



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1021 OF 2023
WITH
INTERIM APPLICATION NO.2272 OF 2023

Shri Gopichand Gopal Utekar,
Age-59 Years, Occ. Service,
Indian Inhabitant,
presently residing at Room
No.LG-185/1/2,
Indira Nagar, Sunder Baug, Kamani,
Kurla (West), Mumbai-400 070.

R/at Room No.34, Plot No.76,
Shradha Co-op. Housing Soc.
Gorai No.1, Borivali (West),
Mumbai.

... Appellant/Org.Defendant

Versus

1. Mr. Vasant Vasudeo Sawant
Age 45 years, Occ. Not known
Indian Inhabitant.

2. Mrs. Sandhya Jayant Asade @
Sandhya Vasudeo Sawant
Age – 53 years, Occ. Not known
Indian Inhabitant,
Both are residing at 31/2, Gajanan
Rahivasi Sangh, Near Acharya College
Khardeo Nagar, Chembur,
Mumbai-400 071

... Respondents

Mr. Balwant Salunkhe for the Appellant/Applicant.

Mr. Rajesh Singh a/w Mr. Hitesh Jain for Respondent Nos. 1 and 2.

CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 25th OCTOBER 2023

PRONOUNCED ON : 6th NOVEMBER 2023

JUDGMENT :

. Heard. **Admit.** Taken up for final hearing with consent of parties.

2 The Appellant/Defendant is aggrieved by the judgment and decree passed by the City Civil Court for Greater Bombay in Short Cause Suit No.1069 of 2016. Respondents/Plaintiffs have filed the said Suit against the Appellant/Defendant for declaration, possession and injunction in respect of Room NO.LG-185/1/2, Indira Nagar, Sunder Baug, Kamani, Kurla (West), Mumbai-400 070. In the suit it is contended that in the year 2004, Plaintiff No.2 was in need of financial help, therefore, he through his sister approached the Defendant. Defendant agreed to give loan of Rs.1,00,000/- to Plaintiff No.2 on 4 per cent interest per month. Loan amount was accepted by Plaintiff No.2 in two installments, after deducting the monthly interest from the said amount. Plaintiff No.2 was regularly

paying the installment of Rs.4,000/- with interest to Defendant and had repaid substantial loan amount. However, in 2005, due to unavoidable circumstances, she was unable to pay installments to the Defendant.

3 On 11 June 2005, Defendant and his family members forced Plaintiff No.2 to place original documents of some immovable property with them. At the request of Plaintiff No.2, Plaintiff No.1 delivered the original documents of the suit premises to the Defendant. On 13 June 2005, Plaintiffs were forced by the Defendant to sign on typed papers, on the pretext that the same are required for loan purpose. On 13 December 2003, Defendant and his brother obtained signatures of the Plaintiffs on some documents under coercion. It was assured that documents will not be misused and would be returned after paying the balance amount. However, Defendant by misusing the documents, illegally and forcibly took possession of the suit premises, when Plaintiff No.1 was out of the premises. Plaintiffs, therefore, claimed that they never executed agreement dated 13 June 2005 or agreement for sale or power of attorney and affidavit dated 13 December 2005 in favour of Defendant and that they have not received any consideration amount

for the suit premises.

4. While passing *ex parte* judgment, Trial Court has held that *“Despite of service of writ of summons, the defendant failed to appear, therefore, suit proceeded ex parte against the defendant”*. By judgment and decree dated 4 July 2022, Suit is decreed *ex parte*. Hence, the present Appeal.

5. Heard learned Counsel for the Appellant and learned Counsel for Respondent Nos. 1 and 2. Perused documents placed on record and the affidavit-in-reply filed by the Respondents and citations relied upon by both sides.

6. It is a matter of record that Appellant had earlier filed S.C. Suit No.785 of 2011 against the Respondents for injunction and declaration in respect of the suit premises claiming that the suit premises is acquired from the Respondents by sale deed dated 13 December 2005. After filing of S.C. Suit No.1069 of 2016, Respondents have moved Notice of Motion No.3874 of 2016 in S.C. Suit No.785 of 2011 before Trial Court seeking rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure. Notice of

Motion was rejected by Trial Court vide Order dated 30 November 2018. In this Order, reference of S.C. Suit No.1069 of 2016 is made.

7. It also appears from the record that transfer application was filed by the Respondents seeking transfer of S.C. Suit No.785 of 2011 to the Court, which was hearing S.C. Suit No.1069 of 2016, the same was allowed on 28 September 2016. It is, therefore, clear that both suits were being heard by the same Court. S.C. Suit No.785 of 2011 filed by the Appellant was dismissed for non-appearance of the Plaintiffs on 28 December 2022. It is a matter on record that on 4 July 2022, *ex parte* order is passed against the Appellant in S.C. Suit No.1069 of 2016. It is, therefore, clear that at the time of passing of *ex parte* order, his S.C. Suit No.785 of 2011 was pending.

8. Roznama of S.C. Suit No.1069 of 2016 indicates that writ of summons was issued to Appellant on 22 June 2016. An affidavit of service of writ of summons on Appellant is filed by Clerk of Advocate for the Respondents. In the roznama dated 22 July 2019, Appellant's appearance is recorded by Trial Court.

9. However, thereafter in Roznama dated 20 March 2021, it is

recorded that :-

“Business : Plaintiff present. On going through the file the affidavit of service of writ of summons is by the clerk of the adv. for plaintiff. Application of plaintiff is not found to show that plaintiff sought permission to serve the writ of summons to the defendant through their end. As per order V of CPC there is a procedure to serve the writ of summons to the defendant. Though the suit has proceeded ex parte against defendant as this lacuna is found, advocate for plaintiff to argue on the point of service of writ of summons to the defendant. Adjd for arguments to 06/04/2021. Next Purpose : ARGUMENTS Next Hearing Date : 06-04-2021.

COURT 20 ASST. SESSIONS JUDGE”

Thereafter, on 27 September 2021, it is observed that :-

“Business : Adv. Rajesh Singh present for Plaintiff. None present for Defendant. Head Ld. Adv for plttf. Vide order dt.20/03/21 the court had asked the plttf to point out that how the private service of summons should be treated as valid service for proceeding ahead against deft. Today the Ld. Adv for plttf pointed out that though there was private service of notice/summons, the deft though not appeared earlier, he was well aware of the stages of the suit. On dt.22/07/19 his presence has been noted by the Court. Then on 14/10/19 also note of his presence of 22/07/19 was taken. It is not that after service of summons, the defendant not at all turned up in the suit. Therefore as the suit has been proceeded

exparte against the deft, in absence of any steps on the part of deft, the suit be proceeded further. Matter adj. To 11/10/2021 for Arguments. Next Purpose : ARGUMENTS Next Hearing Date : 11-10-2021.

Court 59 ADDL SESSIONS JUDGE”

10. From the aforesaid roznamas, it is clear that suit summons was not served on the defendant, as per the procedure laid down in Order V of the Code of Civil Procedure, 1908. No application appears to be filed by the Respondents to seek permission of Trial court to serve writ summons on the Appellant as per Order V of the Code of Civil Procedure, 1908. Respondents were called upon to argue on this aspect on the next date. On that date, Trial Court has proceeded to accept Respondents’ contention that though there was private service of summons, Appellant/defendant did not appear earlier, he was well aware about stages of suit and his presence was noted by Trial Court on 22 July 1990. Accepting this submission, Trial Court proceeded *ex parte* against Appellant as per earlier order and proceeded to pass *ex parte* decree. Therefore, there appears substance in the contention of Applicant that as both suits were clubbed together and as he was attending his S.C. Suit No.785 of 2011, his appearance is recorded in S.C. Suit No.1069 of 2016. It is

not in dispute that both suits were before the same court.

11. Appellant's substantial rights in the suit premises are involved in the matter and Appellant had nothing to gain by not causing his appearance in the suit filed by Respondents. A fair opportunity needs to be given to the Appellant to contest the suit on merits. *Ex parte* decision given against the Appellant, therefore, cannot be sustained.

12. Learned Counsel for the Respondents by relying on the decision in the case of **Suresh Vs. Municipal Corporation of Greater Mumbai**¹, submitted that Appellant was duly served and it was recorded in roznama. In this ruling, it is held that no separate summons was required to be served to respondents, as parties represented through their advocates. This ruling is distinguishable on facts and is not applicable to the present case. In this case appellant has neither appeared himself nor caused appearance through advocate.

13. By relying on the decision in the case of **S.P. Chengalvaraya Naidu (dead) by L Rs. Vs. Jagannath (dead) by L Rs.**² it is submitted

1 AO 807/11 in Notice of Motion No.1334/09 in LC Suit No.2802/09 decided on 23.10.2013

2 AIR 1994 SC 853

by Respondents that Appellant had contested transfer application and, therefore, he was having knowledge of filing of S.C. Suit No.1069 of 2016 and by suppressing this fact, Appellant has played fraud. This argument cannot be accepted and this Court is inclined to accept Appellant's contention that he was under impression that he was attending his own suit and he was to gain nothing by avoiding to attend substantive suit filed by the Respondents against him.

In this case, according to the Respondents, Appellant was aware of filing of the Suit as the same was referred in the transfer application, which was attended by the Appellant and, therefore, the Appellant is guilty of practicing fraud on Court by suppressing the said fact. This argument cannot be accepted in peculiar facts of the present case, as the contention of the Appellant that he was under impression that he was attending his own suit is acceptable and he was gaining nothing by avoiding in not attending the substantive suit filed by the Respondents.

14. Since Appellant has been denied a fair opportunity to contest the Suit on merits, the ex parte judgment and decree dated 4 July

2022 passed by the Trial Court in S.C. Suit No.1069 of 2016 is unsustainable and same was liable to be considered.

Hence, the following Order : -

- (i) First Appeal is allowed.
- (ii) Judgment and decree dated 4 July 2022 passed by the Trial Court is hereby quashed and set aside. S.C. Suit No.1069 of 2016 is remitted back to the Trial Court for decision afresh on merits.
- (iii) The pending application, if any, shall stand disposed of.

At this stage, at the request of learned Counsel for the Respondents, this judgment is stayed for a period of four weeks from today.

(NITIN B. SURYAWANSHI, J.)