

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 12375 OF 2016

Hariram Ramadhar Dhobi

...Petitioner

Versus

Bhairav Singh Nanhakau Singh

...Respondent

....

Mr. Laxman S. Deshmukh, Advocate for the Petitioner.

Mr. Agnel Carneiro a/w. Vaibhav Shah i/b. Mulla & Mulla & Craigie
Blunt & Caroe, for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 13th JUNE, 2018

P.C.

1. Heard Mr.Laxman Deshmukh, learned counsel for the petitioner and Mr.Agnel Carneiro, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 15.10.2016 passed by the Appellate Bench of the Small Causes Court at Bombay in Misc. Appeal No.170/2016. By that order, the Appellate Court dismissed the appeal preferred by the defendant challenging the judgment and order dated 19.3.2016 passed by the learned Judge, Court Room No.8 of the Small Causes Court at Mumbai in Misc. Notice No.874/2010 in R.A.E. Suit

No.193/2007. The Courts below rejected the application made by the defendant under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for setting aside the exparte decree dated 7.8.2008 passed by the trial Court in R.A.E. Suit No.193/2007.

3. In support of this Petition, Mr. Deshmukh strenuously contended that the defendant was not served with the suit summons. He submitted that with a view to obtaining eviction decree, the plaintiff deliberately gave address of the suit premises, namely, room No.14, Chawl No.95, Nanhakau Singh Chawl, Ambewadi P.T. Road, Kalachowki, Mumbai-400 033 as also address of the defendant of his native place, namely, village Bodwala, Post-Bodwala H.P. Munederva, District – Basti (Uttar Pradesh). He submitted that the Courts below have only considered the aspect of delay in filing application under Order IX Rule 13 of C.P.C.. The Courts below, however, did not consider whether the defendant was duly served with the suit summons.

4. Mr. Deshmukh invited my attention to the bailiff's report dated 21.2.2007 and the application dated 23.2.2007 at Exhibit-7 made by the plaintiff praying for effecting service of the suit summons by Registered packet and Under Certificate of Posting (for short, 'UPC') at the address mentioned in that application, namely, address at Uttar Pradesh. By order dated 27.2.2007, the learned trial Judge passed a

cryptic order permitting substituted service.

5. In support of his submissions, Mr. Deshmukh relied upon the decision of Apex Court in the case of **Neerja Realtors Private Limited vs. Janglu (dead) through Legal Representative, 2018(2) SCC 649** and in particular paragraphs-13 to 15 thereof. He submitted that before ordering substituted service, the Court has to satisfy that the defendant was keeping out of way for the purpose of avoiding service or that for any other reason, the summons could not be served in the ordinary way. Substituted service is an exception to the normal mode of service. The Court must apply its mind to the requirements of Order V Rule 20 of C.P.C. and its order must indicate due consideration of the provisions contained in it. He submitted that in the present case while granting application Exhibit-7, the learned trial Judge did not apply his mind and satisfy himself about avoidance of service by the defendant. He, therefore, submitted that the impugned orders may be set aside thereby setting aside ex parte decree and restoring the suit for deciding the same on merits.

6. On the other hand, Mr. Carneiro supported the impugned orders. He submitted that even before instituting the suit, the plaintiffs had issued notice dated 3.10.2006 by Registered Post Acknowledgment Due (for short, 'RPAD') as also UPC at the suit address as also at

defendant's address of native place in Uttar Pradesh. He submitted that the notice dated 3.10.2006 sent on the defendant's address in Uttar Pradesh was duly received by him on 6.10.2006. He has invited my attention to the notice dated 3.10.2006 at Exhibit-14 and the acknowledgment receipt of the defendant at Exhibit-15. He submitted that by way of abundant caution, in the cause title of the suit two addresses of the defendant were mentioned, namely, one of the suit premises and other of his native place in Uttar Pradesh. He submitted that the bailiff had submitted report to the effect that when he went to serve copy of the summons along with copy of the plaint on the defendant at his address of suit premises, he was not found and the home was found locked. On making enquiry with neighbour Mr. Mahindra Kadam, he informed that the defendant was not staying there and present whereabouts of the defendant is not known to him. Said report is duly verified on oath by the bailiff.

7. Mr. Carneiro has also invited my attention to the application dated 22.2.2007 at Exhibit-7 and in particular paragraphs-1 to 3 thereof. In that application, the plaintiff asserted that the defendant had shifted to his native place and, therefore, prayed for effecting service of the summons by registered packet and UPC at the address mentioned in the cause title of the plaint. Accordingly notice was sent

by RPAD to the defendant and the packet at Exhibit-8 returned back with endorsement that the defendant refused to accept the service and to that effect endorsement is made by the Postman on 9.3.2007. He submitted that thus the defendant was duly served with the registered packet and despite service as far back as on 9.3.2007, did not participate in the trial. The *exparte* decree was passed on 7.8.2008. Application for setting aside *exparte* decree is made on 29.10.2010. By refusing the registered packet at Exhibit-8, the defendant is deemed to have been duly served and, therefore, application under Order IX Rule 13 of C.P.C. ought to have been made within 30 days from passing of the decree on 7.8.2008. The application for setting aside *exparte* decree is made on 29.10.2010. He, therefore, submitted that no case is made out for interfering with the impugned order.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The plaintiff had instituted suit against the defendant on or about 5.1.2007 *inter alia* contending that the defendant is not in use and occupation of the suit premises and is presently being used by third party. In other words, the plaintiff has claimed possession of the suit premises on the ground of non-user under Section 16(1)(n) and unlawful sub-letting under Section 16(1)(e) of the

Maharashtra Rent Control Act, 1999 (for short, 'Act'). A perusal of the cause title of the suit shows that the plaintiff had given two addresses of the defendant – one of the suit premises and other of his native place in Uttar Pradesh. The relevant portion of cause title reads thus :

“HARIRAM RAMADHAR DHOBI,
Aged about 56 year, Occupation Retired
Residing at Room No.14, Chawl No.95,
Nanhakau Singh Chawl, Ambewadi, Parel
Tank Road, Kalachowki, Mumbai – 400 033
Also residing at VILLAGE – Bodwala,
Post-Bodwala, H.P. Munederva
Dist. Basti (Uttar Pradesh).”

9. In paragraph-5 of the plaint, the plaintiff specifically asserted that the defendant was served with the demand notice dated 3.10.2006 through his Advocate by RPAD at both addresses given in the cause title of the plaint. The registered packet sent on the suit premises came back with remark “not claimed” though intimation was given at the suit premises. The RPAD sent at the native place address was duly served upon the defendant.

10. After the suit was instituted the summons was issued to the defendant on or about 7.2.2007. On 21.2.2007, the Bailiff tried to serve copy of the summons along with copy of the plaint. The report of the Bailiff as also the affidavit made by the Bailiff reads thus :

“Unserved for Defendant

on 21-2-07

I went to serve a copy of this summons along with copy of complaints on the within named defendant at his residing address, at room No.14, Chawl No.95, Nanhaku Singh Chawl, Tubewadi Parel Tank Road, Kalachuki, Mumbai-33 on 21-2-07 at about 4.55 PM.

But he was not found and room was found locked. On my inquiries with neighbour Mr. Mahindra Kadam, I was informed that said defendant is not staying there and present where about not known to him. Hence I came back.

Sd/-

Bailiff

I, Mr. A.A. Khan hereby declare on oath that what is stated above is true. This 22nd day of Feb. 2007

Before me

Sd/ 22/2/07

Sr. Bailiff

Sd/- 22-2-07

Bailiff”

11. As the defendant was not found and the suit room was found locked, the plaintiff filed application at Exhibit-7 on 23.2.2007 and referred to this aspect in paragraph-2 of the application. In paragraph-3, the plaintiff prayed for effecting service on the defendant at the addresses mentioned in the cause title of the plaint, namely, at the address of the suit premises and the address of native place of the defendant. On that application, the learned trial Judge passed following order :

“
Q
Perused the application. Granted as prayed for.
Sd/ 27/2/07”

12. In pursuance thereof, the notice was sent to the defendant at the address of Uttar Pradesh. Though the defendant was tried to be served at that address, he refused to accept the service and to that effect the Postman made endorsement dated 9.3.2007. A perusal of the application under Order IX Rule 13 of C.P.C. shows that the defendant has chosen not to deal with this aspect at all, though in paragraph-5 of the application, it is specifically asserted that after filing Vakalatnama on behalf of the defendant, his Advocate had taken inspection of the suit proceedings on 5.10.2010. However, a perusal of the application shows that is totally silent as regards receipt of notice dated 3.10.2006 as also return of envelope at Exhibit-8 on 9.3.2007 at the native place of the defendant.

13. Mr. Deshmukh heavily relied upon the decision of Apex Court in the case of **Neerja Realtors** (supra) and in particular paragraph-14 thereof. As noted earlier, in the present case the suit is instituted on the ground of non-user of the suit premises as also on the ground that the defendant has unlawfully sublet the suit premises to the third party. It is in that context, one has to appreciate the fact that the plaintiff has sent notice at the suit address as also at the native place address of the

defendant. I have referred to the assertions made by the plaintiff in paragraphs-4 and 5 of the plaint. As far as notice dated 3.10.2006 sent at the suit premises is concerned it returned with endorsement “not claimed”. As far as notice sent at the native place address of the defendant is concerned, that was duly received by the defendant. However, when the Bailiff tried to serve the summons along with copy of the plaint, he did not find the defendant in the suit premises and accordingly to that effect report was made. It is in that context, application at Exhibit-7 was made by the plaintiff for effecting service at the native place of the defendant.

14. A perusal of application filed by the defendant under Order IX Rule 13 of CPC shows that the defendant has not denied receipt of notice dated 3.10.2006 at his native place address. Equally as noted earlier, there is no averment as regards remark of the Postman dated 9.3.2007 on the registered packet which was refused by the defendant.

15. In the case of **Neerja Realtors** (supra), before the Apex Court the appellant had instituted suit for specific performance of agreement of sale dated 15.7.2006. On 9.2.2011, the trial Court had issued notices to the original defendant for settlement of issues. Though the summons were issued on two occasions to the original defendant, they were returned un-served. On 11.4.2011, the Bailiff had submitted report

stating that when he went to serve the defendant he was informed by the persons residing in that village that he 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.

16. The appellant filed an application for substituted service under Order V Rule 20(1-A) of C.P.C. on 2.9.2011. The trial Court allowed that application on the same day in the following terms :

“Issue S/S to defendant under Order V Rule 29(1-A) CPC at the expense of the plaintiff.”

17. The appellant claims to have effected substituted service by publication in Marathi daily “Lokmat”. On 29.11.2011, the trial Court passed following order:

“Defendant served on public notice in daily newspaper Lokmat on 4-10-2011 but he remained absent. Suit proceeded exparte against the defendant.”

18. In the present case prior to institution of the suit, notice dated 3.10.2006 sent by the plaintiffs was received by the defendant. After the order dated 27.2.2007 below Exhibit-7, notice by RPAD was sent to the defendant at his native place address. A perusal of the RPAD packet at Exhibit-8 shows that the Postman had made endorsement to the following effect :

“Addressee has refused to accept the Registry.
Sd/ 9.3.07.”

19. At the cost of repetition, it must be mentioned that the application filed by the defendant under Order IX Rule 13 is totally silent on these aspects. The facts obtaining in the present case are materially different from the facts in the case of **Neerja Realtors** (supra). In the present case, the plaintiffs have sought eviction on the ground of non-user and unlawful subletting.

20. The Courts below have considered that as the defendant was served with the summons of the suit, he has to file application under Order IX Rule 13 of C.P.C. within 30 days from passing of the decree. The decree is admittedly passed on 7.8.2008 and the application for setting aside *ex parte* decree is made on 29.10.2010. Article 123 of the Limitation Act reads thus :

THIRD DIVISION—APPLICATIONS
PART I – APPLICATIONS IN SPECIFIED CASES

Description of application		Period of limitation	Time from which period begins to run
123.	To set aside a decree passed <i>ex parte</i> or to re-hear an appeal decreed or heard <i>ex parte</i> . Explanation. -- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

21. The present case does not fall in the later portion, namely, “or where the summons or notice was not duly served, when the applicant

had knowledge of the decree.” The defendant is not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The defendant is also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Article 227 of the Constitution of India. In view thereof, I do not find that the Courts below committed any error in passing the impugned orders. Hence, the Petition fails and the same is dismissed.

22. At this stage, Mr. Deshmukh orally prays for continuation of ad-interim order dated 25.10.2016 for a period of eight weeks from today. Mr. Deshmukh, on instructions, states that Omkar Baburam Kanojia is not residing in the suit premises. He further states that the applicant and all adult family members residing with him are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer. Statements on instructions are accepted in the form of undertaking to this Court.

23. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be

met by continuing the ad-interim order dated 25.10.2016 for a period of eight weeks from today subject to the applicant and all adult members residing with them giving usual undertaking to this Court within two weeks from today incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that they will pay the arrears of rent, if any, to the respondent within two weeks from today; and
- (v) that in case the applicant is unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

24. In view thereof, notwithstanding dismissal of Writ Petition, ad-interim order granted on 25.10.2016 shall remain in force for a period of eight weeks from today subject subject to the applicant filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case the applicant does not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the ad-interim order shall stand vacated without further reference to the Court.

25. List the Petition for reporting compliance after two weeks. Office shall transmit the original R & P to the lower Court forthwith. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)