

**IN THE COURT OF PRL. SENIOR CIVIL JUDGE,
JAMAKHANDI, AT: JAMAKHANDI**

PRESENT:

Sri.Balachandra.N.Bhat
B.Sc, LLB, PGDHRL,
Prl. Senior Civil Judge & JMFC,
Jamkhandi.

Misc. Appeal No.1/2018

DATED THIS THE 20th DAY OF February-2021

Petitioner:

- 1. Satyappa S/o Siddappa Mang,**
Age: 47 years Occ: Agriculture,
R/o: Chinagundi Tq: Jamkhandi.
Dist: Bagalkot.

(Petitioner by Sri.GKM Advocate)

- Versus -

Respondents:

- 1. Smt. Kamalavva W/o Laxman Madar @ Mang,**
Age: 65 years Occ: Agriculture,
R/o Chinagundi Tq: Jamkhandi,
Dist: Bagalkot.
- 2. Shrishail S/o Laxman Madar @ Mang,**
Age: 23 years Occ: Agriculture,
R/o Chinagundi TQ: Jamkhandi,
Dist: Bagalkot.
- 3. Rangavva D/o Laxman Madar @ Mang,**
Age: 25 years Occ: Agriculture,
R/o Chinagundi Tq: Jamkhandi,
Dist: Bagalkot.
- 4. Mahadevi D/o Laxman Madar @ Mang,**

Age: 22 years Occ: Agriculture,
R/o Chinagundi Tq: Jamkhandi
Dist: Bagalkot.

5. **Hanamant S/o Laxman Madar @ Mang,**
Age: 31 years Occ: Agriculture
R/o Chinagundi Tq: Jamkhandi,
Dist: Bagalkot,
6. **Sadashiv S/o Laxman Madar @ Mang,**
Age: 30 years Occ: Agriculture,
R/o Chinagundi TQ: Jamkhandi,
Dist: Bagalkot.
7. **Maruti S/o Laxman Madar @ Mang,**
Age: 30 years Occ: Agriculture,
R/o Chinagundi TQ: Jamkhandi,
Dist: Bagalkot.
8. **Mahantesh S/o Channavva Madar @ Mang,**
Age: 26 years Occ: Agriculture,
R/o Chinagundi TQ: Jamkhandi,
Dist: Bagalkot.
9. **Vittal S/o Channavva Madar @ Mang,**
Age: 18 years Occ: Agriculture,
R/o Chinagundi TQ: Jamkhandi,
Dist: Bagalkot.

(R-1,2, 4 to 6, 8 & 9 placed exparte)
(R-7 by Sri. PPN Adv)
(R-3 by Sri.CPB Adv)

::O R D E R::

1. The present appeal is preferred by the appellant
under order XLIII rule 1 of the Code Of Civil Procedure

against the impugned order passed by the learned principal civil judge, Jamkhandi in civil mis.1/ 2015 on 23.01.2017 on his file amongst various grounds that shall be summarised elsewhere in this judgment.

2. The parties shall be referred to by the ranks held by them before the learned trial court for the sake of convenience, clarity and to avoid confusion.
3. The appellant before this court in this appeal was the petitioner in civil mis.1/ 2015 before the learned principal civil judge at Jamkhandi and the respondents herein were the respondents in the miscellaneous petition too.
4. The respondents herein were the plaintiffs who had instituted the suit in O.S.81/ 2011 before the learned principal civil judge at Jamkhandi against the appellant in this appeal.
5. The suit was instituted first by presenting the plaint before this court in O.S.21/ 2007 but on the ground of pecuniary jurisdiction the plaint came to be

returned and presented before the learned principal civil judge at Jamkhandi.

6. The suit was instituted for declaration that the plaintiffs were the owners in respect of the southern portion of the land in Sy.No.68/ 2B of Chinagundi village measuring 8 guntas and earmarked as CDEF in the rough sketch accompanying the plaint, for possession of this portion, permanent injunction restraining the defendants from trespassing over the property.
7. The plaintiffs claimed to be the owners of the land in Sy.No.68/ 2B measuring 1.14 acres situated at Chinagundi village. The land in Sy.No.68/ 2C measuring 1.05 acres is situated to the south of the land in sy.no.68/ 2B. These two bits of land are said to have been owned by Sri Binji Dattatreya Karkun. The plaintiffs claim to have purchased the northern portion of the land measuring 1.14 acres out of total extent through a registered sale deed dated

15.10.2001 that came to be numbered as 68/ 2B and before this the defendant is said to have purchased 1.05 acres in this land numbered as 68/ 2C. The cause of action for the suit had arisen when during the measurement of the lands the defendant was found to have encroached upon the land of the plaintiffs to the extent of 8 guntas.

8. The defendant had then failed to appear before the court even after the service of the suit summons. Hence the defendant was placed ex parte and the suit was proceeded with and came to be decreed. Now being aggrieved by the ex parte decree the defendant had filed a civil miscellaneous petition in 1/2015 under order IX rule 13 of the code of civil procedure seeking an order to set aside the ex parte decree passed in O.S.81/ 2011 on 2.07.2013. the civil petition came to be dismissed on 23.02.2017. the petitioner being aggrieved by this order is before this court in appeal. The appeal was preferred by

presenting the memorandum of appeal on 4.01.2018. the notices were served on the respondents on steps being taken by the petitioner on 28.06.2019. along with the appeal the appellant had filed an application under section 5 of the Indian Limitation Act. The application came to be allowed on 3.02.2020 and the appellant was given a weeks time to comply with the order but had only complied with the order on 13.02.2020.

9. The grounds on which the appellant are before this appellate court in a nut shell could be summarised as follows;

GROUND OF APPEAL

1. The order passed by the trial court is perverse, capricious and not based on principles of law. Further contended that the trial court has not taken into consideration that proper grounds raised by the appellant and since the basic contention of the appellant is that the summons is not served on

him and he has not signed the summons, the signature obtained on the summons is not that of the appellant, this serious ground has not been considered without comparing the signature admitted before this court and one signed on the summons. The trial court has passed order not considering the prayer and observations made by the trial court has not taken into consideration of the evidence lead by the appellant which is not controverted or cross examined and arrived at wrong conclusion and hence prayed to allow the miscellaneous appeal.

10. The counsel for appellant has relied on following citation;

1) 2019(4) KCCR 3638 (Karnataka High Court, Smt.Nagarathnamma and another Vs Sri.Chandrashekara Swamigalu and others.

11. The following points arise for my consideration:

(1) Whether the petitioner made out grounds to

allow the petition?

(2) What Order?

12. Heard both the sides. Perused the materials. I have gone through the citations relied.

13. My answers on the above points are:

Point No.1: In the affirmative

Point No.2: As per the final order, for the following:

:: R E A S O N S ::

14. Point No.1 :- The only ground on which the appellant has been agitating his case is that, the summons in OS No.81/2011 was not served on him. In this regard it appears that the appellant has also filed an application in EP No.92/2014 which is numbered as IA No.4 U/s 340 of Cr.P.C. The stage appears to be still preliminary and it is not clear as to whether any decision is taken in respect of the maintainability of the IA No.4 if so the other steps taken in this regard. However, it would be clear that, the appellant has

already initiated step in so far as his allegation is concerned. On the contrary the appellant has not placed even a single piece of document so as to counter the copy of the summons in which the suit summons was served on him in person. Even the learned trial court while considering the petition U/o 9 rule 13 of CPC had liberally dealt with this aspect. Now in order to testify all these materials the appellant has not placed any document or even a single piece of document. Mere allegation in respect of the none service of the suit summons would not be sufficient. Moreover it is not a private individual effecting the service of the suit summons. The suit summons is served through Bailiff of the process Nazir section and the official effecting service of the suit summons is a public servant and whose acts are presumable in so far as the acts done by him in discharging official duties are concerned. Now in order to displace all these acts and to raise suspicion the appellants appear to have done nothing. But a mere

allegation is made. If necessary action under the provision of law could have been taken if the appellant does not successful to prove the allegation made against the official. Let apart all these things, the defendant or the appellant in this case was found on measurement to have encroached 8 guntas of land and thereafter the defendant appears to have taken such stand of not appearing before the court and contending that the suit summons was not served on him and the conduct is very much apparent on the records available before this court. The witness P.W-1 during cross examination also has specifically contended that he had the knowledge of the proceedings since and that in respect of another proceedings he has been appearing before the court since 2007. Therefore it is not a case where the defendant is not aware of the nuances and the niceties of the court proceeding therefore under such circumstances P.W-1 further admits even in respect of his knowledge regarding the decree therefore it would

very much evident that intentionally the defendant kept on observing to only to take benefit of the fact that he was not served with the suit summons and thereby ensuring that the proceedings are dilated detrimental to the interest of respondents in whose favour the decree is drawn. As held by the Hon'ble Apex court in number of decisions such acts must be curbed and must be dealt with iron hands a person who has approached the court at a very first instance and on obtaining a decree the adversaries makes a mockery of such a decree must pay for it. Therefore I have no hesitation to hold the point against the appellant apart from that it is also necessary to hold that in addition to the relief granted to the respondent or the decree holder, the decree holder is at liberty to pursue his remedy for means profits in respect of the possession of the property that had turned into illegal possession. The appellant shall also pay the costs of the proceedings to the decree holder or the respondent. It may appear that the appellant is being

saddled with liability without giving an opportunity to him. However the materials placed before this court in respect of the proceedings that had taken place on the original side, the petition filed U/o 9 rule 13, Execution Petition all would clearly show that the conduct of the defendant is not worth protecting and moreover the defendant had ample opportunity to appear before the court and could have defended the suit. When the defendant or appellant was engaged in the proceedings before a court since 2007 it is not clear what prevented him from putting his appearance in OS NO.81/2011. In so far as the second leg of the provision of order 9 rule 13 is concerned the appellant has not made out any grounds in this regard.

Order 9 rule 13 of Code of Civil Procedure;

(provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient

time to appear and answer the plaintiff's claim).

Therefore there is no doubt in so far as the service of the summons on him is concerned. The last but not the least ground that would go against the appellant is that, if the suit summons was not served on him he could have summoned the official who had effected service of suit summons at the very early opportunity that according to him he had gained knowledge in respect of the present proceeding that could even by that petition U/o 9 rule 13 was preferred by the appellant. Having lost all these opportunities the appellant has not made out sufficient grounds. However the principles laid down in citation furnished by the counsel for appellant is followed & facts in the case on hand could be distinguished. Accordingly I have answered point No-1 in the Negative.

15. Point No.2:- In view of above discussions on point No1,I proceed to pass the following;

:: O R D E R ::

The appeal filed U/o XLIII rule 1(d) of the Code Of Civil Procedure is dismissed with costs.

The appellant shall bear the costs of entire proceedings.

Office is directed to send intimation of this order to the trial court.

(Dictated to the stenographer, transcribed and typed by him, corrected and signed by me, then pronounced in open court on this 20th day of February-2021)

(Balachandra.N.Bhat)
Prl. Senior Civil Judge, JMFC
Jamkhandi.

:: A N N E X U R E S ::**List of witnesses examined for the petitioner:**

Pw.1	:	Sri.Satyeppa Siddappa Mang
------	---	----------------------------

List of exhibited documents marked for the petitioner:

Ex.P.1	:	Certified copy of petition in EP No.92/2014,
Ex.P.2	:	Certified copy of IA-6 in EP No.92/2014,
Ex.P.3	:	Certified copy of order in EP No.92/2014,

List of witnesses examined for the respondent:

	:	- Nill -
--	---	----------

List of exhibited documents marked for the respondent:

	:	- Nill -
--	---	----------

Prl. Senior Civil Judge, JMFC
Jamkhandi.

(Vide separate order pronounced in the open court)

:: O R D E R ::

The appeal filed U/o XLIII rule 1(d) of the Code Of Civil Procedure is dismissed with costs.

The appellant shall bear the costs of entire proceedings.

Office is directed to send intimation of this order to the trial court.

**Prl. Senior Civil Judge, JMFC
Jamkhandi.**