

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.271 OF 2022
WITH
INTERIM APPLICATION (STAMP) NO.35279 OF 2023
IN
SECOND APPEAL NO.271 OF 2022

Rajani Prabhakar Kulkarni & Anr.Appellants/Applicants
V/S

Madhukar Shankar Godase
since deceased through LHs.Respondents

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Mr. Rushikesh C. Barge for the Appellants/Applicants.
None for Respondents.

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CORAM: SANDEEP V. MARNE, J.
DATE : JANUARY 05, 2024.

P.C.:

1 The Appellants have filed this Appeal under provisions of section 100 of the Code of Civil Procedure, 1908 (**Code**) challenging the judgment and decree passed by the District Judge, Satara on 18 January 2021 dismissing Regular Civil Appeal No. 176 of 2016 and thereby confirming the judgment and decree dated 24 February 2004 passed by the Civil Judge Junior Division, Medha, Deputation Court, Satara in Regular Civil Suit No. 900 of 2001.

2 Plaintiff-Respondent No.1 filed Regular Civil Suit No.900 of 2001 for partition against his brothers-Madhav and Vilas and sisters-Rajani

and Vijaya. The suit property bearing CTS No.822/1A admeasuring 17 square meters and bearing CTS No.822/A admeasuring 161.4 square meters and CTS No.823/1A admeasuring 26.4 square meters situated at Shaniwar Peth, Satara was originally owned by Plaintiff's father Shankar Godase. Father-Shanker Godase died on 30 July 1982 leaving behind Plaintiff (Madhukar), his two brothers (Madhav and Vilas) and two sisters (Rajani and Vijaya). At the time of death of their father, mother Mrunalini was also alive. It is Plaintiff's case that on 6 September 1990, mother-Mrunalini executed Will bequeathing her share in the suit properties in favour of the Plaintiff. Mother passed away on 29 November 1991.

3 In the above factual background, Plaintiff issued notice to the Defendants on 22 October 2001 and sought partition and separate possession of his share. Since the notice was not acted upon, Plaintiff filed Regular Civil Suit No.900 of 2001 in the Court of Civil Judge Junior Division, Medha, Deputation Court at Satara. The suit summons were issued by Registered Post Acknowledgment Due (**RPAD**). It appears that only Defendant No.1 Madhav filed his Written Statement through post and consented for partition but stated that the interest of one Shri Shrikant Ganesh Godase, residing alongwith the family, be protected. The rest of the Defendants did not appear in the suit. There is some degree of debate about the manner of service of summons on them, which is being dealt with in latter portion of the order. The Trial Court therefore proceeded to decree the suit on 24 February 2004 directing that the

Plaintiff has 7/15th share in all the properties. The Trial Court further held that Defendant No.1 Madhav and Defendant No.2 Vilas have 7/30th share each and Defendant Nos.3 Rajani and Defendant No.4 Vijaya have 1/30th share each in all the properties.

4 Aggrieved by the decree of the Trial Court, only two Defendants Rajani and Madhav filed Regular Civil Appeal No.176 of 2016 before District Court, Satara. The Lower Appellate Court has proceeded to dismiss the Appeal by judgment and order dated 18 January 2021. Aggrieved by the decision of the First Appellate Court, Defendants Rajani and Madhav have filed the present Second Appeal.

5 I have heard Mr. Rushikesh Barge, the learned Counsel appearing for the Appellants. He would submit that Appellant No.1 Rajani never received suit summons. That the procedure prescribed under Order V, Rules 17 and 19 of the Code was not followed for service of suit summons on Appellate No.1 Rajani. That mere leaving intimation by postal authorities does not amount to fulfillment of requirements of provisions of Order V Rules 17 and 19 of the Code. That therefore the judgments of the Trial Court and the First Appellate Court are required to be set aside and the suit needs to be remanded for retrial after grant of opportunity Appellant No.1 to defend the suit. In support of his contentions Mr. Barge would rely upon judgments of this Court in ***Manju Baldev Narang vs. Prakash Manohar Lokhande***, 2014 (3) Bom.C.R. 474, ***Deepali Pratap Sonawane vs. Pratap Irappa Sonawane***, (2015) 6 Bom.C.R.

597 and *Sachin Arvindrao Mahajan vs. Vrushali Sachin Mahajan*, 2018 DGLS (Bom.) 961.

6 Mr. Barge would further submit that the Trial Court and the First Appellate Court have erred in relying on the alleged Will without its probate. That the authenticity and genuineness of the Will was not proved before the Trial Court. He would therefore pray for setting aside the decree of the Trial Court as upheld by the First Appellate Court.

7 I have considered the submissions canvassed by Mr. Barge. His first complaint is about non-service of suit summons on Appellant No.1. Here it must be observed at the very outset that the Appeal is filed by two Appellants viz. Rajani Prabhakar Kulkarni, who is original Defendant No.2 and Madhav Shankar Godase, who is original Defendant No.1. The Appellant No.2 (Defendant No.1) admittedly received the suit summons and filed his written statement. The judgments of the Trial Court and the First Appellate Court would indicate that Appellant No. 2 Madhav expressed no objection for effecting partition in accordance with the Will executed by the mother. He did not oppose the Plaintiff's suit for partition. The only concern expressed by him was with regard to entitlement of his relative Shri Shrikant Ganesh Godse who according to him, was residing in suit premises for over 80 years and could not be evicted. Thus except expressing concerns about the rights of said Shri Shrikant Ganesh Godase, Appellant No.2-Madhav did not oppose

Plaintiff' suit for partition. He did not raise any doubts about the Will executed by mother in Plaintiff's favour. Admittedly, Shri Shrikant Ganesh Godase is not entitled to any share in the suit property as he is not the legal heir of father Shankar Godase. Thus, so far as Appellant No.2-Madhav is concern it is quite incomprehensible as to why he has litigated before the First Appellate Court and has filed the present Appeal. He has been allotted 7/30th share in the suit properties in the preliminary partition decree. He is not even aggrieved by the quantum of share allotted to him. Having not opposed Plaintiff's suit for partition on merits, either *qua* Plaintiff's entitlement or his own entitlement, Appellant No.2-Madhav cannot challenge the partition decree of the Trial Court. This is possibly the reason why though Madhav Shankar Godase was impleaded as Defendant No.1 in the suit, he is shown to be the Appellant No.2 both before the District Court as well as in the present Second Appeal. His other brother and sister are not aggrieved by the partition decree. Thus what is sought to be done is to project the alleged grievance of Appellant No.1-Rajani about non-service of summons to frustrate the partition decree by their impleadment as Appellant No.1-Rajani.

8 In the above background, I proceed to examine the grievance raised about non-service of suit summons on the Appellant No.1-Rajani. It appears that the suit summons were dispatched on all the four Defendants by RPAD. Findings recorded by the First Appellate Court would indicate that so far as the Appellant No.1 Rajani is concerned, the

suit summons was served on address '24, Gourai, Rajaratna Co-operative Housing Society, Flat No.28, RDPI, Gourai Road, Boriwali (West), Mumbai. The endorsement on the postal envelope reflects that the same was not accepted and an intimation was given to the addressee by making an endorsement to that effect on the envelope. It appears that Appellant No.1 Rajani did not approach the post office to collect the packet containing summons. Perusal of the Appeal Memo filed before the District Court would indicate that no ground contending that Appellant No.1 Rajani was not residing at the address given in the cause title of the suit. Once she does not dispute the position that she was residing at the address shown in the cause title and suit summons, it cannot be said that leaving of intimation by postal authorities with regard to the envelope containing suit summons would amount to improper service of the summons.

9 Mr. Barge has relied on provisions of Order V, Rules 17 and 19 of the Code. Rule 17 of the Code deals with the procedure when the Defendant refuses to accept service of summons and cannot be found. In the present case however the summons were dispatched by RPAD at the address at which Appellant No.1 was admittedly residing. Therefore, the procedure envisaged under Rule 17 of the Order V of the Code for the Bailiff to affix copy of the summons on the outer door or conspicuous part of the house would not apply in the facts and circumstances of the present case. Rule 19 of the Code provides for examination of serving of summons. In the present case, the service is done through RPAD and

therefore Rule 19 of the Code would again not have any application. In the present case it must be borne in mind that none of the four Defendants have contested the suit. The other two Defendants Vilas and Vijaya have not challenged the Trial Court's decree. Though Appellant No.2-Madhav has challenged the decree, he agreed for partition in accordance with the Will executed by mother. This factual background needs to be borne in mind while deciding the complaint of Appellant No.1 about non-receipt of suit summons. In the light of this position, and inapplicability of provisions of Order V, Rules 17 and 19 of the Code, the reliance of Mr. Barge on the judgments of this Court in ***Manju Baldev Narang*** (*supra*), ***Deepali Pratap Sonwane*** (*supra*) and ***Sachin Arvindrao Mahajan*** (*supra*) is baseless.

10 In my view findings of fact is recorded by the Lower Appellate Court about proper service of summons on Appellant No.1. This Court is not expected to determine correctness of the said finding of fact while exercising jurisdiction under section 100 of the Code. No substantial question of law is involved in the present Appeal with regard to issue of service of summons on Appellant No.1.

11 So far as the issue of validity of the Will is concerned, though certain grounds are raised in the present Appeal Memo in that regard, the Appellant No.2 Madhav did not question genuineness of the Will in his Written Statement. Therefore, he cannot be permitted raise any doubts about the same in the present Appeal. Appellant No.1 did not

appear in the suit nor filed a Written Statement. Thus there was no challenge to the Will and it is too late in a day to cast any aspersions about the same.

12 After considering the overall conspectus of the case, I am of the view that no substantial question of law is involved in the present Appeal. The Second Appeal is accordingly dismissed without any orders as to costs.

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

(SANDEEP V. MARNE, J.)

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SUDARSHAN
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KATKAM
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