

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 311 OF 2016

Smt. Prabhavati Jagdish Patil

..Petitioner.

Vs

Smt. Bhimabai Shankar Thakur,
through power of attorney
holder Shri Pundlik Shankar
Thakur

.. Respondent

Mr. Ashok B. Tajane, Advocate for Petitioner.

Mr. Anil S. Kalekar i/b Jaydeep Deo, Advocate for Respondent.

CORAM : R.G.KETKAR,J.

DATE : 07/12/2016

PC:

1. Heard Mr. Ashok Tajane, learned counsel for the petitioner and Mr. Anil Kalekar, learned counsel for the respondent at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 15.2.2016 passed by the learned 3rd Jt. Civil Judge, Senior Division, Thane in Misc. Application No. 374 of 2009. By that order, the learned trial Judge allowed the application made by the respondent, hereinafter referred to as 'defendant', for setting aside ex-parte decree dated 8.4.2008 passed by the learned trial Judge in Regular Civil Suit No.524 of 2007.
3. In support of this Application, Mr. Tajane submitted that the plaintiff has instituted the suit against the defendant whose address is as under:

Smt. Bhimabai Shankar Thakur
residing at Magor Pada, (Owala),
Post Kasarwadavali,
G.B.Road, Taq. And Dist Thane.

He submitted that bailiff attempted to serve the defendant on 7.9.2007, 12.12.2007 and 13.12.2007. On all these dates, the summons could not be served on the defendant. As the defendant was avoiding the service, the plaintiff took out application-Exhibit-11 for effecting substituted service under Order V, Rule 20 of C.P.C. on the defendant. By order dated 30.1.2008, the learned trial Judge, after perusing Bailiff's report, issued summons under Order V, Rule 20 by way of publication in daily newspaper at the cost of the plaintiff. In pursuance of that order, public notice was issued in daily Kokan Sakal, Thane on 1.4.2008. He further submitted that apart from this paper publication, on 4.4.2008 bailiff visited the premises of the defendant as shown in cause-title of the plaint. At that time, Kailash Pundlik Thakur was present. In his presence summons and plaint was affixed. Signature of Kailash Thakur was also obtained on the copy of summons. Thus, the defendant was duly served through her grand son Kailash Thakur. He submitted that the defendant is residing at the address given in the cause title of the suit. That is also evident from the agreement dated 6.12.2012 executed by the defendant along with others wherein address of the defendant is Mogar Pada, Taluka and District Thane. Thus, the service effected on the defendant was valid.

The learned trial Judge was, therefore, not justified in holding that the defendant was not served with the suit summons. He submitted that the learned trial Judge committed serious error in setting aside the decree on the ground that the defendant was not duly served. Mr. Tajane submitted that even otherwise, the learned trial Judge was not justified in allowing the application under Order IX Rule 13 as it was not filed within a period of limitation. On the other hand, Mr. Kalekar supported the impugned order.

4. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, on 7.9.2007 the bailiff tried to serve the suit summons on the defendant. In the report, it is stated that the premises of the defendant was found locked. Upon making inquiries from neighbours they were unable to give any information. Summons was, therefore, returned unserved. On 12.12.2007 the summons could not be served for want of time. On 13.12.2007 again summons could not be served for want of time. Perusal of the reports dated 7.12.2007, 12th and 13th December 2007 does not indicate that the defendant was avoiding service of suit of summons. It is in that context material to note that the plaintiff filed application for effecting service under Order V, Rule 20. On 31.1.2008 the learned trial Judge passed the following order.

“Perused bailiff report . Issue sum. u/o 5x20 (1) & (1a) by way of publication in daily newspaper at the cost of applicant on P.F..”

Perusal of the order extracted herein above, shows that the learned trial Judge did not record any satisfaction as to whether there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service as contemplate by Order V, Rule 20 of C.P.C.. In other words, the learned trial Judge mechanically passed order permitting the plaintiff to serve the defendant by way of paper publication.

5. In pursuance thereof, the plaintiff issued public notice in daily Kokan Sakala, Thane. In that context, it is interesting to refer to deposition of the plaintiff's witness Ravindra J. Patil. In the cross examination he admitted that two sons of the defenant Vilas and Pundlik are residing separately. The defendant is residing in house by name “Arun Nivas”. Pundlik is residing in house by name “Tara Niwas”. He further stated that he is unable to state names of persons from Mogar Pada who are taking newspaper, namely, Kokan Sakal, Thane. He does not know whether the newspaper is being distributed at Mogar Pada. The learned trial Judge observed that there is no evidence on record to prove that summons was published in the local newspaper where the defendant is residing at the relevant time.

6. In paragraph 11, the learned trial Judge referred to service effected on grand son Kailash as also reports of bailiff at Exhibits

45 and 46 and evidence of the defendant. After considering the material on record as also ration card at Exhibits 48 and 49, the learned trial Judge held that the suit summons was not duly served on the defendant at the address mentioned in the cause title of the suit. The said finding is based upon appreciation of evidence on record.

7. Mr. Tajane submitted that the application is not filed within time. I do not find any merit in this submission. As noted earlier, the learned trial Judge has held that the suit summons was not served on the defendant. In view thereof, as per Article 123 of the Limitation Act, application is to be made within 30 days from acquiring knowledge of decree. In the present case, the learned trial Judge has observed in paragraph 12 that the defendant came to know about passing of the decree in the last week of May, 2009 and, therefore, the application is within limitation. Plaintiff was not in a position to demonstrate that the findings recorded by the Court below are based on no evidence or that they are contrary to evidence on record. Merely because on the basis of evidence on record other view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. No case for is made out for interfering with the impugned order. Hence, Application fails and the same is dismissed.

(R.G.KETKAR, J.)