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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL No. 168 of 2017.

In

Suit No. 2808 of 2008

With

Chamber Summons No.139 of 2017

With

Notice Of Motion No.2513 of 2016

In

Suit No.2808 of 2008

1. M/s. Jain Developers, ... Appellants.
Office at 304/305, Raj Chambers,
Manchubhai Road, Opp. Pragati Shopping
Centre, Malad (E), Mumbai -400 097.
2. Rajesh Ramji Nandu, Adult,
R/at. Room No.2, Jaswant Niwas, 1st floor,
153, Modi Street, Fort, Mumbai-400 001.
3. Dhiraj Devraj Gada, Adult,
R/a. C-305, Pratap Nagar, Pushpa Park,
Daftary Road, Malad (E), Mumbai-097.

Vs

1. Raja R. Chhabria, Adult,
R/at. Flat No.103, Sujatha Niwas,
S.V. Road, Bandra, Mumbai-400 050.
2. Deviprasad Uditnarayan Mishra

3. Sitla Prasad Uditnarayan Mishra,
Both Adults, R/at Stable No.28, Mogra
Village Rd., Andheri(E), Mumbai-069.

4. Ajay Kumar Tiwari, Adult.
R/at. Gupta Chawl, Room No.2,
Near Lajja Compound, Mogra Village,
Andheri (E), Mumbai -069.

5. Zahid K. Khan, Adult. ... Respondents.
R/at. Dexter Villa, St. Francis Road,
Vile Parle (W), Mumbai -400 056.

WITH
NOTICE OF MOTION (Appeals) NO. 1940 OF 2017
In
Commercial Appeal No. 168 of 2017
In
Suit No. 2808 of 2008

M/s Jain Developers & Ors ... Appellants/Ori.Plaintiffs

In the matter between:

M/s Jain Developers & Ors ... Appellants/Orig.Plaintiffs.

Vs.

Raja R. Chhabria & Ors ... Respondents.

Ms. Vidya Nair a/with Riddhi Rana i/by Vimala & Co. for the
Appellants.
None for the Respondents.

**CORAM : S.C. DHARMADHIKARI &
 SMT.BHARATI H.DANGRE, JJ.**

ORDER RESERVED ON : 11th December, 2017.

ORDER PRONOUNCED ON : 29th January, 2018.

JUDGMENT : (Per : Smt. Bharati H.Dangre,J).

1 Being aggrieved by the order passed by the learned Single Judge on Notice of Motion No. 2513 of 2016 filed in Suit No. 2808 of 2008 thereby dismissing the suit for want of prosecution on the sole ground that the plaintiffs have failed to serve the defendants as directed by the court, the present appeal is filed.

2 Suit No. 2808/2008 was filed by the present appellants, thereby seeking a declaration that there is a valid and subsisting agreement of sale in respect of a piece of land situated at village Mogra, taluka Andheri, near Silk Mill Compound, Andheri (East) in accordance with the terms and conditions described in the memorandum of understanding executed on 16/11/2007 between

the plaintiffs and defendant no. 1 to 5. According to the appellants, they had paid an amount of Rs.17 lakhs towards part payment against the total consideration amount to respondent no.5 under MoU for sale / transfer of the suit properties in favour of the appellants, but there was failure on the part of respondent no.5 to discharge his obligations under the MoU in not providing the marketable title of the suit properties. The appellants were aggrieved by further development that respondent no.5 indulged in an attempt to sell the suit property in order to defeat the legitimate right of the appellants.

In the said suit, notice of motion No.3354/2008 was filed seeking ad-interim relief restraining respondents from creating third party rights over the suit property and the Hon'ble Court by an order dated 22/9/2008 granted ad-interim relief in favour of the appellants and the same was confirmed till the final disposal of the suit by an order dated 30/9/2014.

3 The suit being filed, the appellants attempted to serve the

respondents through private service and courier with the copies of plaint and notice of motion etc. But respondent no. 1 to 4 were not found at their respective address as mentioned in the cause title of the plaint and all the envelopes containing the notice and the documents were returned with remarks “not found”. Respondent no.5 filed his appearance in the suit and appeared through an advocate in the proceeding.

4 In the suit, writ of summons was not served on the respondent Nos. 1 and 4 and when the matter was listed before the Prothonotary and Senior Master on 22/6/2015, on an application, he granted one more opportunity to the plaintiffs to serve the writ of summons on the respondents. Another attempt was made by the appellants to serve respondent No. 1 to 5 again on address mentioned in the cause title through the bailiff and also through RPAD. The summons were again returned with a remark “left, not known”. The plaintiff filed an affidavit of the clerk of the advocate and also of the Bailiff on 24/7/2015 before the learned Prothonotary and Senior

Master. On 22/9/2014 the appellants again moved an application for issuance of fresh writ of summons by way of substituted service and presented the same before the Prothonotary and Senior Master who passed an order on 27/7/2015 permitting the appellants to serve the writ of summons by way of substituted service. It is the case of the appellants that in accordance with the rules of summons as prescribed under the CPC, the appellants published the extract or writ of summons on 1/10/2015 in two local newspapers being “Free Press Journal” and “Navshakti”. It is also the case of the appellants that the writ of summons again came to be served to the respondents through the Bailiff by registered post acknowledgment due on September 30, 2015 and the copies of writ of summons were affixed on the conspicuous part on notice board of this Court on 7/10/2015. The appellants again filed an affidavit of service before the Court depicting service done on the respondents.

5 When the matter was listed before the learned Single Judge of this Court on 14/3/2016, he was of the opinion that the

service of writ of summons was not properly done and the learned Prothonotary and Senior Master was not justified in granting leave to serve by substituted service as there was no document to show the address of respondent No. 2 to 4. The learned Single Judge observed in the said order that in the Memorandum of Understanding which was signed by defendant No.5 the address of defendant No.5 was only reflected and he was pleased to observe that there was nothing on record as regards address of defendant No. 2, 3 and 4, though the plaintiffs had relied upon the document at Exh.C to the plaint which was an Indenture between defendant No.1 and defendant No.5 and an attempt was made to serve the said defendant No.1 on the said notice. The matter was again listed before the Court on 29/8/2017. In continuation of its earlier order the learned Single Judge noted that there was no question of recalling the order dated 14/3/2016 and the learned Single Judge then proceeded to observe that the plaintiffs had failed to serve the defendants as directed earlier and therefore dismissed the suit for want of prosecution. It is this order which is impugned in the present appeal.

6 We have perused the notice of motion filed along with the said appeal and also an affidavit supporting the said motion praying for grant of stay to the effect and operation of the impugned order dated 29/8/2017 passed by the learned Single Judge.

 We have also taken on record the compilation of documents tendered by the Counsel for the appellants Ms Vidya Nair.

7 The affidavit in support of notice of motion sets out certain relevant facts. In paragraph 5 of the said affidavit, it is stated by the appellants that an attempt was made to serve the respondents through private service and vide courier. However, respondent No. 1 to 4 were not found at the respective address as mentioned in the clause title of the plaint and all the envelopes sent to their respective addresses were returned with remarks “not found” etc.. The affidavit states that respondent no.5, however, appeared in the suit from time to time. After reiterating the steps taken to serve the respondents, which we have mentioned in paragraph above, the appellants have

stated in their affidavit that they have complied with all the requirements of Order V of the Code of Civil Procedure, 1908 in every means possible. A specific statement is made in the affidavit to the following effect in paragraph 6:-

“I say that on March 14, 2016 when the said matter was listed before this Hon'ble High Court the learned Judge was of the opinion that the service of writ of summons was not properly done and that the learned Prothonotary and Senior Master should not have granted leave to serve by substituted service as there was no documents to show the addresses of Respondent Nos. 2 to 4. This order was passed despite the fact that the learned Judge was informed that the Applicants had even published the extract of the writ of summons in two daily newspapers. I say that the applicants thereafter took out Notice of Motion No. 2513 of 2016 for recalling the order dated March 14, 2016. In the meantime, the applicants took a search in the office of the Sub-Registrar of Assurances in order to see if there are any other documents in respect of the suit property, which would have mention of the addresses of the Respondent Nos. 1 to 4.”

with summons to be served to the defendants. It provides that where a suit has been duly instituted, a summons may be issued to the defendants to appear and answer the claim and may be served in the manner prescribed not beyond 30 days from the date of institution of the suit. Order V of the CPC deals with service of summons. Rule 2 mandates that every summons shall be accompanied by a copy of the plaint. As per Rule 5, the summons may be issued either for settlement of issues or final disposal of the suit and it is mandatory to mention the date of appearance of the defendants on receipt of service of summons. On receipt of the summons, the defendant may produce the documents which he intends to rely upon in his defence and if the summons is for final disposal, he may produce his witnesses on whom he intends to rely in support of his case. Rule 9 prescribes the manner in which the summons are to be delivered to the defendant and the summons can be delivered or sent either to the proper office to be served by him or it can be served through a courier service approved by the Court. Rule 10 provides mode of service of summons by delivery or

tendering a copy thereof signed by the Judge or any officer authorized on its behalf and sealed with the seal of the Court. Rule 17 prescribes the procedure when the defendant refuses to accept the service or cannot be found and it requires the serving officer to affix the copy of the summons on the door or some conspicuous part of the house in which the defendants ordinarily reside or carries on business or personally works for gain and to return the original to the Court from which it was issued. Rule 18 mandates the serving officer to endorse or annex or caused to be served, annexed or caused to be served, annexed or to the original summons returned stating the time and the manner in which the summons were served. When the summons is returned unserved, the Court is duty bound to examine the serving officer on oath and may make further enquiry about service of such summons.

9 Rule 20 of the Code of Civil Procedure,1908, sets out modalities for effecting substituted service and provides that 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 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.

However, as per sub-rule (1A) - Where the court acting under sub-rule (1) and 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.

Sub-Rule (2) of Rule 20 provides that the service substituted by order of the court shall be as effectual as if it has been made on the defendant personally.

Thus the perusal of the Order V of Rule 20 makes it amply clear that a substituted service effected under the order of the court shall be considered as effective service and, as if it had been made on the defendant personally.

10 The learned single Judge has not taken into consideration the effect of a substituted service. On institution of the suit, the appellant attempted to serve the defendant the writ of summons but the same was returned back with postal remarks “left - not found” in respect of defendant no.1 and in respect of defendant nos. 2 to 4 with a remark “unclaimed”. Ordinarily, such a remark denotes that the summons was served by delivery at the address mentioned on it, meaning it was properly addressed and delivered. That it is not claimed particularly even after due intimation from the Post Office means it is taken as served. The Appellants, therefore, preferred an application, seeking permission to serve the defendants with writ of summons by way of a substituted service. A joint affidavit of service was also filed in this court, demonstrating

attempts to serve the defendants. The Prothonotary and Senior Master on 27th July, 2015 made the following endorsement :

“PC : Advocate for Plaintiffs submits that when attempt was made to serve with writ of summons upon Defendants, packet returned back with postal remarks “Left, Not Found”. Affidavit of service dtd. 24.07.2015 is taken on file. Advocate for Plaintiffs seeks and permitted to serve on Defendants with Writ of Summons by way of Substituted Service under the provision of Order V Rule 17 and 20 of C.P.C. 1908 by publishing the extract of the writ of Summons in (1) two daily local newspaper viz. One in English and another in vernacular language widely circulated at last known address shown in the Plaint (2) by affixing true copy of Writ of Summons on the Notice Board provided for, of this Hon'ble High Court (3) by sending duplicate Writ of Summons at the residence of the Defendants by Registered A. D.. The returnable date is extended till 28.09.2015. Office to issue fresh writ of summons. Adjourned to 28.09.2015.”

On the permission being granted to serve the defendants

by way of substituted service, the appellant published the extract of service of summons in the Free Press Journal, which is circulated in Mumbai on 1st October, 2015 and also in Marathi Daily Nav-Shakti, published and circulating in Mumbai. Another affidavit of service came to be filed before this court on 14/01/2016 which was sworn by the bailiff and clerk attached to the office of the Sheriff of Mumbai in which the deponent stated that as per request of the plaintiff's Advocate the office had transmitted packet containing writ of summons in the above matters at their above address by registered post acknowledgement due on 30/09/2015 and the office receives the original packets with marking either "not found" or "unclaimed".

11 In the impugned order dated 29/08/2017, the learned single Judge was pleased to refer the earlier order passed by this court on 14/03/2016, where the court had observed that the Prothonotary and Senor Master should not have granted the leave to serve by substituted service and directed the plaintiff to re-serve

defendants as required in law within four weeks from that date.

The learned single Judge failed to take into consideration that a substituted service is also one of the mode of service and by virtue of the Order V Rule 20, the service substituted by the alternate mode shall be effectual as if it had been made on the defendants personally. As per Order V, Rule 20 the court is empowered to permit the substituted service when it is satisfied that the defendant is keeping out of way for the purpose of avoiding service or for some other reasons, the summons cannot served in the ordinary way, then the court may permit to effect the substituted service 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. The court may thus permit a substituted service either in the manner enumerated under the Rule 20 of Order V or in such a manner as it thinks fit. The learned single Judge failed to

consider that substituted service is also a service recognized in law and the direction issued by the court on 14/03/2016, directing the plaintiff to re-serve the defendants as required in law, is without consideration of the provisions of Order V, Rule 20.

12 The learned single Judge was appraised of the substituted service by filing an affidavit in support of the notice of Motion where a prayer was made to recall the order dated 14/03/2016 on the ground that the plaintiff had even undertaken substituted service by publishing the extract of writ of summons in the two newspapers. The learned single Judge, however, refused to accept the said statement and makes a reference to the order dated 14/03/2016 and specifically referred to paragraph 2 of the said order, where the learned single Judge has noted that the Prothonotary and Senior Master ought not to have granted permission to serve the defendants by substituted service. The learned single Judge had then observed that when the plaintiff was asked as to which is the address to which the writ of summons was

sent, it was mentioned that it is the same address as is mentioned in the cause title and upon asking as to what is the correct address of the defendants, the counsel had referred to Exh. 'D' annexed to the plaint, which is the memorandum of understanding which was signed by the defendant no. 5 and reliance was placed on Exh.'C', which is an Indenture between the defendant no. 1 and defendant no.5 and it was the address that was mentioned in it. We fail to understand with respect, as to how the plaintiff can be charged for not giving the correct address. As we have noted that in the suit filed by the plaintiff, he has categorically mentioned the address of the 5th defendant and has attempted to serve the defendants on the aforesaid address. The defendant No. 5 has put an appearance and did not dispute about he being resident of the place mentioned in the suit under the caption of defendant no.5. The appellants have taken all efforts to serve the defendants through the bailiff and also by RPAD. The packets issued to the respondents were returned with remark "left, not known" or "unclaimed". The affidavit of the bailiff is placed on record and based on the said affidavit the Prothonotary

and Senior Master, on an application filed by the appellant, passed an order on 27th July, 2015, permitting the service of writ of summons on the respondents by way of substituted service. Pursuant to the said order, the appellants published extract of writ of summons on September 22, 2015 in two local newspapers being - "Free Press Journal" and "Navshakti". Not only this, the bailiff once again served the writ of summons to the respondents by acknowledgment due on 30/09/2015 and it also affixed the copies of writ of summons on October 07, 2015 on the conspicuous part of the Notice Board of this Hon'ble Court. Thereafter, the appellants have filed the affidavits of service dated 20/10/2015, 14/01/2016 and 18/01/2016, interalia, pointing out the service effected on the respondents. The appellants have thus complied with the requirement of Order V Rule 20 of the Code of Civil Procedure in every means possible. With great respect, we are of the opinion that the learned single Judge did not consider the provisions of Order V, Rule 20 of the CPC and the effect of the substituted service.

13 The present matter arises out of a suit filed in ordinary Original Civil Jurisdiction of the High Court of Judicature at Bombay. The Hon'ble High Court, being a chartered High Court, in exercise of powers conferred upon it by Article 225 of the Constitution of India, has framed Bombay High Court (Original Side) Rules. The power of the Hon'ble High Court to make rules is also recognised in section 122 of the Code of Civil Procedure, 1908. Section 122 reads as follows :

“S.122. Power to certain High Courts to make rules.--
[High Courts [not being the Court of a Judicial Commissioner]] [***] may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Thus the High Court regulates its procedure through the said Rules made by it and as such the Rule may alter or add to all or any of the rules in the first schedule. Section 128 of the Civil Procedure Code

provides for the matters for which the Rule may provide for and by virtue of the said section, the Rules framed by the High Court, may provide for : (a) the service of summons, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service.

Further section 129 of the Code also recognise the power to make rules on the original civil procedure. Section 129 reads as follows :

“S.129. Power of High Courts to make rules as to their original civil procedure. – – Notwithstanding anything in this Code, any High Court [not being the Court of a Judicial Commissioner] may make such rules not consistent with the Letters Patent [or order] [or other law] establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

14 Perusal of the said Rules, framed by the Bombay High

Court in the form of “The Bombay High Court Original Side Rules” shows that the said Rules deal with the procedure to be followed by the High Court. The said Rules in Part-II include the Rules relating to jurisdiction of the High Court on its Original Side. Chapter VI of the Part -II deals with summons and the manner in which the summons are to be issued and served on the defendant in various proceedings. Rule 76 provides for mode of service of summons and it reads as follows :

“R.76. Mode of service of summons.-- A Writ of Summons shall be served within the local limits of the Ordinary Original Civil Jurisdiction of the High Court by personal service or, if the plaintiff so desires, by registered post pre-paid for acknowledgement. Where the Writ of Summons is to be served at a place situate beyond the said limits, it may be served by registered post pre-paid for acknowledgment. An acknowledgement purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed to be prima facie proof of service. In all other cases, the Court shall hold such

inquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.”

Rule 84 - provides for proof of service of Summons.-- Said Rule reads as follows :

“R.84. Proof of service of Summons.-- Unless the Court shall otherwise order, the service of a Summons to appear and answer shall be proved by the vakalatnama having been filed or when on vakalatnama has been filed, by evidence showing that the Summons was served in the manner provided by the Code of Civil Procedure. Such proof shall ordinarily be by the affidavit of bailiff and (as to such matters as the bailiff cannot speak to of his knowledge) of the person who attended the bailiff for the purpose of identification at the time of service,, or of such other person or persons as can speak to the identify of the person served or to other matters necessary to be proved in respect of the service.”

Rule 86 provides for substituted service and Rule 87 provides for dismissal of the suit if the summons is not served within six months.

Rules 86 and 87 are reproduced as below : -

“R.86. Substituted service.-- Application for substituted service of the Writ of Summons shall be made in chambers. The application shall be supported by an affidavit, and in the case of service through another Court, by the deposition of the Officer who attempted to make the service, and of such other person or persons as may have accompanied him for the purpose of pointing out the party to be served, stating when where and how such service was attempted to be made.”

“R.87. Suits to be placed on board for dismissal if summons not served within six months. -- If the Writ of Summons is not served within six months from the date of the filing of the plaint, the Prothonotary and Senior Master shall, unless good cause is shown, place the suit on board for dismissal. The Prothonotary and Senior Master shall notify such items on his notice board one week before they are placed on the board for dismissal.

15 The Bombay High Court, Original Side Rules contain a procedure for service of summons to the defendants and such writ of

summons are to be served within the local limits of the Ordinary Original Civil Jurisdiction of the High Court by personal service or, if the plaintiff so desires, by registered post prepaid for acknowledgment. In terms of Rule 76 an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed to be prima facie proof of service. Such service has to be proved by the evidence showing that the summons is issued and served in the manner provided for in the Code of Civil Procedure. Such proof has to be ordinarily in the form of the affidavit of the bailiff and of the person who attended the bailiff for the purpose of identification at the time of service or of such other person or persons who can identify the person served. Rule 86 of the Bombay High Court, Original Side Rules contain the provisions for substituted service which is to be granted on an application being made, supported by an affidavit by the deposition of the officer, who attempted to effect service on such person or any other persons who is accompanied him for the purpose of effecting such a service, stating the manner in

which the service was attempted to be made.

The aforesaid procedure prescribed is consistent with the procedure prescribed for service of summons as contemplated under order V of the Code of Civil Procedure. The learned single Judge has failed to take into consideration the said Rules framed by the High Court on the Original Side, dealing with the service of summons, when he issued a direction to serve the defendants as required in law when an affidavit was already placed before the Prothonotary, reflecting a valid service.

The learned single Judge has also not taken into account section 27 of the General Clauses Act, 1897, which deals with the manner of service by post and by virtue of the said section where ever any [Central Act] or Regulation authorizes or requires any document to be served by post, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in

the ordinary course of post. Thus when a notice is served by a registered post acknowledgment due, then it is a deemed service, properly effected, unless the contrary is proved by the defendant. The learned single Judge failed to take into consideration all the material placed before him to reflect the efforts taken to serve service on the defendants and the endorsement of “refused” or “unclaimed” would amount to a service by applying provisions of section 27 of the General Clauses Act, 1897. The said aspect of the matter, with due respect, has been completely lost sight of by the learned single Judge while dismissing the suit on the ground that the summons were not served on the defendants.

16 We may gainfully refer the judgment of the Hon'ble Apex Court in the case of **Gujarat Electricity Board and Anr. vs. Atmaram Sungomal Poshani**, reported in AIR 1989 Supreme Court 1433, where the Apex Court while dealing with the presumption under section 27 of the General Clauses Act, was pleased to observe as follows in para 8 :

“8. *There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service. In the instant case the respondent failed to discharge this burden as he failed to place material before the Court to show that the endorsement made by the postal authorities was wrong and incorrect. Mere denial made by the respondent in the circumstances of the case was not sufficient to rebut the presumption relating to service of the registered cover. We are, therefore of the opinion that the letter dated 24.4.1974 was served on the respondent and he refused to accept the same. Consequently, the service was complete and the view taken by the High Court is incorrect.*

The Hon'ble Apex Court in case of **M/s. Madan and Co. vs. Wazir Jaivir Chand**, reported in AIR 1989 Supreme Court 630, while dealing with the issue of a notice sent by a landlord to a tenant, demanding arrears of rent and the same being returned on account of non-availability of the addressee, concluded that all that the landlord can do to ensure an opportunity to the tenant to post a prepaid registered post letter acknowledgment due, containing the

tenant's correct address and once that letter is delivered to the post office over which the landlord has lost his control, it is to be presumed that it has been delivered to the addressee under section 27 of the General Clauses Act. The Hon'ble Apex Court has observed so in paragraph 6, which is reproduced below :

“6. We are of opinion that the conclusion arrived at by the courts below is correct and should be upheld. It is true that the proviso to Clause (i) of S.11(1) and the proviso to S. 12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through posts. All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgement due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee Under Section [27](#) of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules

do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a Court under Order V of the C.P.C. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret the provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, an addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found", "not in station", "addressee has left" and so on.

17 The presumption under section 27 of the General Clauses Act is once involved and applied, the burden shifts on the defendant to rebut the presumption by adducing evidence that there was no service of notice upon him. In the case in hand, the plaintiff had

taken the steps to serve the defendants and also filed affidavits to that effect from time to time and has also effected the substituted service and tendered an affidavit to that effect. The learned Single Judge, however, has apparently erred in concluding that it is not a service as required in law. The learned Single Judge by invoking Rule 87 of the Chapter VI, Part-II of the Bombay High Court (Original Side) Rules, was pleased to dismiss the suit since the summons were not served within six months from the date of the filing of the plaint. The learned single Judge has rather been harsh on the plaintiff, as the plaintiff has taken all the steps to serve the defendants and had put all the material before the learned single Judge, pointing out the steps taken by the plaintiff for serving the defendants. No contrary material was produced before the Court to show that the endorsement was made by the processor of service and the affidavit filed before the court to be either false or erroneous. The rejection of the suit by the learned single Judge, therefore, is extreme step which the learned single Judge has adopted, causing grave prejudice to the plaintiff / appellant.

18 In these circumstances, the service effected on the defendant nos. 1 to 4 is “effective service”. The order passed by the learned single Judge which records that the plaintiffs have failed to serve the defendants and therefore, dismissed the suit for want of prosecution is not sustainable. We feel that the appellants have taken all steps to serve the writ of summons on the address known to the appellants. They had specifically filed an affidavit stating that the defendants were avoiding service and that it was clear from the affidavit of service filed on record, based on which the Prothonotary and Senior Master of this court has granted permission to effect substituted service and which was accordingly effected on the respondents, we do not feel that the order passed by the learned single Judge is sustainable in law.

19 In the result, the appeal is allowed and we set aside the impugned order dated 29th August, 2017 passed by the learned Single Judge of this Court, thereby dismissing the Suit No.2808 of 2008 with Chamber Summons No. 139 of 2017 with Notice of Motion No. 2513 of 2016

in the said suit, for want of prosecution.

The Suit No. 2808 of 2008 is restored to file and the appellants are permitted to move appropriate Notice of Motion for seeking appropriate reliefs, as is advised.

[SMT. BHARATI H.DANGRE, J.]

[S.C. DHARMADHIKARI, J.]

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