

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 137 OF 2015

Vinod Madhukar Mundada .. Petitioner

Versus

Ananda Dhoman Patil .. Respondent

Shri A. S. Shelke, Advocate for the Petitioner.

Shri C. R. Deshpande, Advocate for the Respondent.

CORAM : S. V. GANGAPURWALA, J.

DATE : 07TH SEPTEMBER, 2015.

PER COURT :

. Mr. Shelke, the learned counsel submits that the Trial Court erroneously allowed the application filed by the present respondent U/O IX Rule 13 of the Code of Civil Procedure. The present petitioner has filed suit for specific performance of contract, which was decreed ex-parte. In the suit for the first time summons were issued on 16.04.2011. It was returned back with the bailiff report that the defendant was not found on the address. On 26.04.2011 again notice was issued, which came back with endorsement that the defendant had gone to another village. Thereafter, notice was issued by Registered Post Acknowledgment Due. The said notice was refused by the present respondent. On 08.07.2011 the order was passed

directing suit to proceed ex-parte and thereafter judgment was delivered. The plaintiff filed execution proceedings. In the execution proceedings also the notice was served upon the respondent on very same address on which notice was refused to be accepted in the suit. In view of that presumption U/Sec. 114 of the Evidence Act would be applicable. According to the learned counsel, the Court has committed error in allowing the application filed by the respondent for setting aside ex-parte decree.

2. Mr. Deshpande, the learned counsel submits that, the present respondent had never refused to accept the notice. The endorsement shows that the addressee is not taking said notice that is addressee was not available and thereafter has not gone to the post office to receive the same. According to the learned counsel the address on the said postal envelop is incorrect.

3. I have considered the submissions canvassed by the learned counsel for respective parties. The suit is substantive suit for specific performance of contract. It is undisputed that the suit has proceeded ex-parte. The reliance on the part of the plaintiff is on the ground that in the suit the defendant has been served by R. P. A. D. that is he has refused to accept the notice. The same is a proper service and the Court below has committed error in setting aside said ex-parte decree.

4. The defendant has specifically denied that he has refused to accept the said notice by R.P.A.D. In such circumstances burden lay upon the plaintiff to prove the said endorsement. The postman is not examined. The Court has discussed the said aspect. The Court has observed that, there is nothing on record to show that when summons of R.C.S. No. 69 of 2012 were issued to him, he was residing in Shantiniketan Colony, Nandurbar. The notice of execution was served upon the respondent. As the first bailiff report shows that the respondent is not found on the given address, that is report of 16.04.2011.

5. Even otherwise, the suit has proceeded ex-parte. By the impugned order the opportunity is given to the defendant to contest the suit on merits by imposing cost upon him. The Court has given date for appearance of the parties.

6. In case the written statement is not filed by the defendant as yet, the same shall be filed within a period of one month from today and the Trial Court shall endeavour to dispose of the suit on merits. The civil revision application is disposed of. The Record and Proceedings be sent back immediately.

[S. V. GANGAPURWALA, J.]