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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 373 OF 2022**

Mr. Mohammed Aqiq Surve Applicant.
V/s
Shraddha Enterprises and Anr. Respondents.

Mr. H.T. Pawar i/b Yadnesh R. Aher for the Applicant.
Ms. Neeta Jain i/b Alochan Naik for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: AUGUST 03, 2022

P.C.:-

1] Challenge in the present Revision is at the behest of the tenant. RAE Suit No.329/472 of 2010 was initiated by the Respondent for eviction of the Applicant which was decreed. Appeal of the Petitioner being Appeal No.7 of 2018 came to be dismissed on 26/3/2022. As such this Revision.

2] Facts necessary for deciding present Revision are as under:-

3] Applicant herein faced eviction proceedings on the ground of subletting, non-user and as such was served with summons as tenant holding over by the Small Causes Court. Summons was sought to be

served on the Applicant through court process i.e. bailiff. However, by way of substituted service, summons was effected. Copy of the summons was affixed on the outer door of the suit premises. Since the Applicant failed to appear before the Trial Court, suit came to be decreed on 25/2/2012.

4] Present Applicant having noticed that suit was decreed ex parte, moved MARJI Application No.656 of 2012 for setting aside ex parte decree in the aforesaid suit on the ground that he was out of India for his employment. According to him, he was residing in the suit premises till the time he left for his job out of the country i.e. 20/4/2011. According to him, after he returned in May 2012 he again left for his job to a foreign country in July 2012. As Applicant was not residing in India which fact was within the knowledge of the Plaintiff, by playing mischief, ex parte decree was obtained. The said MARJI Application came to be rejected on 11/12/2017 by the Court of Small Causes, Mumbai. Misc. Appeal No.7 of 2018 was taken out by the Applicant questioning the order passed on the aforesaid MARJI Application. The said Appeal also came to be dismissed on 26/3/2022.

5] Contentions of Mr. Pawar, learned Counsel for the Applicant are, fact about non-service of suit summons on the Applicant and passing off ex parte decree can be noticed and inferred from the record. According to him, Applicant has demonstrated sufficient cause for not attending the suit as the suit summons was never served on the Applicant. He would urge that the fact that Applicant was not available in the country was known to the non-applicant and as such, non-applicant should have taken appropriate precaution for effecting service of suit summons which they have failed to. Apart from above, contentions are, there is sufficient cause which restrained the Applicant from appearing in suit for defending the same and as such necessary ingredients of Order 9 Rule 13 were made out for setting aside the ex parte decree, which both the Courts below have failed to appreciate.

Drawing support from the following judgments in the matters of (1) *Dr Madhav Vishwanath Dawalbhakta (D) Thr. Lrs. vs. M/s Bendale Brothers* reported in **2019(2) ALL MR 42**, (2) *Shri Lal Mohamed Mestry vs. Shri Abdul Sakur Abdul Gafoor & Anr* reported in **2002(4) ALL MR 420** (3) *Ramesh Jagannath Ingole vs. Shakunbai Ganesh*

Ingole reported in **2015(6) All MR 286**, (4) *Achut Pandurang Kulkarni vs. Sadashiv Ganesh Pulambrikar*, reported in **AIR 1973 Bombay 210** and (5) *M/s Babu Ram Gopal and Others vs. Mathra Dass*, reported in **(1990) 2 SCC 279**, he would urge that for non-service of suit summons, as the Applicant was not available in the country, ex-parte decree is liable to be set aside. According to him, in such a situation, Courts below have committed an error in not granting relief of setting aside ex parte decree. He has drawn support from the judgment of this Court in the matter of *Dr Madhav Vishwanath Dawalbhakta* cited supra. His further contentions are, there has to be effective service of suit summons so as to provide sufficient and fair opportunity to the person against whom proceedings are initiated to defend the suit. In the case in hand, since the Applicant was not in the country, suit summons could not be served. As such, he would urge that valuable right of the Applicant to defend the suit was frustrated. He has drawn support from the judgment of this Court in the matter of *Shri Lal Mohamed Mestry* cited supra in support of his above claim. According to him, since Applicant was temporarily shifted for his employment outside the country, said fact cannot be considered to the detriment of the Applicant for inferring non-user. He

has drawn support from the judgment in the matter of *Ramesh Jagannath Ingole* cited supra so as to support his contention. On similar lines, he has placed reliance on other two judgments referred to above.

6] Counsel for the Respondents would support the judgment impugned, as according to her the Court decreeing the suit was sensitive to the consequences of service of suit summons by way of substituted mode. Apart from above, according to her, fact about non-user is well established as Applicant even otherwise was not residing in the suit premises. As such, she sought dismissal.

7] I have appreciated aforesaid submissions.

8] Fact remains that the suit summons was sought to be served on the Applicant after the notice was issued to him of eviction on 1/1/2010 by RPAD. The said notice was issued on 1/1/2010. Acknowledgments were duly exhibited as Exhibits 16/1 to 16/3. Eviction was sought on the ground of non-user and sub-letting i.e. in accordance with the provisions of Section 16(1)(e) and 16(1)(n) of the Maharashtra Rent Control Act,

1999. Trial Court noticed that since bailiff visited premises for effecting service about three occasions and the Applicant was not available, suit summons with copy of the Plaint was affixed on the outer door. The neighbour of the Applicant claimed to have informed the Applicant about execution of possession warrant. Apart from above, it is the case of Applicant that his mother was occasionally used to visit the suit premises to clean and maintain premises. Bailiff's report in categorical terms speaks of attempts made by him to effect service and also intimation given to the neighbour. Thus, every possible step in law was taken by the Respondent-Plaintiff to effect service of suit summons pursuant to the provisions of Rules 9 and 10 of Order 5 of the Civil Procedure Code. As such, it has to be inferred that there was sufficient notice to the Applicant about pendency of the suit against him for eviction.

9] Applicant on his own has gone outside the country. He is trying to take advantage of self created situation. He is likely to stay outside the country for some longer period, was well within his knowledge. The notice for eviction was duly received by him. As such, it is apparent that in the above background claim of the Applicant that there was bonafide

cause which restrained him from defending the suit cause is at all not appealable. Rather, case of the non-applicant of non-user appears to be justified in view of admissions given. Be that as it may, said issue can be looked into in an independent appeal, if so brought by the Applicant, challenging the decree. However, what can be noticed is, MARJI Application claimed to have been preferred through Power of Attorney Holder i.e. mother of the Applicant was rejected on 11/12/2017. While rejecting said MARJI Application, Trial Court, having regard to the provisions of Order 9 Rule 13, has specifically observed about repeated attempts/efforts made by Bailiff to serve the Applicant with summons.

10] Appeal questioning the said order was dismissed on the ground that both these proceedings i.e. MARJI Application so also Appeal was moved by the Power of Attorney Holder i.e. mother of the Applicant. It appears that Power of Attorney was executed on 4/9/2012 whereas MARJI Application was signed and presented on 3/9/2012 i.e. the date on which there was no authorization in favour of the Power of Attorney Holder to present such Application. Apart from above, in Appeal specific findings are recorded as regards attempts made by the Bailiff to

effect service, so also intimation given to the neighbour about pendency of the eviction proceedings. Report of the postal authority in categorical terms establishes that at the relevant time, Applicant was not occupying the suit premises. As such, it was for the Applicant to establish that there was sufficient cause which kept the Applicant away from proceedings for eviction, which he has failed to. That being so, it cannot be said that though there was sufficient cause still Court below has failed to exercise powers under Order 9 Rule 13 of the Civil Procedure Code. As such, law laid down in the matter of *Dr. Madhav Vishwanath Dawalbhakta*, cited supra will be of hardly any assistance.

11] As such, Revision lacks merits and is dismissed accordingly.

12] However, this will not preclude the Applicant from preferring an appeal/revision questioning decree for eviction which, if filed, be decided on its own merit.

(NITIN W. SAMBRE, J.)