

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

**SECOND APPEAL NO. 699 OF 2018
WITH
CIVIL APPLICATION NO. 1582 OF 2018**

Shantanu Harish Bhomkar ... Appellant
V/s.
Ashok Gajanan Mule & Anr. ... Respondents

- Mr.Pratik B. Rahade for the Appellant.
- Mr.Kalpesh U. Patil for Respondent No.1.

CORAM : ANUJA PRABHUDESSAI, J.

DATE : 21st DECEMBER, 2018.

P.C. :

1] With consent of both parties, the appeal is taken up for final hearing at the stage of admission.

2] The Appellant herein has challenged the judgment dated 13th August 2018, whereby the learned District Judge, Karad, dismissed the Regular Civil Appeal No.66 of 2015 and thus confirmed the judgment and decree dated 2nd September 2015 passed in Regular Civil Suit No.121 of 2013.

3] The Respondent No.1, herein, was the Plaintiff and the Respondent No.2 and Appellant herein were the Defendant Nos.1 and

2 respectively and shall be herein after referred to as the Plaintiff and the Defendants respectively. The suit was for specific performance of agreement dated 21st August 2008. The suit had proceeded, ex-parte against the Defendant No.2. The Defendant No.1 had put in his appearance but had failed to file the written statement and to contest the suit. The defendants were set ex-parte and by ex-parte decree dated 02nd September 2015, the learned trial Judge decreed the suit.

4]. The Defendant No.2 challenged the said decree before the First Appellate Court mainly on the ground that he was not served with the summons. The learned District Judge dismissed the appeal holding that the summons was served on the mother of the Defendant No.2. Hence, this appeal under Section 100 CPC.

5] Heard Mr. Pratik Rahade, learned counsel for the Appellant and Mr. Kalpesh Patil, learned counsel for the Respondent No.1.

6] The short question involved in this Appeal is whether the Courts below were justified in holding that the appellant/defendant no.2 was duly served with summons under the provisions of Order 5 Rule 15 of the Civil Procedure Code specially in the absence of any material to show that there was no likelihood of his being found at the residence

within a reasonable time.

7] It is not in dispute that Order 5 Rule 15 of the Civil Procedure Code empowers service of summons on an adult member of defendant's family who is residing with him when the defendant is absent from his residence at the time of service of summons is sought to be effected and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf. A plain reading of the provision indicates that the service under Order 5 Rule 15 can be effected only when there is no likelihood of the defendant being found at his residence within a reasonable time.

8] In the instant case, service report indicates that the defendant was not present at his residence when the bailiff / process server had been to his residence to serve the summons. The mother of the defendant informed the bailiff / process server that the defendant had gone to work and would return in the evening. The bailiff / process server served the summons on the mother of the defendant since she had agreed to accept the same. In my considered view, the summons could not have been served on the mother of the defendant in the absence of any material to show that there was no likelihood of the

appellant / defendant no.2 of being found on the residence within a reasonable time and specially when the mother of the appellant / defendant no.2 had informed the bailiff / process server that the appellant / defendant no.2 would be returning by evening. Hence, both the Courts below erred in holding that the service was valid and proper.

9] Mr. Kuldeep Patil, learned counsel for respondent no.1 though initially tried to justify that the service of summons was proper, in the course of hearing, he conceded that there was no proper service on the appellant / defendant no.2.

10] Considering the above facts and circumstances, there is no other option but to allow this Appeal. Hence, the following order :-

(I) The Appeal is allowed.

(II) The impugned judgment and decree dated 13/08/2018 passed by the District Judge-3, Karad in Regular Civil Appeal No.66/2015 as well as the *ex-parte* judgment and decree dated 02/09/2015 passed by the Civil Judge, Junior Division, Patan in Regular Civil Suit No.121/2013 are hereby set aside.

(III) The Trial Court is directed to give an opportunity to the defendants to file their written statement and thereafter, to decide the suit on its own merits in accordance with the law.

(IV) The learned Trial Judge shall endeavour to dispose of the suit as expeditiously as possible and in any event, within a period of six months from the date of receipt of this order.

(V) Both parties are directed to appear before the Trial court on 04/01/2019.

11] Second Appeal stands disposed of in the above terms.

12] In view of disposal of the Second Appeal, nothing survives in the Civil Application, hence stands disposed of.

[SMT. ANUJA PRABHUDESSAI, J.]