

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0604 of 2016

District : Dhule

Shri Madan s/o. Mohan Gupta,
Age : 59 years,
Occupation : Driver,
R/o. Bagal Building, Dondaicha,
Taluka Sindhkheda,
District Dhule.

.. Appellant
(Original
defendant)

versus

Ramavati Ramesh Chauvan,
Age : 62 years,
Occupation : Household,
R/o. Andheri, 4, Bangala,
Mumbai - 58.

.. Respondent
(Original
plaintiff)

.....

Mr. Yogesh B. Bolkar, Advocate, for the appellant.

Mr. S.P. Brahme, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 20th June 2019**

**Date of pronouncing
the judgment : 05th August 2019**

JUDGMENT :

01. Present appeal has been filed by original defendant challenging the concurrent judgment and decree passed in Regular Civil Appeal No. 253 of 2012

dt.10-08-2016 by learned District Judge-4, Dhule; thereby confirming the decree passed in Regular Civil Suit No. 38 of 2007 dt. 22-02-2008 by learned Civil Judge Junior Division, Dondaicha, District Dhule.

02. Present respondent / original plaintiff had filed said suit for possession of house property. Plaintiff is the owner of CTS No. 587 admeasuring 574 sq.ft. with house constructed in it. She had purchased the said house in 1984. Defendant was family friend of the plaintiff and on his request, plaintiff had allowed defendant to occupy the house in 2003. It was permissive possession without any charge. When plaintiff had asked defendant to vacate the suit premises and hand over the possession to her, defendant refused to do so. Hence, suit.

03. Suit proceeded ex-parte against defendant.

04. Taking into consideration the evidence adduced by plaintiff, learned Trial Court decreed the suit. Defendant was directed to hand over the possession of the suit premises to plaintiff within a period of one month.

05. Defendant challenged the said decree before First Appellate Court and as afore-said, the said appeal has been dismissed. Hence, this Second Appeal.

06. Heard learned Advocate Shri. Y. B. Bolkar for appellant and learned Advocate Shri. S. P. Bramhe for respondent.

07. It has been vehemently submitted on behalf of appellant that the learned Trial Court erred in proceeding ex-parte against defendant. In fact, the defendant was never tried to be served in the matter. The report of the bailiff on the summons issued to the defendant shows that defendant had refused to accept the notice. However, in view of requirement under O 5 R 17 of Code of Civil Procedure, the concerned Bailiff ought to have affixed a copy of the summons on the conspicuous part of the house of defendant. When there is no complianace under O 5 R 17 of the Code, it can not be said that defendant was duly served. Specific ground to the tune of non-compliance was taken in the appeal memo. However, the learned First Appellate Court failed to consider the same. There was no proper opportunity to the appellant to contest the matter. Learned Advocate for appellant has therefore, prayed for the remand of the matter to the Trial Court.

08. Reliance has been placed by the learned Advocate for appellant on the decision of the Division Bench of this Court in **Deepali Pratap Sonawane v/s. Pratap Irappa Sonawane** [2015 (4) Mh. L. J. 378], which dealt with duty of the Court while holding the service of summons valid in any given case before it. It has

been observed that, "Basically service of summons is to be made by delivering a copy thereof to the concerned party apart from other modes of service prescribed in Code of Civil Procedure.....Perusal of Rules 17 and 19 of Order V of the Code show that in order to accept the service as valid service, particularly, when the report is to the effect that the respondent refused to accept the summons then, it becomes the duty of the Court to examine the Process Serving Officer/ Bailiff if his report is on affidavit. Even if the Process Serving Officer gives his report on affidavit, discretion is with the Court to examine the Process serving Officer in order to ascertain, whether his report is correct or not in order to hold the service valid. After complying with these mandatory requirements, the Court is required to declare, whether the summons is duly served or not". Further reliance has been placed on the decision in **Manju Baldev Narang and another v/s. Prakash Manohar Lokhande and others [2013 (6) Mh. L. J. 810]**; wherein it has been held that, "Provisions of Rules 17 and 19 of Order 5 are mandatory in nature and are required to be scrupulously followed. In absence of that there can not be proper service of summons and if summons is not properly served, the adjudication on merits and the decree passed by the Court will be nullity". Learned Advocate for appellant has also placed reliance on the provisions made by this Court in Bailiff Manual and the Forms supplied for compliance and submissions of

report of service of summons.

09. Per contra the learned Advocate appearing for respondent has submitted that there was proper service of summons to the defendant. When defendant had refused to accept the summons, Bailiff has reported it, with his verification. He tried to submit that interpretation of R.17 of O.5 of the Code would indicate that the first part of it till word "acknowledgment" will have to be read disjunctively, till the 'comma' and then from further 'comma' with words 'and shall then return' will have to be taken as what compliance is to be made. Thereby, the learned Advocate tried to submit that it is not necessary that the Bailiff should affix a copy of summons on the conspicuos part of house or property of defendant in case of refusal to accept the summons. There was proper compliance of O. 5 R 17 of the Code. Learned Trial Court has decided the matter on the basis of evidence before it. Defendant had not preferred any application under O.9 R 13 of the Code, but preferred to file appeal. Therefore, the appellate Court has rightly considered the evidence and dismissed the appeal. There is no question of remand of the matter.

10. Learned Advocate for respondent has relied on the decision in **Parasurama Odayar v/s. Appadurai Chetty** [AIR 1970 Madras 271], wherein it has been held

that “In particular, where the return of the process-server under R.17 of O 5 has not been verified by the affidavit of the serving officer the Court shall examine the serving officer on oath or cause him to be so examined by another Court touching his proceedings. It should also declare expressly that the summons has been duly served, though the exact form of that declaration may be in any convenient form. What is important is that the endorsement of the Court itself should indicate that the Presiding Officer has applied his mind and considers that the summons has been duly served”. It has been submitted that in our case, the learned Trial Court has declared that the summons was duly served. Further reliance has been placed on the decision of Division Bench of this Court in **Rakesh v/s. Vaishali Rakesh Jaiswal [AIR 2018 Bom 53]**; wherein how the 'comma' is to be interpreted has been discussed.

11. It is to be noted that the suit summons issued to defendant has been stated to be return by the process server / Bailiff on the ground that he had refused it. Persusal of summons Ex.6 would show that it was issued on 08-10-2007. Printed form as prescribed this Court has been used for the summons. The back side of the page would show that sufficient space was made available for writting report. It also contains some words used in affidavit already printed on the same. Bailiff has reported that he had met defendant and gave him copy of summons and copies along with it. Those were accepted by him. However, when Bailiff asked him to sign, he refused to sign on

the summonsn / notice copy with Bailiff. There is signature of one witness. For the sake of convenience the said report is reproduced here.

रिपोर्ट		
सदरहू -मदन मोहन गुप्ता, वस्ती स्टेशन भाग, धोंडाईचा येथे यांचा तपास करिता ते स्वतः समक्ष भेटले. त्यांना समन्स व नक्कल दिल्या व घेतल्या तसेच त्यांना सही करण्याचे समज दिली. परंतु त्यांनी खालील साक्षीदार समोर असताना नाकारले. सबब समन्स बजवून परत केले असे १०/१०/०७		
सही/-	तपासले ता. १६/१०/०६	
साक्षीदार	सही/-	सही/-
नामदंव मंगा माजीको.	सहा.अधिक्षक	बेलिफ

After taking note of the report on the summons Ex.6, it is now required to be seen whether it fulfills the requirements under O.5 R. 17 of the Code. In order to appreciate the submissions made on behalf of appellant, it would be convenient to reproduce the relevant provisions of the Code. Rules 16 to 19 of Order 5, of the Code, are relevant here which read thus:

16. Person served to sign acknowledgement -Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

17. Procedure when defendant refuses to accept service, or cannot be bound.-**Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment**, or 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 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 of some other conspicuous part of the house in which the defendant ordinarily reside 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 so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed. (Stress supplied)

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”.

12. Thus, the harmonious reading of all the three rules make it clear that even in case of refusal on the part of defendant to sign the acknowledgement, Bailiff was duty bound to affix copy of the summons / notice to the outer door or some other conspicuous part of the house of defendant. As has been held in **Deepali** and **Manju's** case (supra) those provisions are mandatory. Order of acceptance / refusal of service of summons without verifying it by the Presiding Officer in a casual manner, without application of mind and without adhering to the procedure laid down would affect the party prejudicially.

13. In **Sushil Kumar Sabharwal v/s. Gurpreet Singh and others [(2002) 5 SCC 377]**, when Apex Court found that copy of the summons was not affixed nor there was any witness to the said alleged affixation, it was held that, *“Be that as it may, we are satisfied that the summons was not served on the defendant-appellant. He did not have an opportunity of appearing in the Trial Court and contesting the suit on merits. The Trial Court and the High Court have committed a serious error of law resulting in failure of justice by refusing to set aside the ex-parte decree”*. It was an order under O. 9 R 13 of the Code, which was under challenge before the Apex Court.

14. Here in this case, the perusal of the report would show that there is no verification, much less

affidavit of the process server in proper form. Though the words in respect of solemn affirmation are printed, there is no name of the Bailiff. It appears that learned Trial Court had accepted the report in very casual manner. There was no compliance of Rule 19 of O 5 of the Code before passing the order of proceeding the matter ex-parte. Learned First Appellate Court has discussed above infirmities, but surprisingly held that the report is duly verified by Assistant Superintendent of the Court. When the Bailiff had not affixed copy of summons to the outdoor of the house of defendant after the alleged refusal by him to sign the acknowledgment, then such casual verification by the officer of the Court has no meaning at all. Both the Courts below have erred in holding that the defendant was duly served with summons. In fact, **Sushil Kumar's** (supra) decision was cited before the learned First Appellate Court, but it was not relied on the ground that in this case defendant had accepted the copies of the summons, but refused to sign the acknowledgment. It appears that learned First Appellate Court failed to consider the wordings of Rule 16 and 17 of O. 5 of the Code. Rule 16 imposes a duty on the process server to obtain signature of the person on whom the summons is being served on the copy of the summons with him. Rule 17 deals with procedure when such person refuses to accept service, etc. It contemplates the situation that defendant has refused to sign the

acknowledgement, there is no further bifurcation about refusal before or after acceptance of summons. Therefore, even in case of acceptance of copies of summons, but refusal to sign the acknowledgment by the defendant, the process server was bound to affix a copy of the summons on the outer door of the house of the defendant. There was no proper service of summons in this case. Both the Courts have wrongly accepted the said service as proper service.

15. In the afore-said situation, when defendant was not served properly and could not get proper opportunity to defend himself, the appeal deserves to be partly allowed and deserves remand to the Trial Court for deciding the matter afresh as per the provisions of law. Hence, following order :-

ORDER

1. Second Appeal is hereby allowed.

2. The judgment and decree passed in Regular Civil Appeal No. 253 of 2012 dt.10-08-2016 by District Judge-4, Dhule as well as judgment and decree passed in Regular Civil Suit No. 38 of 2007 dt. 22-02-2008 by Civil Judge Junior Division, Dondaicha, District Dhule are hereby set aside.

3. Regular Civil Suit No. 38 of 2007 is remanded and restored to the file of Civil Judge Junior Division, Dondaicha, District Dhule for deciding it

afresh as per the provisions of law.

4. Both the parties to appear before learned Trial Court on 19-08-2019. When directions are given to appellant / defendant herein, it is not necessary to issue summons to him. Defendant to file his written statement within a period of 15 days after the appearance and that time will not be extended.

5. Needless to say that since the matter of 2007 has been remanded, the learned Trial Court to expediate the hearing of the suit and decide it as early as possible, preferably within a period of 6 months from the appearance of the parties before it. Trial Court to give opportunity to both the parties to lead evidence, if any.

6. Record and proceedings of the matter be sent back to the concerned Court immediately.

7. No order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

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