

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9334 OF 2018

Rajmani Benimadhav Malviya (decd) through legal
heirs and representatives Dashrat R. Malviya & another... Petitioners
Vs.
Ramdulari C. Mishra (decd) and others ... Respondents

Mr. D. D. Singh for Petitioners.
Mr. E. K. Sasidharan for Respondents No.2(bb), 2(bc), 2(ca), 2(cb), 2(d),
2(e) and 2(f).

CORAM : R. G. KETKAR, J.
DATE : AUGUST 23, 2018

P.C. :

Heard Mr.Singh, learned Counsel for the petitioners and
Mr.Sasidharan, learned Counsel for the respondents No.2(bb), 2(bc),
2(ca), 2(cb), 2(d), 2(e) and 2(f) at length.

2. This Petition takes exception to the judgment and order dated 16.08.2018 passed by the learned Judge, Court Room No.34 of the Court of Small Causes at Bombay, Bandra Branch below exhibit-191 in R.A.E.& R. Suit No.990/5881 of 1977. By that order, the learned trial Judge rejected the application filed by the Constituted Attorney of the defendants No.1 and 2 seeking relief in terms of paragraph 5 of the order dated 02.08.2018 passed by this Court in Writ Petition (St.) No.17941 of 2018. In paragraph 5 of that order, it was observed that the learned trial Judge will satisfy about service on defendants No.2(a) to 2(c) and will also find out whether they are accepting that they are the heirs and legal representatives of the original defendant - Rajmani Benimadhav, since deceased. If they indicate that they are not the heirs and legal representatives of the original defendant - Rajmani Benimadhav, since deceased, the learned trial Judge was directed to order their deletion

from the proceedings.

3. In support of this Petition, Mr. Singh strenuously contended that defendants No.2(a) to 2(c) were not served with the writ summons. The writ summons was sent by R.P.A.D. and returned as 'unclaimed', which does not constitute a valid service. Apart from that, the writ summons was served on the defendants No.2(a) to 2(c) on 13.07.2018 and the learned trial Judge proceeded on the footing that despite service, they failed to appear and passed order on 14.07.2018 that Suit to proceed ex-parte against defendants No.2(a) to 2(c). Thus, no sufficient time was given to defendants No.2(a) to 2(c), assuming that they were duly served on the previous day to make arrangements for their appearance. He submitted that the learned trial Judge was not justified in dismissing the application.

4. On the other hand, Mr. Sasidharan invited my attention to paragraph 22 of the order dated 18.04.2018 below exhibit-71. The application exhibit-71 taken out by the plaintiffs was allowed after conducting enquiry as per the directions of the Appellate Bench. The learned trial Judge considered death certificate at exhibit-89 and property card at exhibit-90. Names of defendants No.2(a) to 2(c) are recorded in exhibit-90. The learned trial Judge, after considering the evidence on record, held that defendants No.2(a) to 2(c) are also legal representatives of the original defendant and accordingly permitted the plaintiff to amend the plaint by adding defendants No.2(a) to 2(c). As the enquiry was held, no fault can be found with the impugned order as in paragraphs 5 and 6, the learned trial Judge has recorded a categorical finding that writ of summons was duly served on defendants No.2(a) to 2(c) on 13.07.2018 and despite service, they did not appear.

5. I have considered the rival submissions advanced by the learned

Counsel appearing for the parties. I have also perused the material on record. It is evident from record that before deciding application exhibit-71, defendants No.2(a) to 2(c) were served by R.P.A.D. and the R.P.A.D returned with the remark 'unclaimed'. The issue whether service by R.P.A.D. which is returned 'unclaimed' is a valid service or not is no longer *res integra*. In the case of ***New India Assurance Co. Ltd. Vs. Nasibunnisa Mohd. Israr Khan, Civil Application No.1979 of 2011 in First Appeal (St.) No.13185 of 2011*** decided by this Court (Coram : A. S. Oka, J.) on **14.10.2011**, it has been held that it is a valid service. The learned Single Judge has considered the following decisions:

- a. ***Lalmani Ramnath Tiwari Vs. Bhimrao Govind Pawar, 2001 (2) Mh.L.J. 342;***
- b. ***David K. N. Vs. S. R. Chaubey (Chaturvedi), 2003 (4) Bom.C.R. 612;***
- c. ***Krishna Ramchandra Jadhav @ Yadav Vs. Shankari B. Ajimal, 2005 (4) Mh.L.J.577;***
- d. ***P. T. Thomas Vs. Thomas Job, (2002) 7 SCC 531;*** and
- e. ***M/s. Madan and Company Vs. Wazir Jaivir Chand, AIR 1989 SC 630.***

6. In view thereof, I do not find any merit in the submission of Mr. Singh that while deciding application exhibit-71, service was not effected on defendants No.2(a) to 2(c). While deciding application at exhibit-71, it was observed by the learned trial Judge, in paragraphs 22 to 24, thus,

“22. It appears from the record that, defendants did not give their cooperation to the plaintiff to disclose names and addresses of all the legal heirs of deceased Rajmani Malviya and it appears that, there is dispute between defendants regarding number of legal heirs of deceased Rajmani Malviya left behind. As per the directions of Hon'ble Appellate Bench enquiry was carried out and both the parties led their evidence to prove their contentions. While considering the merits of the present issue it is important to consider that, the documents produced by the plaintiffs are proved whereas documents produced by the defendants are not proved and marked as

exhibits.

23. The proposed respondents never appeared before the Court saying or denying that, they are the legal heirs of deceased Rajmani Malviya therefore, on the basis of Exhibit-89 and Exhibit-90 it becomes clear that, deceased Rajmani Malviya was having legal heirs as claimed by the plaintiff. How plaintiff came to know about the legal heirs of deceased Rajmani Malviya and whether the said evidence is hearsay or inadmissible in evidence is not the issue. The main important issue is that, whether the proposed respondents are the legal heirs of deceased original defendant Rajmani Malviya. Admissibility of documents is considered by this Court and documents produced by the plaintiffs in support of his claim are exhibited. Therefore, the documents are sufficient to hold that, the proposed respondents are legal heirs of deceased Rajmani Malviya.

24. As far as the contention of defendants that, there is delay of 15 years in filing the present application and the abatement of the suit on this ground, the reasons for delay are already considered during the course of evidence on this issue. Therefore, it cannot be said that there is delay in filing the present application and suit has partially abated against defendant and partial abatement amounts to entire abatement of the suit. Plaintiff has proved with the help of documents that, proposed respondents are the legal heirs of the deceased original defendant, therefore as discussed in the above paragraphs, if they are not joined as party to the suit, plaintiff will suffer irreparable loss. None of the proposed defendant has appeared before the Court denying that, they are not the legal heirs of deceased original defendant Rajmani Malviya. Therefore, I answer Point No.1 in the affirmative and proceed to pass the following order in respect of Point No.2. Hence, the order.”

7. The order dated 18.04.2018 below exhibit-71 was challenged before this Court by instituting Writ Petition (St.) No.17941 of 2018. That Petition was disposed of on 02.08.2018. In paragraph 4 of that order, statement of Mr. Sasidharan that amendment was carried out in pursuance of the order dated 18.04.2018 below exhibit-71 and writ of summons was served on the added defendants No.2(a) to 2(c) after carrying out amendment was also recorded. Mr. Singh disputed that

position. In view thereof, while disposing of the Petition, direction was issued in paragraph 5, which is to the following effect:

“5. Needless to observe that the learned trial Judge will satisfy about service on defendants No.2(a) to 2(c) and will also find out whether they are accepting that they are the heirs and legal representatives of the original defendant - Rajmani Benimadhav, since deceased. If they indicate that they are not the heirs and legal representatives of the original defendant - Rajmani Benimadhav, since deceased, the learned trial Judge will order their deletion from the proceedings. Petition is disposed of accordingly.”

8. In pursuance thereof, defendants No.1 and 2 filed application exhibit-191. The learned trial Judge observed in paragraphs 5 and 6 of the impugned order that defendants No.2(a) to 2(c) are duly served. The plaintiffs also filed affidavit of service of summons at exhibit-170 and even thereafter, defendants No.2(a) to 2(c) did not appear. In paragraph 6, the learned trial Judge reiterated that despite service of writ of summons, defendants No.2(a) to 2(c) chose not to appear. Thus, the learned trial Judge has satisfied herself in terms of paragraph 5 of the order dated 02.08.2018 passed in Writ Petition (St.) No.17941 of 2018.

9. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order more so when it was recorded in paragraph 22 that defendants did not extend co-operation to the plaintiffs in disclosing names and addresses of all the legal heirs of deceased Rajmani Malviya. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)