

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.466 OF 2018
IN
CIVIL REVISION APPLICATION(ST) NO. 18808 OF 2018

Rambujharat Bhumidhar Yadav

since deceased through

Mr. Rajaram Rambujharat Yadav & ors.

v/s.

Bharat Vasram Chudasama

... Applicants

... Respondent

Ms. Kalpana Trivedi for the applicant.

CORAM : DAMA SESHADRI NAIDU, J.

24th June 2019.

P.C.

The applicant, as the owner of a piece of property, claims to have leased it out to the respondent. Later he has come to know that the respondent illegally inducted another person into the property. So he filed R.A.E. & R. Suit No.175/321/2012 before the Court of Small Causes, Mumbai, against both the respondent and the subsequent inductee. But he failed to serve suit summonses on them.

2. As to the first defendant, the Bailiff's report reads that "he left

the suit premises five years ago”; as to the 2nd defendant, the applicant, for reasons I could not readily ascertain, failed to serve the summons. Then, he got the 2nd defendant’s name deleted from the array of parties. Eventually, the Trial Court set the remaining defendant *ex parte* and, later, decreed the suit.

3. When the applicant laid execution, the respondent-defendant filed Marji Application to have the *ex parte* decree set aside. He filed that Marji Application with 122 days’ delay. The Trial Court, however, remained unpersuaded; it dismissed the Marji Application through its order, dated 16th January 2016. Aggrieved, the defendant filed Appeal No.11 of 2016, which the Appellate Bench of the Small Cause Court, through its order, dated 16th January 2016, allowed it. Impugning that order, the plaintiff has filed this Civil Revision Application.

4. Here, too, the applicant’s all efforts to serve the notice on the respondent yielded no result. First, the applicant tried to have the notice served on the respondent through the process of Court. The notice was returned unserved with the Bailiff’s remark: “not found, left premises since 5 years back.” On the other hand, the Tracking Report of the speed post taken out from the Postal Department’s website reveals that the respondent had the notice delivered to him on 2nd March 2019.

5. True, the applicant’s efforts through the process of Court failed, but the speed post track record reveals that the respondent had

been duly served. Though the notice was served in March 2019, to this date the respondent has not entered his appearance. I, therefore, set him ex parte and proceed with the matter on merits.

6. The applicant's counsel has made strenuous efforts to impress upon the Court about the various devices the respondent adopted, both before the trial Court and before this Court to drag the proceedings. Nevertheless, the trial Court's order setting the respondent ex parte, I am afraid, seems to suffer from a legal infirmity. It is evident that as the respondent could not be served in more than two years, however, the bailiff's report reveals that the respondent has not been residing in the leased property for the last five years.

7. That said, a plaintiff's inability to service summons on the defendant without anything further does not amount to a deemed service. Nor does it enable the trial Court to set the defendant ex parte. The plaintiff ought to exhaust all statutory steps before he asks the Court to set the opponent ex parte. Put it differently, the plaintiff ought to have taken recourse to substituted service, such as publication. That has not happened.

8. Order 5, Rule 20 speaks of substitute service. If the trial Court is satisfied that there is reason to believe that the defendant is keeping out of the way for avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing 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. The service can also be in such other manner as the Court thinks fit. Subrule (2) of Rule 20 creates a legal fiction: the substituted service of summons is proper service as if it were served on the defendant personally.

9. Indeed, here, the Bailiff's report reveals that the respondent had left the leased property about five years ago. True, the Tracking Report of the speed post reveals that the respondent had the notice delivered to him on 2nd March 2019. I reckon the notice was delivered at the address mentioned. The Tracking Report has not, however, conclusively showed that it was served on the respondent. As the applicant's case stands on the footing of subletting, the summons getting served on the adult member of the respondent's household, too, does not arise.

10. I, therefore, hold that Appellate Bench's order in setting aside the ex parte decree and remanding the matter to the trial court does not suffer from any legal infirmity.

11. That said, I hasten to add that respondent's conduct cannot be appreciated, either. It is evident that he has been employing all the tricks he has up his sleeve. In the trial Court he remained unserved, but the moment he suffered an ex parte decree, he sprung into action, filed an appeal, and got the ex parte decree set aside. Here, too, despite

service of notice, he remains elusive. His aim, it seems, is to obstruct or obfuscate the trial and drag the proceedings. Let it not happen.

12. Under these circumstances, first, I refuse to interfere with the Appellate Bench's discretion in setting aside the ex parte decree and remanding the matter. Second, because of the trouble the applicant has faced to have the case fast tracked and the delay that has already occurred, the trial Court will make all its efforts to see that the suit is disposed of in six months. The defendant is not entitled to any adjournment unless the Trial Court is satisfied that he has faced unavoidable circumstances.

With the above observations and directions, I dispose of the Civil Revision Application.

(DAMA SESHADRI NAIDU, J)