

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

WRIT PETITION NO. 13931 OF 2018

Ramsanjivan D. Mishra Decd. Thru ...Petitioner
Legal Heir Shreeprakash
Ramsanjeevan Mishra

Versus

Ishak M. Sendole Decd.Thru LR Gani ...Respondents
Isahk Shendole & Ors.

Nilesh Soni i/b Bhati Associates Fernandes Prakash
Kingsly - Advocate for the petitioner.
Prakash K. Fernandes - Advocate for the Respondent 1
to 5.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 17th JUNE 2019.

P.C. :

The Petitioner-tenant is the defendant in Suit No. R.A.E. 437/746 of 2012, instituted by the respondent-landlord, for eviction. The notice sent through post to the tenant was returned unserved with an endorsement 'unclaimed'. Later, the Trial Court's bailiff tried to serve the summons on the tenant, but on all three occasions

—that is on 10.10.2012, 15.10.2012 and 18.10.2012—he could not succeed, as the building was found locked. Under those circumstances, the Trial Court set the tenant ex-parte and decreed the suit on 06.04.2015.

2. To have the ex-parte decree set aside, the tenant filed an application under Order 13, Rule 9 but could not succeed. The Trial Court rejected the application by impugned order, dated 29.10.2015. Aggrieved, the tenant filed Appeal No. 6 of 2016 before the Division Bench of the Small Cause Court, at Bandra, Mumbai.

3. In that appeal, the tenant filed Exhibit-27 application for amending his pleadings; pleadings in his application to have the ex-parte decree set aside. Nevertheless, the Appellate Bench allowed the application only in part. In that context, it noted that what the tenant wanted to amend are the dates and the manner in which the summons was sought to be served on him. Observing thus, the Appellate Bench has held that what is sought to be amended is a matter of record

and that the party could as well advance his contentions based on the record. The Appellate Bench has felt that the amendment is an empty formality.

4. Questioning the order, dated 7.09.2018, the tenant has filed this Civil Writ Petition.

5. Heard the respective counsel for the petitioner and the respondents.

6. To put the issue in perspective, I may extract what the tenant actually wanted to bring on record by amending his application under Order 9 Rule 13. And the schedule to the amendment application reads:

SCHEDULE

Add the followings before the prayer of Application under Order X Rule 13 of Code of Civil Procedure, 1908, and the present Appeal;-

Vide Order dated 23.10.2012, the Hon'ble Trial Court passed an order of substituted service.

And on 3.11.2012 the bailiff of this Hon'ble Court serve the summons and plaint on defendant by affixing the same on the outer door of the suit premises and submitted its report in this Hon'ble Court.

The order dated 23.10.2012 was not complied as per mandate of Order 5 Rule 20 of code of Civil Procedure, 1908. The summons was not duly served upon the defendants as per the order of the Hon'ble Court and the service is defective service.

Service under order 5 rule 20 of Code of Civil Procedure, 1908 is always doubtful and suspicious.

7. As has been rightly observed by the learned Appellant Bench of the Small Cause Court, the tenant wanted to bring on record a couple of dates and also the legal plea that the plaintiff's efforts to serve the summons on the defendant does not accord with the statutory mandate under Order 20, Rule 5 of CPC.

8. Indeed, the dates are a matter of record. And how summons is to be served under Order 20 Rule 5 is a question of law. Neither needs any amendment. I reckon the tenant has already pleaded the factual controversy involving the alleged non-service of summons.

I see no merits in the writ petition; so I dismiss it.

[DAMA SESHADRI NAIDU, J.]