

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

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SECOND APPEAL NO. 317/2017

Shri Rajkumar s/o Dharmraj Lanjewar
Aged about 68 years, occu: Retired
R/o Plot No.27/28, Bank Colony No.2
Chakole Layout, Narsala Road, Dighori, Nagpur.

..APPELLANT

v e r s u s

Shri Pruthviraj s/o Macchindra Bhalerao
Aged 43 years, occu: Business
R/o Purnabai Nivas, Plot No.85
Siddartha Nagpur, Teka, Nagpur 440 017.

..RESPONDENT

.....
Mr.G.D. Vaidya, Advocate for the appellant
Mr.R.R.Gour, Advocate for Respondent
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CORAM: ANIL L. PANSARE, J.
DATE OF RESERVING : 31.07.2023
DATE OF PRONOUNCEMENT: 18.08.2023.

JUDGMENT:

Heard Mr.G.D.Vaidya, the learned counsel for the appellant
and Mr. R.R.Gour, the learned counsel for the respondent.

2. The appellant/original defendant has challenged the judgment and decree dated 29.12.2015 passed by the learned District Judge-8, Nagpur in Regular Civil Appeal No.431/2012 arising out of the judgment and decree dated 06.09.2011 passed by the learned 3rd Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No.114/2011

(old RCS No.343/2009). The trial Court decreed the suit and the first Appellate Court dismissed the Appeal.

3. The appellant will be hereinafter referred to as the 'defendant' and the respondent as the 'plaintiff'.

4. The plaintiff has filed the suit for declaration and permanent injunction. According to the plaintiff, he is/was the lawful owner of House bearing Municipal Corporation House No.1561, Plot No. 85, Siddarthanagar, Teka, Nagpur admeausring 157.8 sq.m. (for short, 'the suit property'). The plaintiff allegedly acquired the suit property by testamentary disposition made by his grandmother. The registerd will was executed on 15.09.2001.

5. It is the case of the plaintiff that the suit property original belonged to his grandfather, namely, Dharmraj Marotrao Lanjewar. It was his self-acquired property. Dharmraj married one Smt.Shantabai. He had two sons from the first marriage,namely, Rajkumar and Rajkamal. Shantabai expired after some days. Dharmraj performed second marriage with Smt.Purnabai, who had one son from her earlier marriage by name, Macchindra. Dharmraj had willingly adopted the son of Smt.Purnabai. The defendant was the eldest son of Dharmraj. Dharmraj, his second wife and the three children were all living together. Smt.Purnabai has brought up these children with love and affection. Smt. Purnabai's son Macchindra got married and has one child i.e. the plaintiff. After the birth of plaintiff, his father Macchindra expired. Later on his mother left him with Purnabai and went away. Thus, the grandmother Purnabai brought him up. The plaintiff is thus

residing with Smt. Purnabai, right from his from childhood.

6. It is the case of the plaintiff that the defendant got married and then got employment in the Department of State Employees Insurance Corporation. He had strained relations with his father and mother. He used to rake up quarrels with them every now and then and as a result of which the defendant with his wife started residing separately. Dharmraj got fed up with the defendant's misdemeanour and transgression and decided to expel him from the property. He, therefore, had executed a will some time in July 1996 in favour of his wife i.e. Smt. Purnabai. Dharmraj expired in the year 1997. As stated earlier, Dharmraj's wife, namely Smt. Purnabai, being the absolute owner of the suit property, had executed a will dated 15.09.2001 and bequeathed the suit property in favour of the plaintiff.

7. It is the further case of the plaintiff that the defendant prepared a forged will of Dharmraj dated 02.04.1992, showing the suit property bequeathed to him. He got his name mutated in the office of the Nagpur Improvement Trust. Smt. Purnabai therefore, instituted the suit as well as lodged a report with the police for the offences punishable under Sections 465, 467, 471 and 420 of the Indian Penal Code. Smt. Purnabai then on 15.09.2001 had executed a registered will in favour of the plaintiff bequeathing the suit property.

8. The defendant made an attempt to dispossess the plaintiff and, therefore, another suit being RCS No. 457/2003 came to be filed against the defendant by the plaintiff. The said suit was partly decreed *exparte*. The relief of ownership was declined on the count of non-

payment of requisite court fees. In the month of 2009, the defendant made yet another attempt to dispossess the plaintiff and, therefore, the present suit came to be filed. The plaintiff sought a declaration that he is the owner of the suit property. Another declaration was sought that the will dated 02.04.1992 is null and void. As stated earlier, the suit came to be decreed *ex-parte*.

9. The Appeal has been admitted on the following substantial question of law :-

“ Whether the defendant was rightly proceeded exparte in the light of endorsement on the summons at Exhibit-6 as reported ?”

10. Thus, the only question that arises for consideration is whether the defendant was rightly proceeded *exparte*.

11. Mr. G.D.Vaidya, the learned counsel for the defendant has invited my attention to the endorsement made on the summons (Exh.6). The Bailiff has made an endorsement to the effect that the summons could not be served as the plaintiff has left the quarter 4/5 months back.

12. The plaintiff, therefore, sought permission of the trial Court to serve the summons by paper publication and accordingly, the defendant came to be served vide Exh.17.

13. Mr. Vaidya, the learned counsel for the defendant submits

that the plaintiff was well aware of the fact that the defendant was not residing at the address mentioned by the plaintiff in the cause title. He has placed reliance upon the notice dated 21.08.2009 issued by the defendant through his counsel to the plaintiff. The address of defendant has been mentioned as, "Chakole Layout, Bank Colony No.2 Narsala Road, Dighori, Nagpur".

14. Mr. R.R.Gour, the learned counsel for the plaintiff however submits that the notice was never served upon the plaintiff and contended that he was not aware of the change of address of the defendant. The defendant has not placed on record any proof, either documentary or otherwise, to indicate that this notice was served upon the plaintiff. The learned counsel for the plaintiff submits that this notice is not a part of the trial Court's record. This notice has been placed on record by the defendant for the first time in Appeal. Thus, there is no proof that the plaintiff was aware of the aforesaid address of the defendant.

15. The learned counsel for the plaintiff rightly submits that in absence of the knowledge of change of address of the defendant, the plaintiff has rightly filed the suit against the defendant showing his address which was known to the plaintiff. The plaintiff has further made an attempt to serve the defendant and having failed to serve the notice, the plaintiff has rightly applied for service through paper publication. The Courts below have found that the defendant has been served through paper publication and thereafter the suit proceeded *ex parte* against the defendant, which is justified.

16. The defendant has restricted his challenge to the extent of substantial question of law formulated by this Court and, therefore, the others aspects of the matter are not being tested here. Even otherwise, both the Courts below have concurrently held that the plaintiff has proved his case. This finding appears to be in tune with the evidence led before the trial Court.

17. The substantial question of law is accordingly answered in the negative, so as to mean that there is no substance in the Appeal. The Second Appeal being devoid of merit, is dismissed, with no order as to costs.

(ANIL L. PANSARE, J.)

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