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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 487 OF 2017
WITH
CIVIL APPLICATION NO. 618 OF 2017

Suresh Boble	...Appellant
<i>Versus</i>	
Sushila Mathuradas Thakkar & Ors	...Respondents

Mr GS Godbole, i/b VT Dubey, for the Appellant.
Mr AM Rajabally, for the Respondent.

CORAM: G.S. PATEL, J
DATED: 17th July 2017

PC:-

1. I am not prepared to admit this Appeal. It appears to me to be a classic instance of a defendant attempting to leverage the delays in our legal system only to defeat a legitimate claim by a plaintiff.

2. The 1st Defendant filed Notice of Motion No. 1118 of 2013 in SC Suit No. 4859 of 2004. That Suit was decreed *ex parte* on 24th October 2005. In his Notice of Motion, filed eight years later, well after the Plaintiffs had put the decree into execution, the 1st Defendant sought that the delay in filing the application be condoned and that the *ex parte* decree be set aside.

3. In the ordinary course where such applications are filed with minimal or no delay, the applicants are often afforded a final opportunity. even then, it is always an indulgence. but when the delay is considerably more, and especially when this quite extraordinary, as it is in this case, then these indulgences are not granted for the asking.

4. The 1st Defendant, Suresh Boble, said he was a resident of Room No. 10, Madhuradas Thakkar Chawl, Premier Road, Kurla (West), Mumbai 400 070. He stayed and stays their with his family. At first he was the tenant. Later his wife became the tenant. He claimed that in July 2012 his wife began repairs to the roof. According to Boble, one of the Plaintiffs complained to the Municipal Corporation of Greater Mumbai which issued a notice under Section 354-A of the MCGM Act. Boble's wife filed Suit No. 1974 of 2012 and obtained an order of *status quo*. It was then that the 3rd Plaintiff filed Chamber Summons No. 866 of 2012 and it was then that on 12th March 2013 Boble learnt of the present Suit. He claims that the summons was never served on him. No intimation, according to him, was left at his residence. The postman, he says, never came to his residence. He had knowledge of the decree when the Plaintiffs served Execution Application No. 242 of 2006 and he filed the present Notice of Motion very shortly thereafter.

5. The Plaintiffs pointed out that the Suit was for a declaration that Boble and the 2nd Defendant, one DB Shetty, were both trespassers in respect of Room No. 10. The 3rd Plaintiff went personally with the bailiff to these premises. A true copy of the plaint and the writ of summons was sought to be served on Sujata,

the 1st Defendant's daughter, who was present at the time. She said the 1st Defendant had gone out. She did not know when he would return. On 16th November 2004 at 11.20 a.m. the bailiff served the 2nd Defendant with the plaint and the original writ of summons. He then went to the 1st Defendant's house and served these on the 1st Defendant's elder son. However, the son refused to sign any acknowledgement. The reason is that all took it that service on the daughter was irregular.

6. The bailiff filed a report on 23rd December 2004. The Court directed service of fresh writ of summons through the Registrar by registered post. This was done on 11th February 2005 by RL No. 2569. The envelope was returned to the Registrar on 26th February 2005 with a remark "not claimed".

7. Mr Godbole submits that the postman ought to have been examined. He submits that the learned Judge was in error in accepting the statement that the intimation was duly posted.

8. It is not possible to accept the Appellant's submissions. Paragraph 24 of the impugned order reads:

"24. As regarding the summons have been duly served or not in this respect the Order V is in respect of the summons under the head as issue and service of summons. The service of the summons is concerned have been provided in Rule 9, which provides the service of the summons can be effected for delivering and transmitting the copy by registered post acknowledgement due, address to the Defendant or his agent. As such in this

backdrop it appears that the earlier notice was issued through Bailiff and the same was served Ms Sujata, the daughter of the Defendant no. 1 as Defendant was not present and also obtained the acknowledgement on the original writ of summons. Hence, the Bailiff submitted the report but the Defendant remained absent as per the Bombay amendment first service to the adult male member of the Defendant can be effect as per the Rule 15 as same have nto treated as a proper service by the Court hence again the summons through registered post was served through office. From the bare perusal of Ex.A which contains the endorsement as "unclaimed" and returned to the sender i.e. Board Department of Bombay City Civil and Sessions Court. As it is pointed out that there is no dispute as regarding the address of the Defendant No. 1."

9. It is thus clear that there was absolutely no dispute about the address of the 1st Defendant or that it was to his address that the intimation was sent and that it was from this address that the packets were returned as "unclaimed". It is settled law that when a packet is returned "unclaimed (as opposed to "unserved", "not known"), this is good service and several Courts including various Benches of our own Court have so held.¹ This is also true in the case of the Companies Act where service of a statutory notice is

1 *Datta S Nadkarni v Salvador Fernandes & Ors*, 2016 All MR (Cri) 3002; *Dayanand L Naik & Ors v Vasco Urban Co-Operative Credit Society Ltd*, 2016 (4) All MR 860; *Jenjon Retail and Services Pvt Ltd v Lavasa Corporation Ltd*, Arbitration Petition No. 1422 of 2015, decided on 22nd June 2016, per RD Dhanuka J; *Harcharan Singh v Smt Shivrani & Ors*, [1981] 2 SCR 962; *M/s Madan & Co. v Wazir Jaivir Chand*, AIR 1989 SC 630; *Shri David KN v Shri SR Chaubey (Chaturvedi)*, 2003 (4) Bom CR 612; *Deelip Apte v Nilesh P Salgaonkar & Anr*, 2006 (6) Bom CR 653; *Indira Rani Ugrasen v Vijaya B Desai & Ors*, Civil Revision Application No. 139 of 2007, decided on 7th August 2015, per MS Sonak J, which contains a very instructive review of the case law.

compulsory.² A recent decision by a learned single Judge in *Ganpatraj K Sanghvi v Vishal Udyog & Ors*³ is of interest, because it seems that the attempt there was to leave the packet at an address *never used by the defendant*. Thus, if the address *was* that of the defendant, the service by leaving intimation there would be good.

10. The only ground taken is that the 1st Defendant had no knowledge of the Suit and resultantly the decree that came to be passed in it. On facts this does not appear to be correct. Service of writ of summons was effected and the 1st Defendant certainly had knowledge of the filing of the present Suit.

11. There is only the bare statement of the 1st Defendant “that the postman never came to his house”. This is not a submission that commends itself. The notice was sent by registered post. The endorsement unclaimed is on record and there is, as I have noted, no question of any error or inaccuracy as regards the address. If the Plaintiff is to be believed and his bare words is to be accepted, then, equally, there is no reason why the 3rd Plaintiff should not be believed when she says that the personal service was effected on the 1st Defendant’s son and he refused to sign or acknowledge service. In either event, the 1st Defendant had knowledge of the proceedings.

2 *In Re: Ispat Industries Ltd*, 2005 (2) Bom CR 94; *Jenjon Retail and Services Pvt Ltd v Lavasa Corporation Ltd*, *supra*.

3 Notice of Motion No. 1683 of 2015 in Summary Suit No. 454 of 2012, decided on 23rd June 2016.

12. There is no reason to consider the correctness of the findings regarding the maintainability of the application. This is because even otherwise, in my view, there is no substance to the Appeal.

13. I do not think any ground has been made out that calls for interference with the impugned order.

14. The Appeal is dismissed. There will no order as to costs.

15. The Civil Application does not survive and is disposed of as infructuous.

(G. S. PATEL, J)