



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.18977 OF 2024**

Vijay Gopichand Madhavi and Ors. ... Petitioners
versus
Dadabhau Mahipati Jadhav and Ors. ... Respondents

Mr. Abhijit Patil, for Petitioners.
Mr. Jyotiram S. Yadav with Mr. Ketan Nalawade, for Respondent No.1.

CORAM: N.J.JAMADAR, J.

DATE : 5 FEBRUARY 2025

ORDER :

1. Heard the learned Counsel for the parties.
2. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally.
3. The Petitioners – original Defendant Nos.12 to 20 have invoked the writ jurisdiction of this Court being aggrieved by an order dated 23 September 2024 on applications (Exhibits 54 and 56) preferred by the Defendants, whereby those applications seeking setting aside of the ex-parte orders against the defendants came to be rejected.
4. The Respondent No.1 instituted a suit for specific performance of a contract for sale, declaration and perpetual injunction against the Defendant Nos.12 to 20 and other co-sharers of the property bearing Gat No.131, situated at Mauje Ambarnath, Tal.Ambarnath, Dist. Thane (the suit property). The Plaintiff had approached the Court with a case that Vitthal Balaji Patil, the

predecessor in title of Defendant Nos.1 to 5, and Defendant No.1 Dattaram had entered into an agreement to sell the suit property and had accepted consideration thereunder. Vitthal Balaji Patil and Defendant No.1 had assured that, though the names of other heirs were mutated to the record of rights of the suit land, those co-sharers, i.e., Defendant Nos.2 to 20 would execute the Sale Deed and it was the responsibility of late Vitthal Balaji Patil and Defendant No.1 to make the other Defendants execute the sale deed.

5. Suit summons was issued. On 25 May 2019, the Bailiff reported that the summons was served on Defendant No.1 Dattaram Vitthal Patil, and Defendant No.1 also volunteered to accept the summons on behalf of Defendant Nos.2 to 20 and gave acknowledgment of the receipt of the summons. It appears that on the basis of the said report and noting that Defendant Nos.2 to 20 have not entered appearance, on 23 September 2019, an ex-parte order was passed against Defendant Nos.2 to 20. On the same day, since Defendant No.1 had not filed written statement, despite entering appearance, 'no written statement' order was passed against Defendant No.1.

6. The Petitioners approached the Court initially by filing an application on 9 June 2023, seeking setting aside of ex-parte order. By an order dated 4 August 2023, the trial Court rejected the application as the Defendants had merely prayed for setting aside of the ex-parte order without seeking time to file written statement. The application was also not supported by an affidavit.

7. The Petitioners – Defendant Nos.12 to 20 filed applications (Exhibits 54 and 56) seeking setting aside of the ex-parte order and permission to file written statement. Those applications came to be rejected by the impugned order.

8. Mr. Patil, learned Counsel for the Petitioners, submitted that the Defendant No.1 had accepted the summons on behalf of Defendant Nos.2 to 20 who are not at all residing with Defendant No.1, without any authority. Eventually, Defendant No.1 did not contest the suit, and, thus, ex-parte and no written statement orders came to be passed. The subject contract of sale was also allegedly executed by Defendant No.1 for and on behalf of other co-sharers sans any authority. Defendant No.1 has acted in collusion with the Plaintiff to defeat the rights of the Petitioners. Therefore, the learned Civil Judge was not justified in rejecting the applications by passing a mechanical order.

9. Learned Counsel for Plaintiff – Respondent No.1 resisted the prayers in the Petition. It was submitted that the first application (Exhibit 51) came to be rejected by an order dated 4 August 2023. Despite rejection of the first application, the Petitioners again preferred applications for the same reliefs (Exhibits 54 and 56). The learned Civil Judge was, thus, justified in rejecting the subsequent applications as the order passed on the first application operated as res-judicata. Therefore, no interference is warranted in exercise

of the writ jurisdiction.

10. I have carefully perused the material on record. Prima facie, it is evident that the contract for sale was purportedly executed on behalf of Defendant Nos.2 to 20 by Defendant No.1 and Vitthal Balaji Patil. The averments in the plaint indicate that Vitthal Balaji Patil and Defendant No.1 had taken the responsibility to make Defendant Nos.2 to 20 execute instrument in favour of the Plaintiff. Incontrovertibly, Defendants have interest in the suit property which was agreed to be sold under the contract for sale.

11. In this context, the aspect of due service of summons on Defendant Nos.2 to 20 is required to be appreciated. From a bare perusal of the Bailiff's report, it becomes abundantly clear that the suit summons has not been personally served on Defendant Nos.2 to 20. The Bailiff has reported that Defendant No.1 had requested him to deliver the summons to other defendants and thereupon the bailiff delivered the summons of other defendants to the Defendant No.1.

12. In the face of the aforesaid report of service, it would be audacious to urge that the summons were duly served on Defendant Nos.2 to 20. At that stage itself, the trial court ought to have declined to accept report of service of summons on Defendant Nos.2 to 20 and issued fresh summons. If the fact that the contract for sale was not executed by Defendant Nos.2 to 20 is considered in conjunction with the aforesaid utterly infirm nature of service of

summons, the mischief with which the act of Defendant No.1 is impregnated becomes discernible. The Defendant Nos.2 to 20 would suffer an ex-parte decree of specific performance of the contract, which they neither executed nor authorized the Defendant No.1 to execute on their behalf.

13. On this singular count, the learned Civil Judge ought to have allowed the applications to set aside the ex-parte order and permit the Defendant Nos.12 to 20 to file written statement.

14. The submission on behalf of the Plaintiff that the order passed on the application (Exhibit 51) operates as a res-judicata does not merit countenance. It appears that the trial court declined to entertain the first application as it was not in a proper form and was not supported by affidavit of Defendant Nos.12 to 20.

15. It is true, the principle of res-judicata applies at different stages of the same proceedings. However, in the instant case, it does not appear that the first application was rejected by the trial Court on the ground that the Defendants failed to make out sufficient cause to set aside the ex-parte order and permit them to file written statement.

16. Moreover, in the case at hand, it appears that Defendant Nos.12 to 20 were deprived of the opportunity to effectively defend the suit on account of improper acceptance of the report of service of summons. It would, therefore, be in the interest of justice that the impugned orders are set aside and the

Petitioners-Defendant Nos.12 to 20 are granted opportunity to effectively defend the suit.

17. Hence, the following order :

ORDER

- (i) The Writ Petition stands allowed.
- (ii) The impugned orders stand quashed and set aside.
- (iii) The order dated 23 September 2019 also stands quashed and set aside.
- (iv) Defendant Nos.12 to 20 are permitted to file written statement within a period of one month from the date of uploading of this order.
- (v) The trial court is requested to hear and decide Special Civil Suit No.135 of 2019 as expeditiously as possible.
- (vi) Rule made absolute in the aforesaid terms.
- (vii) No costs.

(N.J.JAMADAR, J.)