on the basis of issues already framed, the trial Court may proceed to decide the same in accordance with law.

19. Accordingly, this appeal succeeds in the above terms, no order as to costs.

20. At this stage, Mr. Vakil for the appellants states that the parties be permitted to suitably amend their pleadings in the context of various subsequent developments. As observed earlier, I have not entertained the unregistered application which was tendered across the Bar. In any case, the trial Court shall proceed to decide the suit on its own merit and may also examine the request of amendment of pleadings, if so advised. However, I hope and trust that the trial Court shall bear in mind that the disposal of this suit is not unduly delayed on such peripheral matters and for that purposes it may put the parties to strict discipline and try the suit on day to day basis, if possible.

Parties to act on the copy of this order duly authenticated by Sheristedar of the Court.