

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

WRIT PETITION NO. 2652 OF 2018

Sakuma Finvest Pvt. Ltd.

...Petitioner

Versus

Chemox Exports Imports Pvt. Ltd.

...Respondent

Mr.Vishal Kanade i/b. V & M Legal for for the petitioner.

Mr.Girish Godbole a/w. Ms.Rutuja Patil Ms.Niyati Kalra i/b.
Negandhi Shah & Himayatulla for the respondent.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 21st JUNE 2019.

JUDGMENT :

Petitioner Sakuma Finvest Pvt. Ltd., is the tenant, and respondent Chemox Exports Imports Pvt. Ltd., is the landlord. Initially, on 12th December 2012, the landlord filed RAE Suit No.1398/3081 of 2012 against the tenant, for a decree of eviction. On 9th May 2013, the suit was decreed *ex parte*. Later on 7th October 2013, the tenant filed Marji Application No.666 of 2013 under Order IX Rule 13 of the Code of Civil Procedure, 1908, to have the *ex parte* decree set aside, but could not succeed. The application was dismissed on 10th February 2015.

2. Aggrieved, the tenant filed Appeal No.108 of 2015 before the Appellate Bench of the Small Cause Court, Mumbai, which was also dismissed on 6th May 2017. Eventually, the tenant filed this writ petition, questioning the Appellate Bench's order.

3. Shri Vishal Kanade, the learned counsel for the tenant, submits that Order IX Rule 13 lays down two grounds for the defendant to have an *ex parte* decree set aside. According to him, if the defendant could prove that no summons had been served on him or that he had been prevented for sufficient reason from appearing before the Court despite service of summons, that would suffice. In that context, Shri Kanade stresses that the tenant has taken both the pleas and placed on record sufficient material to sustain those pleas.

4. Shri Kanade has taken me through the pleadings in Marji Application and the orders rendered by the Trial Court and the Appellate Bench. According to him, the Trial Court dealt with the issue cryptically and did not assign any reason why the tenant's plea was disbelieved. On the other hand, the Appellate Bench's

order, he continues, suffers from an error apparent on the face of the record. To elaborate, Shri Kanade submits that though the Appellate Bench has referred to the second plea—that is, the sufficiency of reasons not to appear before the Court despite service of summons—it has erroneously concluded that there was no plea. He says there was “an oral request” to that effect.

5. Summing up his submissions, Shri Kanade wants this Court to set aside the impugned order and remand the matter to the Trial Court, with a direction to decide the matter afresh.

6. On the contrary, Shri Girish Godbole, the learned Counsel for the landlord, has submitted that the defendant could definitely take either of those pleas, but not both: the non-service of the summons and the sufficiency of cause not to appear. They are, he maintains, mutually contradictory. He has metaphorically described it as a person’s travelling on two horses, at the same time.

7. Shri Godbole has taken me to the pleadings in Marji Application. He asserts that only one of the two pleas was taken;

that is non-service of the summons. According to him, the tenant has not pleaded that there had been sufficient cause for him to not appear before the court despite his receiving the summons. And about the Appellate Court's order, Shri Godbole refers to its observations that the tenant's application is deficient in pleadings. So he urges this Court not to interfere with the concurrent findings of the courts below.

8. In reply, Shri Kanade stresses that the Appellate Court ought to have read the tenant's application, in his words, comprehensively. It is impermissible to the courts below, according to him, to dissect the pleadings technically, sentence by sentence, and, then, hold that the applicant has not pleaded one thing or another. To hammer home his contention, he relies on *Shyam Lal Biharilal Pandey Vs. Reliance Infrastructure Ltd.*¹ and *Steel Authority of India Ltd. vs. Union of India.*²

¹ (2009) 3 AIR Bom R 720

² (2006) 12 SCC 233

9. Heard Shri Vishal Kanade, the learned counsel for the petitioner, and Shri Girish Godbole, the learned counsel for the respondent.

Discussion:

10. Indeed, the facts are not in dispute. As pleaded by the tenant itself in the Marji application, the landlord filed the suit in 2012 for eviction. The suit was mainly on these grounds: (a) the defendant is not using the suit premises; (b) the plaintiffs require the suit premises for its bona fide use; and (c) the defendant has made substantial changes, alterations in the suit premises without the plaintiff's consent. The tenant suffered an *ex parte* decree. To have it set aside, it applied, first, to the Trial Court and, later, to the Appellate Court, but with no success. So it comes before this Court.

11. As the dispute concerns the *ex parte* decree and what the defendant should do to have it set aside, let us examine the provision. Order 9, Rule 13 of CPC reads:

Setting aside decree ex parte against defendant. – In any case in which a decree is passed *ex parte* against a

defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that *the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing*, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

...

Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

(italics supplied)

12. According to the tenant, its application to have the *ex parte* decree set aside has advanced two grounds: (1) non-service of summons; and (2) sufficient cause for non-appearance despite the service of summons. The tenant contends that both the courts below have not addressed its second plea: sufficient cause for its non-appearance. Of course, the landlord does assert that the tenant has never pleaded about the sufficient cause. After going through the tenant's Marji Application, I find that it has focused on non-service of the summons. Besides, it has only pleaded the

lack of knowledge. For this, it supplies justification. According to it, though the landlord's employees had been constantly in touch with its employees, but they never revealed to them about the pending suit.

Non-Service of Summons:

13. The tenant first pleaded that it had not received the summons. It captioned its plea as "summons has not been duly served upon the defendants". Then, it went on explaining how the landlord had not "duly served" the summons. Under that plea, the tenant, however, admits that the bailiff visited the suit premises at least three times for serving the suit summons on the tenant. The application also elaborates on the method the Bailiff has adopted to serve the summons. Indeed, the courts below have concurrently held that there had been an effective service of the summons. It is a finding of fact and requires no revisit, as the record belies the tenant's assertion.

14. The tenant also pleads lack of knowledge. I am afraid mere lack of knowledge in the absence of express assertion that

there had been no service of the summons would not rescue the tenant. Nor does it amount to a sufficient reason for non-appearance before the Court.

Sufficient Cause Not to Appear:

15. In Paragraph-5 of the Marji application, the tenant pleads that in or about November 2012 it directed all its staff to shift temporarily to another office in a phased manner as the suit premises became unusable. In the very next paragraph, it pleads that though it has partially shifted its operation to the “additional premises”, the tenant “[was] regularly using” the suit building, it being the registered office

16. In the Marji Application, under the caption “the defendant has sufficient cause not to appear before the Hon’ble Court”, the tenant again pleads that it was not served with the summons. It also pleads that the landlord might have persuaded the bailiff to visit the suit premises when the tenant’s staff were absent. According to the tenant, though it shared cordial relations with the plaintiff, its Directors or its staff “not even once made [the

tenant] aware of the pending proceedings in the Small Causes Court”.

17. Beyond the above pleas, nothing do I find to justify that there is sufficient cause for the tenant not to appear before the Court. Yet the tenant argues that a plea of defence must be gathered from the holistic reading of the pleadings. Is it so? Regrettably, that plea merits no attention.

18. Pleadings are the foundation for the litigious edifice; the foundation defective, the edifice crumbles. The art of articulation begins with the pleadings. And a counsel's submissions, however brilliant they are, in the later course of the litigation hardly cure the fundamental flaw in the pleadings. In sum, pleadings play a primary role in a suitor's presenting the issue for the court's consideration. There is a method of making a plea and a manner of proving that. Then, it goes without saying that the pleadings of either party to the lis must be clear, cogent, concise—and direct. There is no such thing as the spirit of the pleadings, as there is, interpretatively, the spirit of a statute.

Mutually Contradictory?

19. Now let me address the landlord's plea that the tenant has advanced mutually contradicting pleas. True, in one breath it pleaded that the summons had not been duly served on it; in the other, it also pleaded that it had sufficient reason not to appear before the court. They are *ex facie* contradictory, but they are not, in fact.

20. From the pleadings I note that the tenant has first pleaded that though there was an attempt to serve the summons, the mode the landlord adopted stands legally flawed. Thus, in the tenant's view, it amounts to non-service. For, it asserts, when the statute prescribes certain thing to be done in a particular manner, it shall be done in that manner alone and not in any other manner. That is the judicial dictum of vintage value from the days of *Taylor v. Taylor (1876 (1) Ch D 426)* to this day. It is not mere service, it is due service the tenant has insisted upon.

21. Then, the tenant also claims that it has taken the plea of sufficient cause not to appear before the Trial Court despite service

of the summons. I am afraid, as rightly observed by the courts below, there was no plea in the Merji Application. That stands sufficiently explained already.

22. At any rate, let me examine the decisions the tenant has relied on. In *Shyamlal Biharilal Pandey*, the appellant has set up a claim of acquiring title by adverse possession. He also pleaded that he holds the property as a tenant. Then, ***Shyamlal Biharilal Pandey*** notes that a person “who has permissive possession of the property and/or comes in possession of the property with the permission of the owner, cannot claim title hostile to the owner.” Further pertinent in its observation that the “plea of tenancy and plea of adverse possession cannot co-exist and they are mutually exclusive.”

23. By amending the pleadings, a party cannot go beyond his admission. So holds the Supreme Court in ***Steel Authority of India Ltd.*** I am afraid this proposition does not jibe with the facts of this case.

Conclusion:

24. Both the courts below have held, on facts, the tenant had the suit summons duly served on it. And I also gather from the record that the landlord has already repossessed the property. I reckon the concurrent findings need no interference.

Writ Petition is, accordingly, dismissed.

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[DAMA SESHADRI NAIDU, J.]