

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

SECOND APPEAL NO. 523 OF 2017

Colonel Vinod Marwaha	...	Appellant
V/S		
Shri.Vinayakumar Keshavprasad Tiwari		
and another		Respondents
...		
Mr.A.V.Anturkar,Sr. Adv a/w Amol Gatne for the Appellant.		
Mr.Jaydeep Deo, for the Respondent No.1.		

...
CORAM : A.A. SAYED, J.

DATED : 22 DECEMBER 2018

P.C.:

1. This Second Appeal filed under section 100 of the Code of Civil Procedure, 1908, impugns the order dated 11 April 2017 passed by the District Judge, Pune, dismissing the Appeal filed by the Appellant (Original Defendant No.2) thereby confirming the judgment and decree dated 29 April 2011 passed by the Civil Judge, Junior Division, Pune, in Regular Civil Suit No.1389 of 2007 filed by the Respondent No.1 (Original Plaintiff). The District Judge while dismissing the Appeal held that there was no illegality in service of summons upon the Appellant (Original Defendant No.2), as it was affixed on the conspicuous part of his house.

2. The Appeal being Civil Appeal No.99 of 2012 was filed by the Appellant (Original Defendant No.2) essentially on the ground that it was only on 25-08-2001 that the Appellant came to know that the Respondent

No.1 (Original Plaintiff) had filed a Civil Suit being RCS No.1389 of 2007 against him and the Respondent No.2-Company M/s.Wood Stock Developers Pvt.Ltd.(Original Defendant No.1). It was pointed out in the Appeal that the Appellant, in the capacity of Director of the Respondent No.2-Company had also filed a civil suit being Special Civil Suit No.1628 of 2009 in the Court of Civil Judge, Junior Division, Pune and the same is pending.

3. It is the case of the Appellant (Original Defendant No.2) that he was not served with the summons of RCS No.1389 of 2007 at any point of time and he did not have knowledge of the said suit and therefore he could not appear in the said suit. After having come to know of the said RCS No.1389 of 2007, he took search through his Advocate and it transpired that the said suit was decreed on 29-04-2011. There was collusion between the Respondent No.1 (Original Plaintiff) and the person claiming to be the Director of the Respondent No.2-Company, which was evident from the Written Statement filed by the Respondent No.2 (Original Defendant No.1) in the suit. The person who was representing the Respondent No.2-Company had already expired way back in the year 2009 during the pendency of the suit and no other Director was brought on record by the Respondent No.1 (Original Plaintiff) in the said suit and this fact was intentionally suppressed

by the Respondent No.1 (Original Plaintiff). There is collusion between the Respondent No.1 (Original Plaintiff) and the Respondent No.2-Company (Original Defendant No.1), as the Respondent No.2-Company had given consent and had admitted the claim of the Respondent No.1 in the Plaint. Upon coming to know of the said suit on or about 25-08-2011, the Appellant took search in the Court and an Application for obtaining certified copy was filed and the same was made available on 29-09-2011 and accordingly the Appeal being Appeal No.99 of 2012 was filed on 30-09-2011.

4. I have heard the learned Senior Counsel for the Appellant (Original Defendant No.2) and the learned Counsel for the Respondent No.1 (Original Plaintiff). None appears on behalf of the Respondent No.2-Company (Original Defendant No.1), though served.

5. The issue for consideration in the present Second Appeal primarily is whether it can be said that the Appellant was served with the writ of summons in the Regular Civil Suit No.1389 of 2007, which suit proceeded exparte on 29-04-2011 against the Appellant (Original Defendant No.2).

6. Learned Senior Counsel for the Appellant has pointed out Order 5 Rules 17 to 20 of the Code of Civil Procedure, 1908 (for short "CPC"). The learned Senior Counsel submitted that under Order 5 Rule 20, there are two conditions set out i.e. (a) there has to be satisfaction of the Court, that there are reasons to believe that the Defendant is keeping out of the way for the purpose of avoiding the service, (b) the alternative requirement is that the Court must be satisfied that for any other reason the summons cannot be served in the ordinary way. He submitted that it is only when the satisfaction either of condition (a), or condition (b), has been recorded by the Court and the Court is satisfied that the Appellant (Original Defendant No.2) is keeping out of way for the purpose of avoiding the service or for any other reasons the summons cannot be served in the ordinary way, then only the provisions of Order 5 Rule 20 are attracted. He submitted that in the instant case, perusal of Order dated 02-01-2010 passed below Exhibit 22 of the Trial Court shows that merely a cryptic order has been passed viz. "(C) granted as prayed for on P.F. if any". He submitted that neither the satisfaction has been recorded by the Civil Judge, Junior Division, Pune, to the fact that the Defendant is "keeping out of way for the purpose of avoiding the service" or that "for any other reasons that the summons cannot be served in the ordinary way". He submitted that the provisions of

Order 5 Rule 20 of CPC are not complied with. He submitted that before invocation of powers under Order 5 Rule 20, the Trial Court ought to have satisfied itself and recorded a finding that the service of summons as contemplated under Order 5 Rule 17 has been duly verified by the Bailiff by filing an Affidavit as contemplated under Order 5 Rule 19 of CPC, failing which direct recourse to the provisions of Order 5 Rule 20 is not proper. It is submitted that admittedly, out of the total consideration of Rs.1,33,12,500/-, an amount of Rs.70,44,332/- has been paid and the balance consideration of Rs.62,68,168/- is not paid. The learned Senior Counsel submitted that a suit for injunction and declaration in respect of the Agreement/MoU, where the consideration is of an amount of Rs.1,33,12,500/-, would not lie in the Court of Civil Judge, Junior Division, because the valuation of the property is beyond the pecuniary jurisdiction of the Civil Judge, Junior Division. He pointed out that the Respondent No.1 (Original Plaintiff) has practised a fraud upon the Court in not disclosing the fact that another suit being Special Suit No.1628 of 2009 is already filed by the Respondent No.2- Company viz. M/s.Wood Stock Developers Pvt. Ltd. seeking specific performance of the Agreement and it was necessary for the Respondent No.1 (Original Plaintiff) to disclose this fact in the Plaint of the Civil Suit No.1389 of 2007 or before the District Court in Appeal. He submitted that the office objection regarding pecuniary jurisdiction has not been dealt with

by the Trial Court and no finding was given on objection No.5 which has been raised as per Chapter 11 paragraph 8 of the Civil Manual. He submitted that the decree was obtained in collusion with the Respondent No.1 (Original Plaintiff) and the Defendant No.2-Company. The Agreement and the Power of Attorney were liable to be impounded under the provisions of Article 48(ga) read with Article 25 of the Schedule of the Bombay Stamp Act, as the said documents were not properly stamped. The Affidavit which has been filed on 25 October 2007 by Shri Esmile S.Mulji would show that he has settled the matter only for an amount of Rs.20 lakhs, and accepting that the rights of the Company-Respondent No.2 (Original Defendant No.1) were given up, when the valuation even as per the Agreement/MoU is more than Rs.1.5 crore. It is pointed out that even the Bailiff's report did not indicate that the Appellant (Original Defendant No.2) was trying to evade the service. He submitted that pre-conditions of Order 5 Rule 20 are not complied with. The said Senior Counsel has relied upon the following judgments in support of his submission:

- (1) **Janglu s/o late Damdu Durge v/s. Neeraj Realtors Pvt.Ltd.**
2015 SCC Online Bom 6104;
- (2) **G.S.Ramchandran v/s. M.M.Rajadhyaksha**, Mh.L.J.247;

- (3) **Smruti Pahariya v/s. Sanjay Pahariya**, (2009) 13 SCC 338;
- (4) **Paraswana Odaya v/s. Addadurai Chetty**, AIR 1970 Mad. 271 (FB);
- (5) Judgment of Division Bench of this Court in **Deepali Pratap Sonawane v/s. Pratap Sonawane**, (2015) 6 Bom. C.R.597;

7. On the other hand, the learned Counsel for the Respondent No.1 (Originally Plaintiff) supported the impugned order. He submitted that the Appellant was avoiding the service and he was aware of the suit and the service was effected by substitute service and the Appeal has rightly been dismissed by the District Court. In support of his submissions, he relied upon the following judgments:

- (1) **Sunil Poddar & Ors. v/s. Union Bank of India**, (2008) 2 SCC 326;
- (2) **Yashwant V/s. Mayuresh Builders**, (2009) (1) Mh.L.J.326;
- (3) **Basant Singh & Anr. v/s. Roman Catholic Mission**, (2002) 7 SCC, 531;
- (4) **Smt.Ramdulari Gulabchand Chorasias & Anr. v/s. Vaikuntharai G.Dodia**, 2016 SCC Online Bom. 6186
- (5) **Smt.Jayanti Mahabal Shetty & ors. v/s. Shri. Prafulla Mukund Kharote**, 2016 SCC Online Bom.11926;

- (6) **Yashwant Govind Shivkar v/s. Bhaskar Chavan**, 2011 (4) Mh.L.J. 868;
- (7) **Baburao Soma Bhoi v/s. Abdul Raheman Abdul Rajjak Khatik**, 2000 (1) Mh.L.J. 481;
- (8) **Ahmed Khan v/s. Miss Gracy D'souza**, 1986 Mh.L.J. 764;
- (9) **State of Jammu and kashmir and ors. v/s. Haji Wali Mohd. And ors.** (1972) 2 SCC 402;
- (10) **Yellawwa v/s. Shantavva**, (1997) 11 SCC 159;
- (11) **Commissioner of Income Tax, Punjab v/s. Daulat Ram Khanna**, AIR 1967 SC 1552;

8. I have given due consideration to the rival contentions of the parties.

9. Reference is required to be made to the Bailiff Manual issued by this Court for the guidance of the Bailiffs. In the introduction, it interalia states that the Bailiffs have an important role to play in the administration of justice and they should remember that they fill up an important place in the scheme of administration of justice and they should perform their duties with diligence, honesty and assiduity. The Manual states that the it is with a view to guide the Bailiffs in the proper discharge of their duties that the Manual is written. Chapter II of the Manual deals with the topic "On whom

and how the services may be made". It states that where the Defendant cannot be found or he has no agent duly empowered to accept service, service may be made on any adult male member of the family of the Defendant who is residing with him. It is of primary importance that before the summons is served on the adult male member of the family all efforts must be made to find out the Defendant. It cannot be said that the Defendant "cannot be found", merely because he was not at home or had left for a particular place when the process server went to effect service on him. The law does not hold service as valid unless it is shown that enquiries were made with the relatives and neighbours to find out the Defendant. In absence of such efforts, service on a member of the family cannot be effected. A serving officer can be said to have exercised due and reasonable, diligence only if he has made real and substantial enquiries. He must attend at the right place and time at which he expects to find the Defendant. He must take steps to discover where the Defendant is. He should go to his house, make enquiries and if necessary follow him. He should try to find out when he is likely to be at home and go to the house at a time when he can be found. It further says that where service of summons is to be effected "by substituted service" as per orders of the Court, if it is found on enquiry that the Defendant has more than one house, the Bailiff should affix the copy of the summons to the house in which the Defendant

is known to have last resided. The report must show that the Defendant could not be found and therefore a copy was served on the adult male member residing with him. The Bailiff should give in the return a brief account of the circumstances in which he effected service by affixture or on adult male member as the case may be, If there is no male member, the return must also state so. The full statement of the efforts that were made should be given in order to enable the Court to judge whether the Bailiff was justified in service the summons in the way he had done.

10. Rule 17 to 20 of Chapter-V of CPC reads as under:

“ ORDER V- Issue and Service of Summons:

17. Procedure when defendant refuses to accept service, or cannot be found— Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [127][who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a 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, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did do, and the

name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service— The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

19. Examination of serving officer.— Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

20. Substituted service— (1) Where the Court is satisfied that there is a 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.”

(emphasis supplied)

11. Order 5 Rule 17 inter alia provides where the serving officer after using all due and reasonable diligence, cannot find the Defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent to accept service of the summons on his behalf and/or any other person on whom service can be made, the serving officer shall affix a 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, and shall then return the original to the Court from which it was issued, with a

report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

12. Rule 19 provides that where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit. It further provides that if the Affidavit has been so verified it may examine by the officer on oath.

13. The Trial Court in its judgment and order dated 29 April 2011, observed in paragraph 4 as follows:

“4. Suit summons were issued to Defendants. Defendant No.1 appeared and filed its W.S. at Exh.20. Defendant No.2 did not appear, in spite of the service of summons by means of substituted service. However, the Defendant No.1 has given full consent and admitted the pleadings of plaint generally and specifically. Therefore, I have framed issues due to absence of material proposition affirmed by party and denied by the other. Defendant No.2 did not appeared, in spite of the service of summons by means of regular as well as substituted services.”

14. The first Appellate Court (District Judge) in the impugned order in paragraphs 10 & 11 has observed thus:

“10. If the record and proceedings are perused, at Exh.13, I find, suit summons being issued to the Defendant No.2. The first report speaks that, Defendant No.2 was not available, on the given address. Similar is the second report. Thereafter, on 3rd occasion, at Exh.13, there is a Bailiff report, which speaks about service of suit summons, as per Order 5 Rule 20 of the Civil Procedure Code, 1908. The suit summons has been affixed on the conspicuous part of the house of Defendant No.2.

11. Hence, suit summons was not served by a paper publication, but it was a substituted service, as by ordinary mode, summons was not served. Hence, I find no illegality, with respect to exparte order, passed by the learned Trial Court, against the Defendant No.2.”

15. I have perused the Record & Proceedings. It appears that there are three service reports in relation to service upon the Appellant (Original Defendant No.2). It appears that an attempt was made to serve the Appellant (Defendant No.2) firstly on 22-10-2017 and the second attempt was made on 12-12-2007. Both the reports state that the Appellant (Original Defendant No.2) was not found at his residential premises. There are no particulars mentioned in the reports, as to whether somebody else was found in the said premises or whether the Bailiffs had made any inquiry with the neighbours. What is significant, however, is that both the reports are conspicuously silent on what efforts the Bailiff has made to serve the

Appellant and what inquiries were made. Both the reports are bereft of particulars of time etc. It appears that after first two reports of the Bailiff, an Application was made for substituted service viz. affixing the summons on the front door of the residential address of the Appellant (Defendant No.2) and for publication of the summons in one newspaper 'Prabhat', which Application was allowed without considering whether any proper attempts have been made to serve the Appellant (Defendant No.2) with the summons and without considering that the first two reports of the Bailiff were not duly affirmed as required by Order 5 Rule 19 of CPC. Pertinently, there is another report dated 15-01-2008, after the aforesaid Application for substituted service was allowed, wherein it is stated that the Appellant (Defendant No.2) was not found in the said premises and one Gautam, who is a gardener had informed the Bailiff that the Appellant (Defendant No.2) has gone at his work place at College at Hinjewadi and would come back in the evening.

16. In view of the fact that the first two reports of the Bailiff were not duly affirmed as required under Order 5 Rule 19 of CPC, it cannot be said that there is any Affidavit of the serving Officer/Bailiff. In view thereof, in terms of Order 5 Rule 19, it was obligatory upon the Trial Court to examine the Bailiff on oath and make inquiries before declaring that the summons has been

duly served upon the Appellant (Defendant No.2). Without duly examining the aforesaid reports, the Trial Court had mechanically allowed the Application for substituted service and while decreeing the suit merely stated that the Appellant (Defendant No.2) did not appear in spite of service of summons by means of regular as well as substituted service. The District Judge in Appeal also failed to appreciate the facts discussed above in relation to service of summons upon the Appellant.

17. For the aforesaid reasons, the impugned order of the District Judge cannot be sustained. In the circumstances, I pass the following order:

O R D E R

- (i) The impugned order dated 11 April 2012 of the District Judge, Pune is set aside.
- (ii) The matter is remitted back to the District Judge to decide the Civil Appeal No.99 of 2012 afresh.
- (iii) The observations in the order shall be treated as prima facie. All contentions are kept open.
- (iv) The Appeal shall be decided expeditiously and in any event within 3 months of a copy of this order being placed before the District Court.
- (v) Registry to transmit the R & P to the District Court forthwith.

18. The Second Appeal is disposed of in the aforesaid terms.

(A.A.SAYED, J.)