

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

Second Appeal No. 0028 of 2018

District : Nanded

Hussainibi w/o. Syed Habibur
Rehman,
Age : 50 years,
Occupation : Household,
R/o. C27, Bombay Park,
Solapur, Dist. Solapur.

.. Appellant
(Original
defendant
no.05)

versus

1. Naseera Begum Syed Habibur
Raheman,
Age : 60 years,
Occupation : Household,
R/o. Nandigram Society,
Anand Nagar,
Taluka Nanded,
District Nanded.

2. The State of Maharashtra,
Through the Collector, Nanded,
Collector Office, Nanded.

3. Directorate of Accounts
(Family Pension),
101, Maharshi Karve Road,
Churchgate, Mumbai,
Maharashtra State.

4. Executive Engineer,
Irrigation Department,
Mechanical Division,
Kokan Alore,
Taluka Chiplun,
Dist. Ratnagiri.

5. The Deputy Engineer,
Mechanical Sub-Division,
Koynanagar,
Taluka Patan, Dist. Satara.

.. Respondents
(No.01 - Original
plaintiff
&
Nos.02 to 05 -
Original
defendants
no.01 to 04)

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Mr. G.R. Syed, Advocate, for the appellant.

*Ms. Fatima Kazi, Advocate, holding for
Mr. S.S. Kazi, Advocate, for respondent no.01
(caveator).*

*Mr. Y.G. Gujarathi, Assistant Government Pleader,
for respondents no.02 and 03.*

Respondent no.04 served.

Respondent no.05 served.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 15TH FEBRUARY 2019

ORAL ORDER :

01. Heard both sides.

02. Present appeal has been filed by the original defendant no.05 (respondent no.05 in first appeal) to challenge the judgment and decree in Regular Civil Appeal No. 77 of 2016 passed by learned District Judge-6, Nanded, dated 26-07-2017, whereby the appeal came to be allowed, in which, dismissal of Regular Civil Suit No. 916 of 2012 dated 30th July 2016, by learned Civil Judge (Senior Division), Nanded, was challenged.

03. It is necessary to take the facts of the case into consideration before proceeding towards the

issues contended in the present appeal. Present respondent no.01 had filed Regular Civil Suit No. 916 of 2012 for declaration and perpetual injunction. She had come with a specific case, that she is legally wedded wife of Syed Habib-ur-Rahman s/o. Syed Nyamtulla. Their marriage had taken place as per Muslim rites on 11-03-1979. She has two children by name, Nishad and Mujibur Rahman from Syed Habib. Syed Habib worked as Welder in Irrigation Department, Alore, Taluka Chiplun, with defendants no.03 and 04. He had retired from service and thereafter taking pension. As per the plaintiff, Syed Habib had illtreated her and, therefore, their relations had become strained. She was driven out of the huse and, therefore, she had filed petition for maintenance bearing Misc. Criminal Application No. 115 of 1981 before Judicial Magistrate (F.C.), Nanded. The maintenance was granted to plaintiff and her children by order dated 25-08-1982. It is also contended that another suit was filed i.e. Special Civil Suit No. 143 of 2009 against deceased and defendants no.03 and 04 by the plaintiff before Civil Judge (Senior Division), Nanded and it was also finally decided. Syed Habib expired on 06-06-2010 and, therefore, as per the pension rules applicable to him, according to the plaintiff, she was entitled to get family pension being the legally wedded wife of deceased Syed Habib. She, therefore, served notice to defendants no.02 to 04 on 27-01-2012 and requested to grant family pension. However, it was refused by defendants no.03

and 04 by saying that powers of grant of pension lies with defendant no.02. Again, a notice was sent by the plaintiff to defendant no.02 on 27-03-2012. But it was avoided on one or the other pretext. She came to know that defendant no.05 is claiming to be the wife of deceased Syed Habib and also claiming family pension and, therefore, plaintiff filed the suit for declaration and for directions to grant pensionary benefits.

04. Defendants no.01, 03 and 04 filed written statement, accepted that Syed Habib was the employee, as contended and he retired by superannuation. They contended that in the suit i.e. Special Civil Suit No. 143 of 2009, there was a compromise between plaintiff and Syed Habib. As per the terms of the settlement, amount of Rs. 1,50,000/- was received by the plaintiff as one time settlement. It was also stated that Syed Habib had nominated defendant no.05 to receive the family pension after his death and as he had not nominated plaintiff, she is not entitled. Defendant no.05 filed separate written statement and contended that she is the legally wedded wife of Syed Habib. She is the nominee to receive family pension and accordingly she is getting it as per the rules of the Pension Act. It is stated that plaintiff has no right as she has given it up by accepting amount of Rs. 1,50,000/-.

05. With these contentions, issues came to be

framed. Parties went to trial. After hearing both sides and perusing the evidence on record, learned trial Court has dismissed the suit.

06. The original plaintiff challenged the said judgment and decree passed by the trial Court in Regular Civil Appeal No. 77 of 2016. The said appeal was heard by learned District Judge-6, Nanded and it came to be allowed on 26-07-2017. Now, the respondent no.05 before the first appellate Court intends to challenge the said judgment and decree in this second appeal.

07. Learned Advocate for the appellant has made submission on two points. Firstly, there was no proper service of notice in appeal to respondent no.05 i.e. present appellant and, therefore, the appeal which has been decided in her absence, cannot be allowed to sustain. The second point that is harping upon is the relinquishment of the right by the plaintiff towards the full and final settlement made before the Court in earlier proceedings with deceased Syed Habib.

08. Per contra, learned Advocate appearing for respondent no.01 submitted that there was due service of notice to respondent no.05 - present appellant, but she failed to appear and, therefore, the said point cannot be considered as substantial question of law. Secondly, though there was compromise between

the parties and plaintiff received the said amount, yet, it does not amount to relinquishment of her right. That amount was towards maintenance.

09. I would like to deal with the second point first. As regards the terms of compromise which were arrived at in Special Civil Suit No. 143 of 2009 is concerned, it appears that the said matter was taken before Lok Adalat dated 30th January 2010 and following were the terms of compromise :-

[1] The plaintiff is legally wedded wife of defendant no.01 and their marriage took place in the year 1979. they begotten issues Nishad and Mujibur Raheman. Both were married.

[2] Plaintiff as well as defendant no.01 are old age person.

[3] The parties agreed to pay Rs. 1,50,000/- (One Lakh Fifty Thousand) from monetary benefit of defendant no.01, which will pay within 4 months by defendant no.02 and 03. The plaintiff will not file any proceeding for maintenance further and shall withdraw all proceeding before various Courts. Hence, the suit of plaintiff against defendant may kindly be disposed off.

We have arrived at the compromise terms and willingly before the Lok Nyayalaya held on 30th at ... No coercion of force is applied. Dated this 30th day of January 2010.

Perusal of the said terms would show that there is no clear wording that the plaintiff therein i.e. present respondent no.01 had given up her rights as regards to receive family pension. Another aspect is that on that day i.e. when the compromise took place, Syed Habib was alive and, therefore, any term in anticipation of his death could not have been recorded. Any contingency could not have been contemplated. Therefore, on that day, what amount

was agreed was only towards maintenance and, therefore, it was specifically stated that the plaintiff therein will not file any proceeding for maintenance in future. Those terms of compromise have been, it appears, wrongly taken by the learned trial Court as evidence of relinquishment of right by the plaintiff. Therefore, the view taken by the first appellate Court, that plaintiff had not relinquished her pensionary benefits is a correct view. No substantial question of law can arise on this aspect.

10. As regards the service of summons / notice in the first appeal is concerned, perusal of the record would show that initially notice was tried to be effected on respondent no.05 therein. But on that day, she was not present and, therefore, the said notice was returned unserved i.e. on 27-09-2016. However, thereafter an application was given by the appellant stating that the notice be issued under Order V Rule 20 of the Code of Civil Procedure. That application came to be allowed and on that day also, when it was tried to be effected, defendant was not found in the house. The house was locked and, therefore, copy of the summons was affixed on the conspicuous part of her house. It was tried to be contended by the appellant, that no *panchanama* has been drawn at that time by concerned bailiff nor signature of any person has been taken who was present at the time of affixing the notice. It is to

be noted that as per Order V Rule 20 of the C.P.C., when such order is passed, what is expected is to affix copy thereof on some conspicuous place in the court-house and also upon some conspicuous part of the house in which the defendant is known to have last resided, is only requirement. No doubt, the requirement of endorsement about affixing of a copy, the circumstances under which the bailiff has done the said act and the name and address of the person, if any, by whom the house was shown and in whose presence the copy was affixed, is a mandatory provision, while effecting service under Order V Rule 17 of the C.P.C. Therefore, taking into consideration the said difference between the two provisions, it can be said that the present appellant was duly served before the first appellate Court and the Court was justified in proceeding the matter *ex parte*. Hence, on that point also, there is no substantial question of law.

11. In the result, the appeal fails and the same is hereby dismissed.

(Smt. Vibha Kankanwadi)
JUDGE

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