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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.508 OF 2013

Rangnath Sakharam Shinde
Age - 37 years, Occ - Service and Agriculture
R/o Malipargaon, Taluka - Majalgaon,
District - Beed

APPELLANT

VERSUS

1. Angad Vithal Shinde
Age - 30 years, Occ - Agriculture
R/o Malipargaon, Taluka - Majalgaon,
District - Beed

RESPONDENTS

2. Vandana Bai Gangabhishan Jangle
Age - 32 years, Occ - Agriculture
R/o Patrud, Taluka - Majalgaon,
District - Beed

3. Ramkumar Ashok Dhage,
Age - 30 years, Occ - HH
R/o Malipargaon, Taluka - Majalgaon,
District - Beed

4. Renuk Bai Ganesh Bhanuse,
Age - 32 years, Occ - HH
R/o Gajanan Nagar,
Majalgaon, Taluka - Majalgaon,
District - Beed

5. Sushil Bai Vithal Shinde,
Age - 50 years, Occ - HH
R/o Malipargaon, Taluka - Majalgaon,
District - Beed

6. Vithal Digambar Shinde, (DEAD)
Age - 55 years, Occ - Agriculture
R/o Malipargaon, Taluka - Majalgaon,
District - Beed

7. Ashruba Digambar Shinde,

(Appeal Dismissed)

Age - 39 years, Occ and R/o as above

8. Limbaji Waman Dhisle
Age - 53 years, Occ - Agriculture
R/o Malipargaon, Taluka - Majalgaon,
District - Beed
9. Damodhar Piraji Dhande, (Died) LRS

9/1 Kasturabai Damodhar Dhande,
Age - Major,
R/o Dhamangaon, Taluka - Partur,
District - Jalna
10. Mahadu Bapurao Shinde,
Age - 50 years, Occ and R/o As above
11. Mahadu Rambhau Shinde,
Age - 45 years, Occ and R/o As above

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Mr. Vivek Vasantrao Bhavthankar, Advocate for appellant
Mr. K. S. Solanke h/f Mr. S. J. Salunke, Advocate for R-8, 10 & 11
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 25th AUGUST, 2016

ORAL JUDGMENT :

1. Heard learned advocates for the appearing parties finally.
2. This second appeal has been preferred by original defendant No.5 against judgment and decree passed by first appellate court dated 18th December, 2012 dismissing Regular Civil Appeal No.57 of 2006, preferred against the judgment and

decree in Regular Civil Suit No.235 of 1992 dated 28th March, 2002 passed by Joint Civil Judge, Junior Division, Majalgaon, declaring sale deed bearing No.1831 of 1987 regarding half share of suit property bearing Gut No.46 situated at village Malipargaon, Taluka - Majalgaon, District - Beed is not binding on the plaintiffs.

3. Mr. Bhavthankar, learned advocate for appellant contends that as a matter of fact, suit summons had never been served on defendant No.5 – present appellant, however, record may bear that he has been served by one of the modes as appearing in Order V of the Civil Procedure Code, yet the position factually would not be so. He further points out that while the suit shown to have been carried forward *ex-parte* against defendant No.5, the same has been dismissed in default, subsequently on 2nd May, 1998. He points out that restoration application, thereafter, was filed on 6th May, 1999, however, there was no notice to / or service of summons at all, in respect of said restoration proceedings on the appellant. Thus, a decree came to be passed in absence of appellant, decreeing the suit, as referred to above.

4. Learned advocate submits that the decree hits defendant No.5 hard because defendant No.5 is purchaser from defendant

No.1 and it it him, who is the most affected party in the suit. He thus, contends that upon realizing that such a decree had been passed, an appeal had been preferred challenging the decree by the trial court. While the matter had been considered in regular civil appeal No.57 of 2006, the first appellate court has addressed the matter only on the ground of service of summons on defendant No.5 - present appellant and has purportedly found that it can be said that the appellant had been served around May, 1996, pursuant to Order V, Rule 20 of the Civil Procedure Code and he did not appear. He submits, appellate court ought to have considered that after dismissal of suit, there is no notice served on the appellant of the restoration proceedings and as such, the decision by the appellate court is unjustifiable in fact and in law.

5. He submits that while he had not been residing on said address and had left the premises long ago, *panchanama* depicting service could not be relied on. He submits that it is not the solitary consideration which ought to have weighed with the court. As a matter of fact, subsequent events even have been more important from the point of view of decision making, which appear to have been completely ignored, rather the first appellate court has been oblivious of that in spite of contention

of the appellant that subsequently the suit had been dismissed in default and restoration proceedings were initiated about which there is no record of service on appellant, thereafter. This very important aspect has been missed out by the first appellate court and thus the judgment rendered and the considerations which have weighed with the first appellate court would not subserve cause of justice, rather in the present context tend to be subversive.

6. Perusal of the impugned order indicates that the matter has been addressed as stated above, by the first appellate court as record is stated to bear that the appellant had been served with the suit summons, the appeal came to be dismissed.

7. It appears to be a case of the present appellant before the first appellate court that while the bailiff had been to serve the suit summons, defendant No.5 had been long ceased to be occupant of said address. His mother, an illiterate and gullible lady had naively told that her son (defendant No.5) had been residing on the address and that has been made use of erroneously, which caused grave prejudice to the rights of the appellant in the immovable property.

8. Perusal of the impugned order depicts that there is no

consideration of these aspects involved in the matter. Learned advocate for the appellant points out that these grounds have been specifically taken up in the second appeal. He further states that the record would bear that these grounds have substance in the same and *roznama* would also show aforesaid position.

9. Learned advocate on behalf of respondents contends that this was not the ground, which was taken in regular civil appeal and as such, could seldom taken at the second appellate stage.

10. Learned advocate for the respondents, though has submitted as aforesaid, has not been able to challenge veracity of the contentions or rather events as those have occurred subsequently after dismissal of the suit in default and this important facet having been missed out, taking into account Order IX, Rule 9 sub Rule (2) of the Civil Procedure Code and having regard to rigour underlying sub rule (2) Rule 9 of Order IX of the Civil Procedure Code and the position about dismissal of the suit subsequently and it is not being a case of respondents that notice of restoration proceedings having been served on the appellant, the order impugned in the second appeal would hardly be sustainable.

11. In view of aforesaid, the second appeal stands allowed.

Since the decree has been passed without notice to defendant No.5, it would be appropriate that the matter is remitted to the trial court for re-adjudication afresh of the *lis* between the parties. On this occasion, however, the appellant would not be able to be entitled for fresh notice and he should cause appearance before the trial court *suo motu*. Parties to the second appeal agree to appear before the trial court on 28th September, 2016.

12. As such, judgment and decree dated 18th December, 2012 passed by District Judge-1 Majalgaon in Regular Civil Appeal No.57 of 2006 and the judgment and decree dated 28th March, 2002 by Joint Civil Judge, Junior Division, Majalgaon in Regular Civil Suit No.235 of 1992 stand set aside.

13. Office is expected to send appropriate writ to the trial court in the right earnest.

[SUNIL P. DESHMUKH, J.]