

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(Civil Appellate Jurisdiction)

SECOND APPEAL NO. 712 of 2010
(Tulshiram Nagnath Mate and others vrs Dashrath
Pandurang Gaikwad (Kaikadi))

Mr. Vijay Killedar, Advocate for appellants.
Shri Pankaj J.Das, Advocate, for respondent.

CORAM : R.K.Deshpande, J.
DATED : 09th JUNE, 2015.

P.C.

The trial court has passed a decree for partition and separate possession on 23.11.2000 in Regular Civil Suit No. 180 of 1997. The court has also granted declaration that the sale deed dated 19.09.1991 executed in favour of defendant nos. 3 to 5 is not binding upon the plaintiffs. This was the subject matter of challenge before the lower Appellate Court in Regular Civil Appeal No. 276 of 2003, which has been partly allowed on 18.08.2010 reducing the share. The original defendant Nos. 3 to 5 who are the purchasers of the property are before this Court in this second appeal. The second appeal concerns only with Block No. 29/1 of Chikhali, which was purchased by the appellant-defendant nos. 3 to 5 from the other defendants.

The decree passed by the trial Court is exparte against all the defendants, including the defendant nos. 3 to 5. The other defendants have not preferred any appeal before this Court. The trial Court recorded the finding in its judgment that the defendant Nos. 1 to 8 were duly served with the suit summons, but they remained absent. Hence, the suit proceeded

exparte. Before the lower Appellate Court, the present appellants raised specific ground nos. 2, 3 and 8 which are reproduced below;

- (2) *The summons of the suit were not properly served and also the copy of the plaint was not at all given to the appellants and Respondent 8 told the appellants not to appear in court as the dispute is between them is personal one.*
- (3) *That the appellants are not having knowledge of reading & writing & they were not knowing the dates of the suit & also purpose of filing of the suit.*
- (8) *That all the plaintiffs No. 1 to 6 & defendants No. 1 & 2 are jointly residing at Solapur. But the false address of the defendants No. 1 & 2 is given that they are residing at village- Sarole, Tal-Mohol.*

In the memo of appeal, prayer was also made for remand of the matter back to the trial Court for giving an opportunity to the appellant to contest the suit on merits.

The appellate Court framed the point of determination as to whether the impugned judgment and decree is liable to be set aside under Order IX, Rule 13 of C.P.C. The appellate Court recorded the specific finding that the suit summons was served upon the defendant nos. 3, 4 and 5 at Chikhali through their father – Nagnath vide Report at Exh. 6. The court found no defect in the service of summons of the suit upon the defendants. The court found that none of the defendants put their appearance before the trial Court.

The learned counsel for the appellant has invited my attention to the common order dated

23.09.2009 passed by the lower appellate Court below Exh. 37, 38 and 39 in Civil Appeal No. 276 of 2003. The court allowed the application filed under Order XLI, Rule 27 of C.P.C. The contention of the learned counsel for the appellant is that, without having any regard to this order, the lower Appellate Court has decided the appeal on its own merits.

The findings recorded by the courts below that the appellants-defendants were duly served is based upon the report at Exh.6. From the grounds of challenge raised in the memo of appeal, it is apparent that the appellants/defendants relied upon some advice given by the other defendants not to appear in the court. The ground raised in the memo of appeal that the false addresses of the defendant nos. 1 and 2 were given is hardly of any consequences because the appellants are defendant nos. 3 to 5. The application under Order XLI, Rule 27 of C.P.C. would lie only at the instance of the parties who have participated in the proceedings before the trial Court. Such application by the appellate Court could have been decided only at the time of final disposal of the appeal after recording the finding that the appellants-defendants were wrongfully prevented from appearing before the trial Court or that they were not duly served. This is the law laid down by the Apex Court in the case of ***Union of India vrs Ibrahim Uddin and another***, reported in **(2012) 8 SCC 148**. The order allowing the application passed pending decision of the appeal would be of no consequence in view of the findings recorded by the appellate Court in

its final decision, which is impugned in this appeal. No substantial question of law arises. The second appeal is dismissed.

(R.K.DESHPANDE, J.)

Rvjalit