

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 278 OF 2016

Smt. Ramdulari Gulabchand Chorasia
And Anr

...Applicants

Versus

Mr. Vaikuntharai Girdharilal Dodia

...Respondent

....

Mr.Surel S. Shah i/b. Ashoka Law Firm, Advocate for Applicants.
Mr.Sanjiv A. Sawant, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 29th June, 2016

P.C.

1. Heard Mr. Surel Shah, learned Counsel for the applicants and Mr. Sanjiv Sawant, learned Counsel for the respondent, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants have challenged the judgment and decree dated 31.3.2015 passed by the learned Judge, presiding over Court Room No.9 in Marji No.734/2014 as also the judgment and decree dated 28.3.2016 passed by the Appellate Court of the Small Causes Court at

Bombay in Misc. Appeal No.167/2015. By these orders, the Courts below dismissed the application taken out by the applicants, hereinafter referred to as 'defendants', under Order 9 Rule 13 of C.P.C. for setting aside the exparte decree dated 19.7.2014 passed in R.A.E. Suit No.121/195 of 2013.

3. The respondent, hereinafter referred to as the 'plaintiff' had instituted suit against the defendants for recovery of possession of room No.8 admeasuring 100 sq. ft. on the first floor of the building known as 'Shriji Niwas', Building No.28, 1st Carpenter Street, Nanubhai Desai Road, Mumbai – 400 004 (for short, 'suit premises') *inter alia* on the ground that the defendants have illegally sub-let the suit premises to third party and are profiteering out of it; that the defendants are not using the suit premises for a continuous period of more than six months preceding the date of filing of the Suit; that the plaintiff requires the suit premises reasonably and bonafide for his own use and occupation as contemplated by Sections 16(1)(e), 16(1)(n) and 16(1)(g) respectively of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). In paragraph-3, while decreeing the suit, the learned trial Judge observed that despite service of suit

summons on defendants No.1 to 5 they failed to appear and therefore the Court was pleased to proceed exparte against the defendants. The suit was thereafter decreed on 19.7.2014.

4. The defendants have filed an application on 24.11.2014 under Order 9 Rule 13 of C.P.C. for setting aside the exparte decree. In paragraph-6 of the application, it is stated that no proceedings were ever served on the defendants. Even the execution proceedings were not served upon the defendants. In paragraph-7 it is contended that the plaintiff in active collusion with the bailiff has submitted false report to the Court. They have also filed false affidavit for obtaining exparte decree.

5. The plaintiff opposed that application by filing reply in December, 2014. After considering the material on record the Courts below rejected the application made by the defendants. It is against these orders, the defendants have instituted the present application under Section 115 of C.P.C..

6. Mr. Shah invited my attention to the Rules 17, 19, 20 and Order V. He also relied upon Order XLVIII Rule 3 read with Form No.11 of Appendix-B. Mr. Shah also relied upon Rules 37

and 38 of Chapter III of Civil Manual. Mr. Shah relied upon following decisions :

(i) ***Baburao Soma Bhoi v. Abdul Raheman Abdul Rajjak Khatik, 2000(1) Mh.L.J. 481***, to contend that the bailiff has to affirm the report and if the affidavit is not verified, said affidavit will not carry any force in law;

(ii) ***Yeshwant Govind Shivkar (since deceased) through L.Rs. Devayani Yeshwant Shivkar and others v. Bhaskar Chavan, (since deceased) through L.Rs. Smt. Laxmibai Chavan and others, 2011(4) Mh.L.J. 868*** to contend that the substituted service by affixation of summons must be effected by affixing the summons at two places, namely, (i) in some conspicuous place in the Court-house and (ii) upon some conspicuous part of the house of the defendant in which he is last known to have resided or carried on business or personally work for gain.

7. He submitted that in the present case in paragraph-23, the learned trial Judge has recorded a finding that no copy of suit summons was affixed in the Court house. He, therefore,

submitted that the pasting is illegal. Mr. Shah submitted that basically, the suit summons was not served on the defendants as also the substituted service is invalid. He further submitted that the postman was also not examined. He, therefore, submitted that *ex parte* decree deserves to be set aside and the application requires consideration and the *ex parte* decree deserves to be set aside.

8. On the other hand Mr.Sawant supported the impugned orders. He has taken me through the bailiffs report as also the fact that said reports are duly affirmed by the bailiffs before the Head Bailiff. He has also taken me through the application made under Order 9 Rule 13 of C.P.C. and the impugned orders.

9. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. The short question is whether in the present case the defendants were served with the suit summons and whether the substituted service is defective in any manner. In order to consider this question, it is necessary to go through the reports submitted by the bailiffs. Perusal of the first report dated 15.2.2013 of the bailiff (M.S. Chavan) shows that he went

to serve five copies of the suit summons along with copies of the plaint on defendants No.1 to 5 on 15.2.2013 at about 5:00 p.m.. Defendants No.1 to 5 were not found and the door of the suit premises was found locked. He made enquiries with Shri Sudhakar Maruti Chikne residing in room No.10. He was informed that the defendants No.1 to 5 seldomly visit the suit premises. Perusal of this report shows that the bailiff has affirmed the said report before the Head Bailiff.

10. The second report dated 21.2.2013 shows that on that date at 10:30 a.m., the bailiff (M.S. Chavan) visited the suit premises. Defendants No.1 to 5 were not found and the door of the suit premises was found locked. He made enquiries with Ms.Kiran Subhash Darji, residing in room No.9. The bailiff was informed that defendants No.1 to 5 seldomly visit the suit premises and presently their whereabouts are not known to her. Said report is also duly affirmed by the bailiff before the Head Bailiff.

11. The third report dated 25.2.2013 shows that on 25.2.2013 at about 11:40 a.m. the bailiff (M.S. Chavan) visited the suit premises. Defendants No.1 to 5 were not found and the

door of the suit premises was found locked. He made enquiries with Shri Subhash Darji, residing in room No.9. He was informed that he does not know anything about defendants No.1 to 5. Said report is also affirmed before the Head Bailiff.

12. It appears that the plaintiff took out application Exhibit-9 for effecting service by pasting. The learned trial Judge directed the plaintiffs to affix suit summons at suit premises and in addition to serve defendants by R.P.A.D.. In pursuance thereof, the bailiff (P.B. Gaikwad) went to the suit premises on 22.4.2013 for effecting service on defendants No.1 to 5. He went between 11:15 a.m. and 11:30 a.m. but the defendants were not found and the door of the suit premises was found locked. He made enquiry with Ms. Kiran Subhas Darji, residing in room No.9 and Mr.Sudhakar Maruti Chikne, residing in room No.10. They informed him that the defendants seldomly visit the suit premises and are not found on any fixed time. As per order of the Court, he affixed five copies of summons and five copies of plaint on the door of the suit premises in presence of Ms.Kiran Darji and Mr.Sudhakar Chikane and obtained their signatures as witnesses. Said

report is duly affirmed before the Head Bailiff.

13. In other words, while disposing of the application Exhibit-9 the Court did not direct the plaintiff to effect the substituted service by pasting the suit summons in some conspicuous place in the Court-house. The learned trial Judge referred to the decision of this Court in the case of ***Hemchand Mahabirprasad Singhania v. Subhkaran Nandlal Baragra***, ***AIR 1967 Bom. 361*** and reproduced following portion from that judgment :

“The provisions prescribed the normal method of effecting substituted service, but it does not make it obligatory on the Court to prescribe the service only in the normal way. It has given power to the Court to order the substituted service in any other manner in which it may deem fit and proper. Court ordering copy of summons to be pasted on the premises of the defendant and another copy ordered to be sent to defendant by RPAD, the order is not illegal and is inconfirmity with the provisions of O. 5 R. 20.”

14. In paragraph-7 of the application made by the defendants under Order 9 Rule 13 of C.P.C., it is merely alleged that the plaintiffs in active collusion with bailiffs submitted false reports. The defendants have not disputed that Ms.Kiran Darji and/or Mr. Subhash Darji are residents of room Nos.9 and

Mr.Sudhakar Chikane is resident of room No.10 and did not intend that they are not their neighbours. Defendants have also not stated anything about the neighbours having any animus with them. The entire application under Order 9 Rule 13 of C.P.C. is absolutely silent as to why these neighbours will give information which will be against the interest of the defendants. It is also pertinent to note that the reports dated 15.2.2013, 21.2.2013 and 25.2.2013 were made by bailiff by name M.S. Chavan and the report of pasting dated 22.4.2013 was made by another bailiff by name P.B. Gaikwad. It is, therefore, difficult to accept the case made out by the defendants that the plaintiff in active collusion with the bailiffs submitted false report to the Court and obtained *exparte* decree.

15. Apart from service by pasting, the learned trial Judge directed the plaintiff to serve the defendants by R.P.A.D.. Suit summons sent to the defendants by R.P.A.D. also returned at Exhibits-10 to 14. Perusal of these packets show that intimation of it was left but nobody claimed R.P.A.D. packets and so it returned back. The learned trial Judge, therefore, recorded a finding that the plaintiffs have taken all legal steps for effecting

service on the defendants but the suit premises was locked. It is also relevant to note that one of the grounds invoked by the plaintiffs for eviction of the defendants is non-user of the suit premises as contemplated by Section 16(1)(n) of the Act. As far as the Appellate Court is concerned, this aspect is considered from paragraphs-11 onwards. After considering the material on record, the Appellate Court also upheld the finding recorded by the trial Court.

16. Mr. Shah relied upon Rules 17, 19, 20 of Order V of C.P.C. and submitted that these provisions are mandatory and failure to comply these provisions will result in not effecting service on the defendants. He submitted that the serving officer has to affix copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, in terms of Rule 17 of Order V of C.P.C.. He further submitted that in addition to this, the summons has to be affixed in some conspicuous place in the Court-house as per Rule 20 of Order V of C.P.C.. In the present case, the learned trial Judge has recorded a categorical finding that the suit

summons is not affixed in some conspicuous place in the Court house. He relied upon the decision of **Yeshwant Shivkar (supra)**. In paragraph-6 of that report, it was observed that the substituted service by affixation in order to be valid is required to be made by affixing the summons at two places, namely (i) in some conspicuous place in the Court-house and (ii) upon some conspicuous part of the house of the defendant in which he is last known to have resided or carried on business or personally worked for gain. The learned Single Judge thereafter observed that in the present case the suit summons was affixed at the outer door of the house of the defendant and not by affixing it at any conspicuous place in the Court-house and the service under Order V Rule 17 of C.P.C. was irregular, if not invalid. As noted earlier, the plaintiffs have filed application Exhibit-9 seeking service by pasting. The learned trial Judge directed the plaintiffs to affix the suit summons by pasting at the suit premises and in addition to serve the defendants by R.P.A.D.. The R.P.A.D. packets returned unserved vide Exhibits-10 to 14 and there is remark 'not claimed despite intimation given three times'. In addition, the plaintiff has also filed affidavit of service. In my opinion, said decision does not apply to the facts of the present

case.

17. Mr. Shah also relied upon the decision in the case of ***Baburao Bhoi (supra)***. After considering the provisions of Rules 17 and 19 of Order V as also form No.11 in First Schedule of Appendix “B” observed that the form No.11 provided in First Schedule of Appendix “B” provides form of affidavit of process server to accompany the return of the summons or notice. While returning the summons after having served as provided under Rule 17 the affidavit in form No.11 shall accompany because this affidavit requires to state whether the person has signed or refused to sign the process and in whose presence, and the signature of the process server. In that case, the bailiff made endorsement that the contents of the report are true and they are solemnly affirmed. It was not known who has verified that. That means, whether the bailiff has verified or somebody has verified it and unless and until it was made clear that this affidavit of bailiff which will not carry any force in law. Above all, the name of the bailiff who has sworn was not disclosed anywhere. In my opinion, said decision has no application to the facts of the present case because two different bailiffs have

affirmed the affidavits before the Head Bailiff and the affidavit also discloses the name of the person who affirmed the affidavit. In view thereof, the decision in the case of **Baburao Bhoi** (*supra*) does not advance the case of the defendants.

18. Thus, after appreciating the evidence on record, the Courts below have concurrently held that the service on the defendants by way of substituted service was valid service. The defendants were not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to evidence on record. The defendants were not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

19. At this stage, Mr.Shah orally applies for continuation of the statement made on behalf of the plaintiff and as recorded in the order dated 29.4.2016 for a period of eight weeks from today. He states that the defendants and all adult family members

residing with them are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

20. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying operation of this order for a period of eight weeks from today subject to the applicants and all adult members residing with them in the suit premises giving usual undertaking to this Court within two weeks from today incorporating therein: (i) that they are in actual possession of the suit premises and nobody else is in possession; (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises; (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises; (iv) that they will pay the arrears of rent, if any to the plaintiff; and (v) that in case the applicants are unable to obtain suitable orders within twelve weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

21. In view thereof, notwithstanding dismissal of Civil

Revision Application, this order shall remain stayed for a period of eight weeks from today, subject to the applicants filing undertaking in the aforesaid terms within two weeks from today with copy in advance to the other side. In case the applicants do not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)