

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4217 OF 2018

Dr. Madhav Vishwanath Dawalbhakta (Decd)
through LRs. Dr. Nitin M. Dawalbhakta & Ors. ...Petitioners

Versus

M/s. Bendale Brothers ...Respondent

Mr. Nikhil Sakhardande i/b. Mr. Pralhad D. Paranjape a/w. Shubhra
Paranjape, Advocate for the petitioners.

Mr. Ashok B. Tajane, Advocate for the respondent.

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **7th August, 2018.**

JUDGMENT:

Rule. Rule made returnable forthwith. By consent of both the parties, the Writ Petition is heard finally at the stage of admission.

2. This Writ Petition is directed against the order dated 13th November, 2017 passed by the District Judge-7, Pune for setting aside the ex-parte order for want of proper service on the defendant in the suit. For the sake of convenience, in order to avoid confusion, the parties are referred to by their original status.

3. The petitioners are the original plaintiffs, who have filed the suit for specific performance against the respondent/defendant on the basis of the Agreement dated 4th April, 1996. In Special Civil Suit No.

1491 of 2009, the Court issued summons on the defendant. However, the defendant did not appear though summons were duly served. The trial Court decreed the suit *ex parte* on 8th November, 2011 after considering the affidavit-in-chief of the plaintiff and the documents on record. Nearly two years after, the respondent filed an Application for setting aside the said *ex-parte* order along with the Application for condonation of delay. The delay was condoned by the trial Court and the Application was numbered as M.A. 684 of 2013 which was contested by the plaintiffs and the trial Court accepted the case of the plaintiff that the summons though was served on the defendant, he failed to appear and as it was good service, the Application was rejected by order dated 16th February, 2015. Appeal No. 340 of 2015 was preferred by the respondent/defendant and after hearing both the sides, the Appellate Court allowed the said Appeal with cost and quashed and set aside the order of Small Causes Court, Pune and directed the respondent to file the written statement. The plaintiffs have challenged the said order in Appeal.

4. The learned counsel for the petitioners has submitted that the order of the trial Court is well reasoned in which the trial Court has held that the defendant was duly served by the summons issued by

the Court, however, he failed to appear before the Court and therefore, the Application to set aside the ex parte decree was rejected. The learned counsel pointed out the affidavit of the case and submitted that the Court bailiff has served the summons twice on the address given by the defendant himself. He submitted that the learned District Judge gave wrong finding on fact and as well as on law. The learned Judge has stated that the bailiff has reported that the respondent/defendant was not residing on the given address which is factually wrong, as the bailiff remark on both the occasion was "he had left the premises". He further pointed out that the learned District Judge gave wrong reasoning that the plaintiffs did not prove that the newspaper was affixed like summons under Order 5 Rule 20 of the Code of Civil Procedure on the conspicuous place of the last known address, it cannot be construed to be a valid service. The learned counsel submitted that this erroneous reasoning and the order of the learned District Judge should go and the order passed by the learned trial Judge is to be restored. He has submitted that so far as service of summons is concerned, there was satisfactory compliance of Order 5 Rule 20 of the Code of Civil Procedure. The learned counsel has further submitted that the order passing ex-parte decree not necessarily to be set aside, as a routine. When after

considering the evidence of the plaintiffs and the documents on record, the judgment is delivered, then it is as good as a judgment on merits. In support of his submissions, the learned counsel relied on the following judgments of the Hon'ble Supreme Court:

- (i) **International Woollen Mills vs. Standard Wool (U.K.) Ltd., reported in (2001) 5 SCC 265.**
- (ii) **On the point of substitute service under Rule 20, Commissioner of Income-tax, Punjab vs. Daulat Ram Khanna, reported in AIR 1967 SC 1552.**
- (iii) **Neerja Realtors Pvt. Ltd. vs. Janglu (Dead) through LRs., reported in (2018) 2 SCC 649.**

5. The learned counsel for the respondent, while supporting the order passed by the learned District Judge, has submitted that the respondent/defendant was not staying at the address of Pushkar Apartment or Pushkar Housing Society as shown in the summons, which was issued on 3rd December, 2010 but he was staying at the present address, i.e., 25/26 A Building, Patil Heritage, Bhosale Nagar and therefore, he was never served with summons and therefore, he could not attend the said Civil Suit. He had knowledge of the exparte decree when some mediation talks were going on between him and plaintiffs in the criminal Revision Application filed by the defendant

before Jalgaon and he, therefore, immediately filed the Application for setting aside the ex-parte decree. The delay was condoned and the said exparte decree was set aside by the District Judge. He has submitted that the defendant never avoided to accept the service and the plaintiffs did not attempt to obtain the true and correct address of the defendant. He submitted that the plaintiffs have failed to show compliance of Order 5 Rule 20 of the Code of Civil Procedure. The learned counsel has submitted that it is binding on the Court to record its satisfaction to believe that there is avoidance of service for some reasons, the summons was not served; If it is not, then the trial Court cannot pass the order of substituted service. In this case, the order of substituted service was casually passed, which should not have been. In support of his submission, the learned counsel relied on the following decisions:

- (i) Judgment of Bombay High Court in the case of **Lal Mohammed Mestry vs. Abdul Sakur Abdul Gafoor, reported in ALL MR 2002 4 420.**
- (ii) Judgment of Bombay High Court in the case of **Shashikant s/o. Eknath Choudhari vs. Maharashtra State Electricity Distribution Co. Ltd., reported in Lex(Bom) 2015 1 319.**

- (iii) Judgment of Bombay High Court Bench at Nagpur in the case of **Ramesh Jagannath Ingole vs. Shakunbai Ganesh Ingole**, reported in 2015(4) Mh. L.J. 787.

6. In the present suit, the respondent/defendant has made an Application for setting aside the exparte order on the ground that there is no good service. Under Rule 13, if the Court is satisfied that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make the order of setting aside the decree. Thus, the satisfaction of the Court should be on the point that the summons was not duly served. For the purpose of satisfaction, one needs to see the proper compliance of service of summons under Order 5 Rule 17 and Rule 20 of the Code of Civil Procedure.

7. When a suit is filed by the plaintiff, respondent should be served. Various modes of service including through bailiff are laid down in Order 5. Rule 17 of Order 5 states the procedure of service when the defendant refused to accept service or cannot be found. Under Rule 19, the Court may call upon the serving officer, i.e., bailiff to lead evidence on the point of service. In the case of **Shashikant**

s/o. Eknath Choudhari (*supra*), the learned Single Judge of this Court has held that if it is necessary, then the trial Court to examine the serving officer on oath regarding the service of summons on the defendant. That is one method of proving the service.

8. In the case of **Ramesh Jagannath Ingole** (*supra*), the Single Judge has held that it is necessary for the trial Court to record the satisfaction about the steps taken by the plaintiff for issuance of service of Court summons before granting permission for service under Order 5 Rule 20 of CPC and it is not to be granted in mechanical manner.

9. Order 5 Rule 20 speaks about “substituted service”

20. Substituted services

(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house(if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

[(1A) Where the Court acting under sub-rule(1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the

locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

(2) Effect of substituted service-Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed -Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

[20A. Service of summons by post: Repealed by the Code of Civil Procedure (Amendment) Act, w.e.f. 1st. February, 1977]

10. Thus, the court should be satisfied that either the defendant is deliberately avoiding the service, so the order of substituted service can be passed or if the Court is satisfied that for any other reason, the summons cannot be served in ordinary way, then the order of substituted service can be granted.

11. What is substituted service?

- (i) By affixing the copy in some conspicuous place in Court-house upon some conspicuous part of the house(if any) in which the defendant is known to have last resided or carried on business;
- (ii) personally worked for gain;
- (iii) or in such other manner as the Court thinks fit.

12. Thus, in sub-rule (i) and (ii), the substituted service means fixing the copies of the summons on different place as mentioned in the Rule. However, the sub-rule(iii) gives further option that the summons can be served in such other manner as the Court thinks fit. Thus, the manner which the Court opts for should be akin to the earlier mode of service, which is mentioned in the Rule. For this, the Court can take into account the modern ways of service which are available due to internet connection. It can be served also by courier or by email or by whatsapp etc. The Court should be satisfied about such service. Rule 1A gives a specific option to the Court to serve the defendant by an advertisement or notice in the newspaper which should be daily newspaper circulated in the locality whether it was known to have actually or voluntarily residing or carrying out business. The phrase used in Rule 1A “where the Court acting under sub-rule(1)” contemplates when the Court passes the order of service by publication, in fact the court is using the powers by choosing a mode which is “such other manner as the Court thinks fit”, as mentioned in sub-rule (1) of Rule 20 Order 5. The finding given by the learned trial Court Judge in the present case that after publication in the newspaper, the copy of the newspaper is to be

affixed at the conspicuous place or at the residence, is incorrect. No such pasting of the newspaper is required.

13. The interpretation of Section 1A by the learned counsel Mr. Sakhardande that it is a continuation of Rule 20(1) and while passing the order of service by publication in the newspaper, the Court thinks that it is the other manner which is mentioned in last clause of Rule 1, is found correct, as it is also supported in the case of **Commissioner of Income-tax, Punjab** (*supra*), wherein the Hon'ble Supreme Court while interpreting Order 5 Rule 20(1) has held as follows:

“It seems to us that the last ten words in sub-rule (1) of rule 20, do confer a discretion on the Court to adopt any other manner of service. The sub-rule prescribes one manner which the Court may follow and this manner consists of two acts; (1) affixing a copy of the summons in the court-house, and (2) affixing it in some conspicuous part of the residential house or the business premises of the defendant. If the High Court were right we would expect that the word "also" would be repeated and inserted between the word "or" and "in" in the last ten words. The alternative manner which the Court

decides to adopt for serving must of course be such as gives notice to the person to be served.”

14. On the point of setting aside of ex-parte decree, the Hon'ble Supreme Court, in the case of **International Woollen Mills** (*supra*), has held that it is possible even though the defendant has not entered evidence, the plaintiff may prove its case through oral and documentary evidence. If after consideration of oral and/or documentary evidence, an ex-parte decree is passed, it would be a decree on merits.

15. In the case of **Lal Mohammed Mestry** (*supra*), the learned Single Judge of this Court has held that substituted service cannot be taken as idle formality by the trial Court and the service of summons under Order 5 Rule 20 cannot be allowed as matter of course or in casual manner and in absence of service of summons, if the suit is decided ex-parte and if it is brought to the notice of the Court passing decree, then it would be duty of the Court to exercise jurisdiction under Order 9 Rule 13 of the Code of Civil Procedure.

16. Thus, the Court can also go for service of publication and once it is published, then sub-rule (2) of Rule 20 will be attracted, which

states the effect of substituted service, i.e., substituted service by order of Court shall be effectual as if it was made on the defendant personally. Thus, it lays down the deeming fiction. However, the plaintiff can ask for substituted service after complying with the requirement of Order 5 Rule 17 of the Code of Civil Procedure. If a person refuses to give the acknowledgment and if at all with all due and reasonable diligence, the defendant is not found, then it is mandatory on the service officer to affix the copy of the summons on the outer door or some other conspicuous part of the house where the defendant ordinarily resides.

17. In the case of **Neerja Realtors Pvt. Ltd.** (*supra*), a suit was filed by the appellant for specific performance. On two occasions, the summons was returned unserved and thereafter bailiff submitted the report stating that when he went to serve the defendant, he was informed by the persons residing in the village that the defendant had left the premises two years earlier and was residing elsewhere. The summons were returned since the defendant was not residing at the address given therein. Thus, the facts in the case of **Neerja Realtors Pvt. Ltd.** and the facts of the present case are identical. In the case in hand also, the bailiff has submitted the report twice that

the person has left the premises of Pushkar Apartment or Pushkar Society. In **Neerja Realtors Pvt. Ltd.'s** case also, the order was passed for substituted service by publication. The Supreme Court held as follows:

“The Court must apply its mind to the requirements of Order 5 Rule 20 and its order must indicate due consideration of the provisions contained in it.

The submission that under Order 5 Rule 20, it was not necessary to affix a copy of the summons at the Court house and at the house where the defendant is known to have last resided, once the Court had directed service by publication in the newspaper really begs the question. There was a clear breach of the procedure prescribed in Order 5 Rule 17 even antecedent thereto. Besides, the order of the Court does not indicate due application of mind to the requirement of the satisfaction prescribed in the provision. The High Court was, in these circumstances, justified in coming to the conclusion that the *ex parte* judgment and order in the suit for specific performance was liable to be set aside.”

18. Order IX, R.13 CPC read as under:

"Setting aside decree ex-parte against defendant : In any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called

on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also;

Provided further that no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

19. Under Order IX Rule 13 while setting aside the decree, if the party satisfies the Court that the summons was duly served or that the party was prevented by any sufficient cause from appearing, the Court shall pass the order of setting aside the decree. Thus, Order IX Rule 13 contemplates the true two situations.

20. For ex parte order, two remedies are available -

- (i) To file First Appeal challenging the ex parte decree;
- (ii) to file an Application for setting aside ex parte order under Order 9 Rule 13.

21. The defendant can file both the proceedings simultaneously, however, if the Appeal is dismissed, then the ex parte decree will merge with the order of Appellate Court and the Application under

Order 9 Rule 13 will not be maintainable. If the Application under Order 9 Rule 13 is dismissed, then the order can be challenged in Appeal under Order 43 Rule 1. But if the Appeal is dismissed, then it cannot be challenged in First Appeal under section 96 (**Bhanu Kumar Jain vs. Archana Kumar, reported in (2005) 1 SCC 787**). Thus, when there is no proper service, then the ex-parte decree and judgment is required to be set aside.

22. Under Order 9 Rule 13, the Court is to be satisfied that the summons was not duly served means there is no proper legal service. In ordinary course, the service contemplated under Order 5 Rule 17 and under Order 5 Rule 20 if is complied with, then summons is to be said duly served. However, under some circumstances, though the procedure laid down by law is followed; and yet the defendant if successfully points out that he could not have the knowledge of filing of proceedings by the plaintiff because of certain factual impossibilities, then the Court has to give correct meaning to the word “duly”. Under Order IX Rule 13, “Due service” is not always substituted service, but service which has been effective in bringing the claim to the knowledge of defendant. The Judicial Dictionary, 12th Edition explains that the word “duly” is very significant

and excludes any arbitrary exercise of power is very significant and it excludes any arbitrary exercise of power.

23. The service is neither an empty formality nor procedural ritual but the soul of the service is to have the knowledge of the proceedings to the defendant or the contesting party. Therefore, there may be a service laid down as per the procedure, however, still there is no communication of the proceedings to the other party and, therefore, the knowledge is absent. Thus, satisfaction based on instances of the compliance of the proceedings as a mere formality cannot be a correct approach to interpret the principle behind the service. The deeming fiction is created in law to fill up the gap where the procedural law falls short. By accepting that the substituted service is deemed to be a good service, then passing exparte decree is a correct legal step taken by the Court as per the procedure. However, the moment the defendant acquires the knowledge of the proceedings and he approaches the Court and the fact is brought before the Court that he really never had actual real knowledge, then even though there is a procedural compliance by the plaintiff, the Court has to take realistic and just view and not to limit itself in the procedural wrangles. In the present case, taking into account the

fact that he was beyond communication and unapproachable by either service under Order 5 Rule 17 or Order 5 Rule 20, the ex-parte decree needs to be set aside. No doubt the defendant, i.e., respondent should have intimated the correct address or changed address in the criminal proceedings, however, the Court needs to set aside the said exparte order with cost.

24. I confirm the order dated 13th November, 2017 passed by the District Judge-7, Pune in Miscellaneous Civil Appeal No. 340 of 2015 setting aside the ex-parte order passed in Special Civil Suit No. 1491 of 2009 dated 8th November, 2011 subject to payment of cost of Rs.30,000/-. The Special Civil Suit No. 1491 of 2009 is restored to its original file. I am informed that the defendant has filed written statement. The trial Court to proceed with the issues and the plaintiff to file affidavit-in-chief. The trial Court is directed to try and decide the suit on or before 31st December, 2018.

25. Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)