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**(2013) 08 BOM CK 0183**

**In the Bombay High Court**

**Case No :** S.A. No. 200 of 2013 and Civil Application No. 2998 of 2013

Kashiraj

APPELLANT

Vs

Lata Madhukar Ghorpade

RESPONDENT

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**Date of Decision :** 19-08-2013

**Acts Referred:**

**Citation :** (2014) 1 MhLj 543

**Hon'ble Judges :** A.B. Chaudhari, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

A.B. Chaudhari, J.—Heard. Admit. Taken up for final disposal with the consent of learned Counsel for the parties.

Aggrieved by the judgment and decree dated 6-2-2013 passed by District Judge-1, Kopargaon in Regular Civil Appeal No. 43 of 2009, confirming the judgment and decree dated 26th March, 2003 passed by Joint Civil Judge, Junior Division, Sangamner, in Regular Civil Suit No. 593/2000, granting decree of specific performance of contract, the present Second Appeal has been filed by the original defendants/appellants.

In support of the appeal, Mr. Dhorde, learned Senior Counsel for the appellants, made the following submissions,--

The decree passed by the trial Court for specific performance of contract is an ex parte decree against the appellants/defendants and that has been confirmed by the lower Appellate Court in ignorance of the law relevant on the aspect. According to him, the lower Appellate Court could not have ignored the reasons given by this Court in para No. 5 of the judgment dated 18th August, 2011 in Writ Petition No. 4567/2010, wherein the issue about condonation of delay in filing the appeal was considered. He further argued that apart from the said judgment of this Court, the relevant aspect regarding transfer of the suit from one Court to another Court and requirement of express authority to the advocate

for the defendants, after transfer of the suit; and in the absence of any evidence about the advocate for the appellant being authorized to continue either to make statement or appear for the defendants, the ex parte decree that was made against the appellants, was not sustainable and, therefore, the lower Appellate Court ought to have set aside the ex parte decree of the trial Court.

2. The learned Counsel has relied on the following decisions, --

i) Krishnaji Mahadeo Bapat Vs. Wamanrao Balwantrao Shinde and Another, ; ii) Jawahar Banode Vs. Somajibhai Patel, ; iii) Ratilal Lalji Vs. Kuvarben Patel and Others, ; iv) Ramchandra Ramgopal through Jugalkishore Kothari Vs. Kamalkishore Rungta and Others, ; v) Lal Devi and Another Vs. Vaneeta Jain and Others, ;

3. Per contra, Mr. Chapalgaonkar, learned Counsel for the respondents vehemently opposed the appeal and argued that the findings of fact have been recorded by the lower Appellate Court, which clearly show that the appellants wanted to prolong the execution of the decree passed against them. According to him, mere transfer of the suit from one Court to another, does not end the authority of the advocate. At any rate, since their advocate appeared for the defendants in the proceedings for bringing the legal heirs of the deceased on record, so also of proceedings of attachment of property, it is deemed that he had authority to appear on behalf of the appellants and it cannot be said as afterthought that he had no authority to represent the appellants/defendants. The reasons furnished by the appellants are misleading and, therefore, there is no substance in the present second appeal and he prayed for dismissal of the same.

4. I have heard the learned Counsel for rival parties. I have perused the entire record.

5. Following facts are not in dispute.

The respondents/original defendants filed a suit, based on his agreement dated 17-5-1996 for specific performance of contract against the appellant/defendants in respect of the suit property, i.e. agricultural land.

6. The plaintiffs/respondents believed that the defendants would honour the agreement of sale, but they sold the land to defendant Nos. 3 to 5 by executing three sale-deeds and by accepting amounts from them though the respondents were willing and ready to perform their part of contract. When the suit summons was served, the defendant Nos. 2 to 5 filed their Written Statement and denied all the allegations. A preliminary objection, regarding jurisdiction of the Court at Sangamner to try and decide the suit, was raised and accordingly, the said preliminary issue was also framed. But it was to be heard along with other issues. When the suit was originally filed, it was registered as Special Civil Suit No. 264/1996 in the Court of Civil Judge, Senior Division, Sangamner, in which the advocate for the appellants/defendants appeared for them. Thereafter, there

was enhancement of pecuniary jurisdiction of the Court of Junior Division at Sangamner and as such, the suit came to be transferred to the said Court of Junior Division and it was numbered as Regular Civil Suit No. 593/2000. Thus, the suit was transferred from the Court of Senior Division to the Court of Junior Division.

7. On the initial objection, as earlier stated, that the Court had no jurisdiction, preliminary issue was also framed. But the same advocate continued to appear for the appellants/defendants over after transfer of the suit, without their knowledge, consent or authority. No notice was issued to the appellants by the transferee Court.

8. Thereafter, the suit proceeded ex parte since the defendants did not appear before the said transferee Court; but the counsel for the defendants continued to participate in the transferee Court. According to the appellants/defendants, that was without any authority after transfer of the suit as they had no knowledge about transfer of the suit also.

9. After hearing learned Counsel for the rival parties, following substantial question of law arise for my consideration --

(i) Whether the learned District Judge committed an error in ignoring the fact that admittedly, there was no notice issued to the appellants/defendants, after transfer of the suit to the Court of Junior Division from the Court of Senior Division and there is no evidence to show that the advocate for the defendants had authority after transfer of the suit and no fresh written statement was called from the defendants? -- Yes.

10. It is not in dispute that the suit was initially filed in the Court of Civil Judge, Senior Division in the year 1996, in which the appellants engaged the advocate, who appeared in the Court on their behalf. It is also not in dispute that thereafter, the suit was transferred in the Court of Junior Division and it was numbered as Regular Civil Suit No. 593/2000. It is also an admitted position that the Court of Junior Division did not issue any notice to the appellants after transfer of the suit and there is no evidence on record to show that the appellants had again engaged the same advocate, who was appearing in the transferor Court. On the contrary, there is an assertion by the appellant/defendants that they never knew about transfer of the suit from the Court of Senior Division to the Court of Junior Division, nor their advocate had informed them about it. It appears that their advocate, on his own appeared in the transferee Court and participated in some proceedings about bringing the legal heirs on record etc. But then in the absence of any satisfactory evidence to show that the appellants/defendants had, in fact, continued the authority of the advocate, even after transfer of the suit or that the appellants/defendants were fully aware about transfer of the suit to other Court, it would be unjust to post them with the knowledge of transfer of the suit. It clearly shows from the record that their advocate, on his own, continued to participate in the proceedings in

the transferee Court without the knowledge, consent and authority of the defendants. The things would have been different had there been any evidence about the authority given to the advocate. Therefore, the reasons assigned by the District Judge, that the appellants are trying to blame the advocate, do not appear to be sound in the absence of concrete, cogent and satisfactory evidence. That apart, this Court, as stated earlier, delivered a judgment dated 18th August, 2011, in Writ Petition No. 4567/2010, at the behest of the respondents, ordering condonation of the delay of 1037 days caused in filing the appeal.

11. This Court in para 5 therein, assigned following reasons while disposing of the writ petition

.....It is a fact that, the suit earlier was registered as special civil suit and thereafter because of the enhancement of pecuniary jurisdiction of the Court of Civil Judge, Junior Division, the matter was re-registered as regular civil suit. No notice was issued to the respondents. Thereafter, in fact, when the Court is changed and the registration of the suit is also changed from special civil suit to regular civil suit, notice is required to be issued to the parties. The pursis that is filed on record by the advocate of respondent does not bear the signature of respondents. The said advocate had also never participated in the proceedings till the judgment. All the facts leads credence to the case of the respondents that they had not instructed to appear and the advocate who was earlier appearing in the matter had caused his appearance after re-registration without the instructions. No doubt, when an application for setting aside ex parte decree was filed and thereafter after two years the appeal was preferred. The District Court, while considering this aspect has relied on the judgment in a case of Ratilal Lalji Vs. Kuvarben Patel and Others, So also it is trite law that for the wrong advise a litigant should not suffer. Moreover, the respondents have not gained by delay. The dispute revolves around immovable property...

12. In my opinion, the said reasons ought to have been taken into consideration by the District Judge while disposing of the appeal in question. However, that has also not been done.

13. Be that, as it may; the fact remains that the appellants defendants have suffered the decree, without being defended or represented and the matter relates to immovable property. The respondents though are equipped with the decree, but after all that is an ex parte decree in respect of the immovable property.

14. In the case of Jawahar Banode Vs. Somajibhai Patel, , this Court, in paras 8 and 9, has observed thus, --

8. The crucial question, however, is about the procedure that has to be followed in such an eventuality by the Court of Civil Judge (Senior Division). In the present case, it is apparent that if the Civil Judge (Junior Division) did not have the pecuniary jurisdiction to entertain and decide the suit, anything done by him, would not be valid and would be liable to be questioned on the ground of lack of

jurisdiction, to entertain the matter. If the matter, therefore, goes from his file to that of the Civil Judge (Senior Division) and if the challenge on the basis of lack of jurisdiction is to be abided, the only course open to the transferee Court, if it happens to be a Court of the Civil Judge (Senior Division), would be to retry it and not to proceed from the point at which it was transferred or withdrawn from the Court of the Civil Judge (Junior Division), Only then the further proceedings would be valid.

9. This was exactly the stand taken by the present applicant before the learned Joint Civil Judge (Senior Division) when the matter came before him upon an order made by the District Judge in pursuance of Rule 189 of the Civil Manual. In fact, fresh summons was issued by the transferee Court to the applicant, and the proper course for it would have been to ask the applicant to file a written statement afresh and then decide the suit de novo according to law. It would not be open to the Joint Civil Judge (Senior Division) to try the suit from the stage at which it was at the time of the withdrawal and transfer, before the Civil Judge (Junior Division).

15. In the light of the ratio of the above decision, I think the appellants are required to be given an opportunity to participate in the proceedings of the suit, rather than allowing the decree ex parte.

16. At any rate, the respondents can be compensated by an order of costs and in fact, this Court, passed an order on 5th March, 2013, asking the appellants to deposit costs of Rs. 25,000/-. In the light of the above, I, therefore, make the following order, --

#### ORDER

(i) Second Appeal No. 200/2013 is allowed. CA disposed of. The costs of Rs. 25,000/-, deposited by the appellants shall be paid to the respondents forthwith.

(ii) The judgment and decree dated 6-2-2013 passed by District Judge-1, Kopargaon in Regular Civil Appeal No. 43 of 2009, and the judgment and decree dated 26th March, 2003 passed by Joint Civil Judge, Junior Division, Sangamner, in Regular Civil Suit No. 593/2000, are set aside.

(iii) The proceedings of Regular Civil Suit No. 593/2000 are remitted to the Court of Civil Judge, Junior Division, Sangamner (now Rahata) for fresh hearing and disposal in accordance with law.

(iv) The parties to appear before the trial Court on 12th September, 2013.

(v) The Civil Judge, Junior Division, Sangamner, is directed to decide the suit, of course, after affording an opportunity of being heard to the parties, within a period of one year from the date of first appearance by the parties before it.