

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 293 OF 2016

UDHAV BALIRAM ADAWALE
VERSUS
BABRUWAN PAPANARSH GAIKWAD

Advocate for Petitioner : Shri A.H. Kasliwal.
Advocate for Respondent : Shri A.N. Sabnis
h/f Shri V.D. Gunale.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 25th July, 2017

PER COURT :

1. The petitioner is aggrieved by the order dated 28th October, 2015, by which, the Court below has concluded in application No. 01/2015, that the applicant original defendant was not properly served with the Court notice and as such the judgment in R.C.S. No. 25/2013, delivered on 27th June, 2014, is recalled.

2. I have considered the strenuous submissions of the litigating sides and with their assistance have gone through the petition paper book and the record available.

3. There is no dispute that the judgment dated 27/06/2014, in Special Civil Suit No. 25/2013, was an ex-parte judgment since the Court has observed that the summons issued by Register Post AD of the post and telegraph department at exhibit 9 was returned with the remark "*Unclaimed intimation posted.*" Based on the same the Trial Court held that the defendant is properly served and does not desire to participate in the proceedings. Consequentially, by the said judgment an amount of Rs. 6,74,760/- was directed to be paid by the defendant to the plaintiff within one month.

4. The original defendant, therefore, moved a miscellaneous application before the Court below and prayed for vacating of ex-parte judgment under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure.

5. Shri Kasliwal, learned advocate has strenuously contended that, once the postal remark indicates as "intimation given, unclaimed, not-claimed", this necessarily amounts to proper service on the addressee, since it indicates that the

addressee was informed by the Postal Department and he had declined to accept the envelope and has not claimed it. He relies upon the judgment of the Hon'ble Apex Court in the matter of K. Bhaskaran Versus Sankaran Vaidhyan Balan and another [AIR 1999 Supreme Court 3762 (1)]. He also relies upon the judgment of this Court in the matter of Krishna Ramchandra Jadhav @ Yadav and others Versus Smt. Shankari B. Ajimal [2005 (4) Mh.L.J. 577]. and David K. N. Versus S.R. Chaubey (Chaturvedi) [2003 (4) BCR 612].

6. Learned advocate for the respondent relies upon the judgment of this Court dated 14/10/2011, in the matter of The New India Assurance Co. Ltd. Versus Smt. Nasibunnisa Mohd. Israr Khan and others [Civil Application No. 1979/2011, in First Appeal (Stamp) No. 13185/2011].

7. The issue before this Court is as regards the service of Court notice and the observation made by the Trial Court in the judgment sought to be recalled that the remark 'unclaimed' would amount to proper service.

8. The original defendant led evidence before the Trial Court in support of the miscellaneous application and stated that though his address is correctly shown on the envelope, by which the Court notice was sought to be served on him, the same was not served since he was not available. In the cross-examination, he has maintained the said contention.

9. The submission of the petitioner is that in the matters of Krishna Ramchandra Jadhav @ Yadav (Supra), pertaining to notice served by the landlord on the tenant and in the matter of David K. N. (Supra), where the statutory notice was to be served under the Bombay Rents, Hotel and Lodging House Rent Control Act, 1947, it has been concluded that such statutory notice is presumed to be served under Section 27 of the General Clause Act, since the best that a landlord can do is to send the notice on the correct address and thereafter, it is not within his control to ensure accurate service on the addressee. Even in the case of K. Bhaskaran (Supra), the issue of statutory notice under Section 138 of the Negotiable Instruments Act was considered and the Hon'ble Apex Court concluded that when a

notice is returned by the sendee (addressee) as unclaimed, such date would be the commencement date in reckoning the period of 15 days, contemplated in clause 'D' to the proviso to Section 138. Such presumption/reckoning would be without prejudice to the rights of the addressee/sendee to show that he had no knowledge that the notice was brought to his address and was not served upon him.

10. However, in the judgment delivered by this Court (Coram : Abhay S. Oka, J.) in The New India Assurance Co. Ltd. case (Supra), the issue is practically identical to the issue involved in this case, where notice issued by the Court was alleged to be served upon the defendant. This Court while considering the said position, has considered the law laid down by the Hon'ble Apex Court in M/s. Madan and Company Versus Wazir Jaiwir Chand (AIR 1989 Supreme Court 630), and dealt with the issue of service of Court notice, either through the bailiff or through the postal department. In order to ensure that the service is proper and complete, in so far as Court proceedings are concerned, this Court concluded that it would be unsafe to

hold that the remark “intimation posted or unclaimed” would significantly indicate that the notice of the Court was actually served upon the defendants/respondents. It is further concluded that in such a situation, there is no scope to invoke the rebuttable presumption that the notice was never served and hence the Court must ensure that the notice is properly served.

11. I find it apposite to reproduce the observations of this Court in paragraph Nos. 10 to 16 here under :

“10. It will be necessary at this stage to make a reference to the decision of the Apex Court in the case of **M/s. Madan and Company Vs. Wazir Jaivir Chand (AIR 1989 Supreme Court 630)**. It will be necessary to make a reference to what is held by the Apex Court in paragraph No. 6 of the decision, which reads thus :

“6. We are of opinion that the conclusion arrived at by the Courts below is correct and should be upheld. It is true that the proviso to Cl. (i) of S. 11 (1) and the proviso to S 12 (3) are intended for the protection of the tenant. Nevertheless it will be

easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through posts. All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgment due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under S.27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the

general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a Court under O. V of the C.P.C. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret the provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, an addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found", "not in station",

“addressee has left” and so on. It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee’s own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone or to deliver them to some other person authorised by him. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the words “served” as “sent by post”, correctly and properly addressed to the tenant, and the word “receipt” as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a

landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant.”

(underline supplied)

11. It will be material to note that in the aforesaid decision, the Apex Court has observed that the Indian Post Office Rules do not prescribe any detailed procedure regarding delivery of the registered letters where the postman is unable to contact the addressee or a person who is authorized to receive the letter. The Apex Court noted the general practice that after making an attempt to deliver the letter on one or two days, the Postman returns the letter to the sender. The Apex Court held that the responsibility of a postman cannot be equated to that of a process server (Court bailiff) entrusted with the responsibility of serving the summons of a Court under Order V of the Code.

12. As far as the procedure for service of summons is concerned, Rule 16 of Order V of the said Code is relevant which reads thus :

“16. Person served to sign acknowledgment.-

Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other persons on his behalf, he shall

required the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.”

13. Rule 18 requires the serving officer to submit a return in the form of endorsement stating therein the particulars of service. Rule 17 which deals with service by affixing is already dealt with earlier. If the summons is served by affixing as per the Rule 17 and if the return is not verified on affidavit by serving officer, the Court is under an obligation to examine the serving officer on oath. If the return is verified on affidavit by the serving officer, the examination of the serving officer is not mandatory, but it is at the discretion of the Court. Only after examination as aforesaid and after making such further inquiry in the matter as it thinks fit, the Court can either declare that summons has been duly served or may order fresh service. The officer entrusted with the responsibility of service of summons is under an obligation to file a return contemplated by Rule 18 of Order V which is not the requirement of the Rules of the Postal department. If an officer of the Court makes an incorrect or false statement in the return, the Court can initiate action against him. That is why the Apex Court has made a distinction between the responsibilities of a process server

and a postman. As far as process server is concerned, he is always an officer of the Court (except in the city of Bombay where service is effected through the bailiffs attached to the office of the Sheriff). He is under an obligation to make a return making endorsement as required by Rule 18. In case defendant refuses to accept or declines to accept the summons, he is bound to file a return verified by an affidavit. If he does not verify the return on the affidavit, the Rules mandate that the Court shall examine him on oath.

14. As pointed out earlier, when summons or notice is issued by Registered Post A.D. By invoking Rule 9 of Order V, there is no specific provision either in the said Code or in the Appellate Side Rules which deals with the contingency where the postal article containing the summons or notice is returned with remark "intimation posted" and "unclaimed" or "not claimed". The Sub-Rule (5) of the Rule 9 of Order V which provides that in certain cases the Court shall declare that the summons has been duly served significantly does not cover a case where the summons or notice issued by Registered Post A.D. is returned with remark "intimation posted" and "unclaimed" or "not claimed". Now the question is whether in such a case the presumption under Section 27 of the General Clauses Act or Section 114 of the Evidence

Act can be invoked. Such presumption is held to be a rebuttable presumption. Essentially a presumption is a rule of evidence and the question of invoking presumption arises only after parties adduce evidence. The presumption under both the sections is a rebuttable presumption. The presumption is a rule of evidence which can be applied only after the parties adduce evidence inasmuch as only at that stage, there is an opportunity to rebut the presumption. When it comes to service of summons or notice as required by the said Code, at the stage of service of summons or notice, the Court cannot invoke the presumption either under Section 27 of the General Clauses Act or under Section 114 of the Evidence Act and hold that the service effected in such manner is a good service. The decisions which hold such service as “good service” are rendered in relation to the service of statutory notice by the landlord to the tenant or notices exchanged between the parties. In these cases, such presumption was invoked after the parties adduced evidence. Therefore, when summons or notice of the Court issued by Registered Post A.D. is returned with a remark “intimation posted” and “not claimed” or “unclaimed”, the same cannot be accepted as a good service. The reason is that at that stage there is no scope to invoke the rebuttable presumption. As pointed out earlier, apart from the fact that the

presumption as aforesaid is a rule of evidence, even assuming that there is a proper service of an intimation, the postal authorities do not keep the postal articles in the post office for more than few days and the same are returned to the sender. In case of the Defendant who is away for more than few days, even if he visits the post office for collecting the postal article, he will not get the postal article if it is already returned. It is pertinent to note that while substituting the Rule 9 of Order V of the said Code, though the legislature has expressly provided that if a postal article containing the summons is received back with an endorsement of refusal, the same shall be treated as good service, there is no such provision made in a case where summons or notice issued by Registered Post A.D. is returned with a remark "intimation posted" and "not claimed" or "unclaimed". Therefore, in such a case, the service of summons or Court notice cannot be treated as a good service. The settled law of invoking presumption of service of notice by landlord to the tenant will not apply to service of summons or notice.

15. There is one more aspect of the matter. Noticing the large filing of matters in this Court and the shortage of hands in the office, this Court started practice of directing the Appellant or the Applicant to serve private notice in addition to the service through Court. Such

orders are passed essentially to facilitate early service of notice as it is a matter of common experience that due to large number of matters in which notices are issued by this Court, there is a delay in dispatching the notices. Such private service is not contemplated by either the said Code or the Appellate Side Rules. Rule 9 A of Order V will not apply in such a case in as much as the said Rule contemplates handing over the summons of the Court to the Plaintiff for effecting service. The said Rule reads thus :

“9-A. Summons given to the plaintiff for service.-

(1) The Court may, in addition to the service of summons under rule, on the application of the plaintiff for the issue of a summons for the appearance of the defendant, permit such plaintiff to effect service of such summons on such defendant and shall, in such a case, deliver the summons to such plaintiff for service.

(2) The service of such summons shall be effected by or on behalf of such plaintiff by delivering or tendering to the defendant personally a copy thereof signed by the Judge or such officer of the Court as he may appoint in this behalf and

sealed with the seal of the Court or by such mode of service as is referred to in sub-rule (3) of Rule 9.

(3) The provisions of Rules 16 and 18 shall apply to a summons personally served under this rule as if the person effecting service were a serving officer.

(4) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons cannot to be served by the Court in the same manner as a summons to a defendant.]”

16. The Sub-Rule (4) of Rule 9A provides that refusal of service of summons cannot be accepted as good service and the summons is required to be reissued in such a case. Under the said Rule 9A, If service is attempted to be effected by registered post A.D, Sub-Rule 5 of Rule 9 is not applicable and in case of refusal it is not mandatory that service should be accepted as a good service. A provision like Sub-Rule (5) of Rule 9 has not been incorporated in Rule 9-A. When service is privately effected on the basis of the order of the Court permitting private service in addition to service through Court, it is

always a discretion of the Court to accept whether service of private notice should be treated as a good service or not. While exercising the discretion, no doubt the Court will be guided by the provisions of Order V of the said Code. But it is not mandatory in every case that service of notice effected privately should be always treated as a good service. The Court will have to consider various factors before accepting service effected privately as a good service.”

[Emphasis supplied]

12. Though Shri Kasliwal, learned advocate strenuously submits that even with regard to a service of notice of Court proceedings, the remark “intimation given” or “unclaimed” should be said to be proper service. His submissions find an answer in the judgment delivered by this Court in the New India Assurance company case (Supra).

13. The Trial Court in this case, while dealing with the Miscellaneous application, has concluded in paragraph No. 15, that the envelope was returned with the remark unclaimed. It would not indicate whether the said litigant was available at his

residence or whether any responsible person competent to accept the notice could have been intimated about the said envelope. The Trial Court has relied upon the roznama dated 15/06/2013 and on perusal of the summons and the envelope at exhibit 9, concluded that the observation of the Court that the matter should be decided ex-parte would not be a just observation as the remark does not indicate that the defendant declined to accept the notice.

14. The issue involved is as regards eviction of the defendants. In the above backdrop, keeping in view the law laid down by this Court, specifically with regard to service of Court notices which aspect is not a subject matter in any of the judgments cited by the petitioner, I am of the view that the Trial Court has not arrived at such a conclusion that could be termed as being perverse or erroneous. If the intention of law is to ensure that the ends of justice are to be met and when the issue is not as regards service of statutory notice, either under the Rent Control Act or under the Negotiable Instruments Act and when it pertains to the service of Court summons, where a

remark of “unclaimed” by the post department could cause a world of a difference to the litigating sides, the Courts ought to be more cautious in concluding that the service is complete and the matter should be proceed ex-parte.

15. In the light of the above view and the law as is laid down, I do not find that the impugned judgment would call for any interference. This petition being devoid of merits, is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)