

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5244 OF 2024
(@ Petition for Special Leave to Appeal (C) No.19793/2012)

MAHADEV & ORS.

APPELLANT(S)

VERSUS

ASRABAI & ORS.

RESPONDENT(S)

J U D G M E N T

1. This appeal is directed against the judgment dated 15.03.2012 passed by the High Court of Judicature at Bombay, Aurangabad Bench, in Second Appeal No. 173 of 2012. In view of the order, we propose to pass, we do not think it necessary to narrate the facts and also to deal with the rival contentions in detail.

2. The original plaintiff-Gaibi filed R.C.S. No.68/1987 for partition and separate possession of the plaint schedule properties. The appellant Nos. 1 to 3 respectively were defendant Nos.2, 3 and 5 therein and the others are legal representatives of deceased defendant Nos.6 and 7. The defendants unsuccessfully challenged the judgment and decree of the Trial Court in Regular Civil Appeal No. 77 of 2007 and thereafter preferred Second Appeal No.173 of 2012 before the High Court which culminated in the impugned judgment.

3. Heard learned Senior Counsel appearing for the appellants and

learned Senior Counsel appearing for the respondent Nos.1,2,4 to 12 as also learned counsel appearing for the respondent No.21-State of Maharashtra.

4. It is an indisputable and undisputed fact that the first relief for a declaration that the ceiling proceedings initiated in respect of the property comprised in Survey No.133A, as illegal, null and void, was disallowed by the Trial Court. It is also a fact that despite suffering adverse order to that extent, the plaintiff did not take up the matter further and allowed the same to become final.

5. Learned Senior counsel appearing for the appellants would submit that on 13.08.1991, the plaintiff was examined as PW-1. On that day, taking note of the absence of the defendants and the advocates, the Trial Court recorded 'no cross'. It is further submitted that on the same day itself, an interlocutory application to recall the plaintiff who was examined as PW-1 and permission to cross-examine him was filed. The order sheet of the trial Court would also reveal the same. It is the undisputed position revealed from records that the said application was allowed. Though, the suit was listed thereafter for cross-examination of PW-1, did not take place. Unfortunately, on 20.09.1994, PW-1 breathed his last.

6. Though, the appellants and the respondents put blame for non-examination of PW 1 on each other, we are of the considered view

that the said question need not be taken forward as the indisputable fact is that despite the grant of permission for cross-examination of PW-1, no opportunity was actually given to cross-examine him. There is nothing on record to show that such a situation had arisen due to any lapse on the part of the defendants. When that be the position, the question is what is the worth and evidentiary value of his oral evidence-in-chief.

7. A right to cross-examine a witness available to the adverse party, apart from being a natural right is a statutory right. Section 138 of the Evidence Act confers the right on the adverse party to cross examine a witness who had been examined-in-chief, subject of course to expression of his desire to the said effect. It is to be noted that right to and opportunity for, cross examination are different and distinct. An adverse party must have a right to cross-examine a witness and simultaneously must have an opportunity therefor. It is true that if such an adverse party who has had an opportunity to cross-examine, had not chosen to exercise the same, the said lapse would not nullify the evidence of that witness. Certainly, this is not the situation in the case on hand as revealed from the materials on record. What is applicable in the case on hand is the position of law that no evidence affecting a party is admissible against that party unless the latter has had an opportunity to test the truthfulness by cross-examination. In short, the doctrine providing the right to test the testimonial statements by a witness by cross-examination has to be

understood as mandating, not necessarily an actual cross-examination, but an opportunity to exercise the right to cross-examination, if desired. This is what was not obtained to the defendants/the appellants in the case on hand despite exercising their desire therefor.

8. Hence, oral testimony of PW-1 got no value in the eyes of law. It is also a fact that on 13.09.2006, the plaintiff themselves submitted before the Court that there would no further evidence on the side of the plaintiff.

9. In view of the aforesaid indisputable and undisputed position obtained in this case that after granting permission to cross-examine the plaintiff who was examined as PW-1, the defendant had no opportunity to cross-examine him prior to his death on 20.09.1994.

10. When this being the position, the case is bound to be remanded so as to allow both sides to have a fair trial, by adducing evidence, in accordance with law. At the same time, we are of the considered view that the learned State Counsel is perfectly justified in submitting that even on remand, the finding with respect to ceiling proceedings which had attained finality, shall not be permitted to be reopened.

11. For the reason aforesaid and in such circumstances, we remand

the case to the Trial Court for proceeding with R.C.S. No.68/1987 in accordance with law. However, we make it clear that both sides would be at liberty to file appropriate applications for framing any issue(s), if any relevant issue(s) was not already framed and any such application(s) if filed, shall be considered on their own merits. This remand is thus an open remand except to the extent that the findings relating the findings qua ceiling proceedings and therefore, it shall not be reopened.

12. To enable the Trial Court to proceed further, in terms of what is held above, the judgment and decree of the Trial Court dated 27.02.2007 passed in RCS No. 68/1987, First Appellate Court dated 16.04.2007 passed in RCA No. 77/2007 as also in the Second Appeal dated 15.03.2012 passed in SA No. 173/2012, are set aside, except to the extent qua the ceiling proceedings. Taking into account the fact that the suit is of the year 1987, the trial Court shall conclude the trial as expeditiously as possible, at any rate, within a period of one year from the date of receipt/production of this judgment. The parties shall co-operate for conclusion of trial within the above stipulated time.

13. Registry is directed to transmit the records immediately.

14. The parties shall appear before the Trial Court on 20.12.2024.

15. The appeals stand allowed, as above.

16. Pending application(s), if any, shall stand disposed of.

....., J.
(C.T. RAVIKUMAR)

....., J.
(SANJAY KAROL)

NEW DELHI;
OCTOBER 24, 2024.

ITEM NO.101

COURT NO.11

SECTION III

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 5244/2024

MAHADEV & ORS.

APPELLANT(S)

VERSUS

ASRABAI . & ORS.

RESPONDENT(S)

([PART-HEARD BY : HON'BLE C.T. RAVIKUMAR AND HON'BLE SANJAY KAROL,
JJ.])

Date : 24-10-2024 This appeal was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE C.T. RAVIKUMAR
HON'BLE MR. JUSTICE SANJAY KAROL

For Appellant(s) Mr. R. Basant, Sr. Adv.
Mr. Ankur Mittal, AOR
Mr. Ashish Gajwani, Adv.

For Respondent(s) Mr. K. Rajeev, AOR

Mr. Uday B. Dube, Sr. Adv.
Mr. Abhinav K. Mutyalwar, Adv.
Mr. Siddharth Gautam, Adv.
Mr. Sachin Singh, Adv.
Mr. Ananya Thapliyal, Adv.
Mr. Preetraj R. Dhok, Adv.
Ms. Anagha S. Desai, AOR

Mr. Shreeyash U. Lalit, Adv.
Mr. Siddharth Dharmadhikari, Adv.
Mr. Aaditya Aniruddha Pande, AOR

UPON hearing the counsel the Court made the following
O R D E R

The appeal stands allowed in terms of the signed reportable order.

Pending application(s), if any, shall stand disposed of.

(VARSHA MENDIRATTA)
COURT MASTER (SH)

(MATHEW ABRAHAM)
COURT MASTER (NSH)

(Signed reportable order is placed on the file)