

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.94 OF 2024
WITH
INTERIM APPLICATION NO.1448 OF 2024
IN
SECOND APPEAL NO.94 OF 2024

Dattatraya Mallikarjun Sagar
V/S
Mallikarjun Shakarrao Sagar & Anr.

....Appellant/Applicant
....Respondents

Mr. Hrishikesh S. Shinde for the Appellant/Applicant.

CORAM: SANDEEP V. MARNE, J.
DATE : FEBRUARY 15, 2024.

P.C.:

1 By this Second Appeal, Appellant, who is original Defendant No.1, has challenged judgment and decree dated 26 October 2023 passed by the Principal District Judge, Solapur in Regular Civil Appeal No.69 of 2023. The First Appellate Court has dismissed the Appellant's Appeal and has confirmed the decree of the Trial Court *qua* the land bearing Field Survey No.407, village Bhandharkavathe, Taluka South Solapur, District Solapur.

2 Plaintiff-Mallikarjun is the father of two Defendants Dattatray and
Dnyaneshwar. The Appellant before me is Dattatray, who was impleaded

as the first Defendant in the Suit. Father-Mallikarjun instituted Regular Civil Suit No.607 of 2018 before 3rd Joint Civil Judge Senior Division, Solapur seeking a declaration that he is the owner of the suit properties. Suit properties comprised of two lands bearing Gat No.406 and Gat No.407. It was Plaintiff's case that he purchased both the lands vide registered sale deed dated 21 April 1983. Despite purchase of the suit properties by Plaintiff alone, his two children Dattatray and Dnyaneshwar got their names mutated in the revenue records in the year 1996. Father apprehended that the children would dispose of the properties and accordingly filed Regular Civil Suit No.607 of 2018 on 14 August 2018 seeking a declaration that he alone is the owner in respect of both the lands bearing Gat Nos.406 and 407. The apprehension of father-Mallikarjun was not entirely wrong, in the few days before lodging of the suit by him on 14 August 2018, his younger son Dnyaneshwar (Defendant No.2) had already sold land bearing Gat No.407 to Shri Prakash Baburao Kamale on 24 May 2018. The father was apparently was not aware of the transaction and did not implead Shri Prakash Baburao Kamale as party Defendant to the suit.

3 When suit summons were issued by Registered Post Acknowledgement Due (**RPAD**), the same were apparently refused by both the Defendants. Here there is some debate sought to be created by the Appellant (Defendant No.1) about the validity of service of summons, which is being discussed in latter portion of the order. The suit proceeded ex-parte against both the Defendants. It however appears that

Defendant No.2 Dnyaneshwar subsequently appeared in the suit on his own and was examined as Plaintiff's witness by filing Affidavit-of-examination-in-chief on 20 February 2021. Thus though Defendant No.2-Dnyaneshwar had refused service of summons, he voluntarily appeared before the Trial Court and deposed in favour of the Plaintiff.

4 The Suit was decreed by the Trial Court on 1 October 2022 holding that Plaintiff alone is the owner of the suit properties.

5 It appears that during pendency of the suit Prakash Baburao Kamle further sold the suit land bearing Gat No.407 in favour of Sangappa Kashiram Birajdar by sale deed dated 7 April 2022. Therefore, Sangappa Kashiram Birajdar got aggrieved by the decree passed by the Trial Court and instituted Regular Civil Appeal No.60 of 2023. Shortly after the decree dated 1 October 2022, Appellant (Defendant No.1) also sold the other land bearing Gat No.406 in favour of Santosh Hanmant Bake vide sale deed dated 18 November 2022. Despite sale of the land bearing Gat No.406 the Appellant/Defendant No.1 thought of filing Regular Civil Appeal No.69 of 2023 before the First Appellate Court challenging the decree of the Trial Court. Why Appellant/Defendant No.1 filed said Appeal is a matter of mystery as on the date of filing of the Appeal on 29 April 2023, Appellant/Defendant No.1 had already sold land bearing Gat No.406 on 18 November 2022. Thus both the suit properties were already sold by both the Defendants.

6 Be that as it may. The First Appellate Court has dismissed the Appeal bearing Regular Civil Appeal No.69 of 2023 filed by the Appellant. So far as Regular Civil Appeal No.60 of 2023 filed by Sangappa Kashiram Birajdar is concerned, the same was allowed on the ground that the first sale transaction between Defendant No.2 Dnyaneshwar and Prakash Baburao Kamale had taken place prior to filing of the suit on 24 May 2018.

7 Plaintiff is thus declared as owner in respect of Gat No.406 which is sold by the Appellant to Shri Santosh Hanmant Bake. In respect of land bearing Gat No.407, which was purchased initially by Prakash Baburao Kamale and subsequently by Sangappa Kashiram Birajdar, the suit has been dismissed.

8 I have heard Mr. Shinde, the learned Counsel appearing for the Appellant. He would submit that the Appellant/Defendant No.1 was not served with suit summons and was unaware about filing, pendency or decree of the suit. That he acquired knowledge of filing of suit only after the land was already sold by him. That immediately after acquisition of the knowledge of decree, the Appeal was preferred before the First Appellate Court. He would rely upon provisions of Order V Rule 17 of the Code of Civil Procedure, 1908 (**the Code**) and would submit that if an allegation is made about refusal of summons by any Defendant, it is incumbent for the Court to examine the Bailiff. In support of his contention he would rely upon Division Bench judgment of this Court in

Deepali Pratap Sonawane vs. Pratap Irappa Sonawane, 2015 (3) ALL MR 341. He would therefore pray that the decree of the Trial Court is required to be set aside on account of non-following of proper procedure for service of summons.

9 I have considered the submissions canvassed by Mr. Shinde. It appears that the suit was instituted in the Trial Court at Solapur whereas both the Defendants are residents of Alibag. Therefore, the Trial Court permitted Plaintiff to serve the Defendants through RPAD. After payment of necessary charges by the Plaintiff, the summons were dispatched by RPAD. The roznama dated 14 March 2019 would indicate that the envelopes containing suit summons were returned with remark that the addressee refused to accept the service. This is how the suit has proceeded ex-parte against both the Defendants.

10 Reliance of Mr. Shinde on provisions or Order V Rule 17 of the Code of Civil Procedure or of judgment of Division Bench of this Court in *Deepali Pratap Sonawane* (supra) is irrelevant to the facts of the present case in that service was not attempted through the Bailiff and that therefore there is no question of examination of Bailiff. The suit summons were sent through RPAD to both the Defendants, who refused to accept the same. Though both the Defendants are residents of Alibag, they do not reside jointly. Appellant/Defendant No.1 is resident of village Thal, Taluka Alibag whereas Defendant No.2 was resident of Vidyanagar, Alibag. It is

not a matter of coincidence that a mistake is committed by postal authorities in respect of summons sent through RPAD which were returned on account of refusal of acceptance by both the Defendants. Also of relevance is the fact that Defendant No.2 later appeared in the suit voluntarily and filed Affidavit-of-examination-in-chief on 20 February 2021. The relationship between the parties is also required to be taken into consideration. The Appellant is the son of Plaintiff. He is also real brother of Defendant No.2. Both the brothers resided at Alibag, though the properties are located at Solapur. Though both of them refused service of summons, Defendant No.2 Dnyaneshwar apparently got wind of the factum of filing of the suit and appeared voluntarily in the suit subsequently in the year 2021. It therefore appears highly improbable that Defendant No.1 was unaware about filing of the suit. He refused to accept service of summons. Be that as it may, there is no procedural irregularity in service of summons. It is also required to be noted that in the Appeal Memo filed before the First Appellate Court the Appellant did not raise any specific ground about failure to follow proper procedure while serving the suit summons. In fact he has not made any averment in the entire Appeal Memo filed before the First Appellate Court that he did not receive suit summons. Therefore, the Appellant cannot now be permitted to raise technical pleas with a view to defeat the decree. It cannot be a matter of sheer coincidence that the Appellant thought of executing sale deed in respect of one of the suit properties bearing Gat No.406 within 48 days of decree of the suit. The suit was decreed on 1 October 2022 and sale deed has been executed by the Appellant on 18

November 2022. I am therefore not inclined to accept the contentions sought to be raised by the Appellant that the summons were not served on him.

11 Considering the overall conspectus of the case, I am of the view that no patent error can be traced in the orders passed by the Trial Court and the First Appellate Court. Appellant/Defendant No.1 has already sold the land bearing Gat No.406 and has divested himself of any rights in respect of the same. It is therefore quite perplexing as to why he is prosecuting the present Appeal. In any case, the Trial Court has rightly appreciated the position that mere certification of revenue entries recording names of Defendants to the record of the rights of the suit property did not divest the Plaintiff of his ownership rights, which he acquired registered sale deed dated 21 April 1983.

12 No substantial question of law is involved in the Appeal. The Second Appeal is accordingly rejected.

13 In view of disposal of the Second Appeal, the Interim Application does not survive and the same is disposed of accordingly.

(SANDEEP V. MARNE, J.)

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by SUDARSHAN
RAJALINGAM
KATKAM
Date: 2024.02.17
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