

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

**APPEAL FROM ORDER NO.493 OF 2021
WITH
INTERIM APPLICATION NO. 3849 OF 2021**

Jayapaalan S. Pillai, also known as
J.S.Pillai, Age : 60, Occupation :
Business, Proprietor of “Brilliant
Fabricators, at Gala No.837, Janki Industrial Estate,
Kudalwadi, Chikali,
Pune – 412 114, and also at Gat No.59,
Dehu Alandi Road, Jadhavwadi,
Chikali, Pune

**... APPLICANT/
ORIGINAL DEFENDANT**

VERSUS

Dinesh Sampatraj Mehta, son of
Sampatraj G. Mehta,
Age : 53 years, Occupation – Business,
carrying on Business, under the
proprietary firm name and style
of “Dinesh Steel (India)”
at Shop No.OA, Bansi Bhavan, 3rd Lane
Khetwadi, Mumbai – 400 004

**... RESPONDENT/
ORIGINAL PLAINTIFF**

.....
Mr. Pawan Patil i/by Mr.Vijay Kandpile, Advocate for the appellant.
Mrs.Sneha Bhange, Advocate for the respondent.

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**CORAM : SANDEEP K. SHINDE, J.
RESERVED ON : 05th APRIL, 2022.
PRONOUNCED ON: 06th JUNE, 2022.**

P.C. :

1. This appeal under Order XLIII (1) (d) of the Code of Civil Procedure, 1908 (“CPC” for short), questions the legality and correctness of the order dated 16th September, 2021, by which the learned Judge, City Civil Court, Mumbai in exercise of jurisdiction under Order IX Rule 13 of the CPC, declined to set aside the exparte decree dated 11th June, 2018, passed in Short Cause Suit No.925 of 2015, against the appellant-defendant.

2. Question, that falls for consideration is whether suit summons, issued by the City Civil Court, Mumbai, sought to be served through speed post, on the defendant who was residing outside the jurisdiction of City Civil Court, was valid and proper service.

3. Facts : Plaintiff-respondent instituted Short Cause Suit No.925 of 2015 in March, 2015, in the City Civil Court at Bombay, to seek decree in the sum of Rs.59,76,058.83 towards consideration for goods sold by him to the defendant.

4. On 15th April, 2015, Board Department of City Civil Court, Bombay sent two speed post letters packets containing duplicate writ of summons, along with true copy of plaint to the appellant-defendant who was residing at Pune. On 6th May, 2015, Board Department received back speed post letters packets with a remarks, “*owner is not accepting hence returned*”. Whereupon Mr. J.R. Mhatre, working in the Board Department of City Civil Court, Bombay filed affidavit of service and tendered two speed post letters packets at Exh.A-1 and A-2. On 10th August, 2015, learned Judge, upon perusing the affidavit of Mr. Mhatre and noticing that defendant was absent when the suit was called on for hearing, set down the suit on 13th October, 2015 for hearing exparte, against the defendant. Thereafter, on 11th June, 2018, the suit was decreed exparte against the appellant-defendant and the decree was drawn. Whereafter, plaintiff instituted the execution proceedings vide Application No.150 of 2018 and served the same on the defendant on 22nd July, 2019.

5. Noticing the exparte decree, appellant-defendant applied for certified copy of the judgment and decree on 18th December, 2019

and thereafter moved an application under Order IX Rule 13, on 24th February, 2020, for setting aside the decree on the ground that he was not ‘duly served’ with the suit summons.

6. Learned Trial Court vide order dated 16th September, 2021, for more than one reason held that service of suit summons by speed post was good service and thus, declined to set aside the exparte decree. Hence, this appeal.

7. Heard the learned counsel for the parties. Perused the record and proceedings.

8. The scheme of Code of Civil Procedure containing order V Rule 9 primarily contemplates, personal service of summons on the defendant. Rule 9 which has been inserted in the Code, w.e.f. 01st July, 2002, reads as under:

“9. Delivery of summons by Court.- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent

either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of Rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an

endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, ‘ - the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.”

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1).“

. Rule 9 sub Rule (1) contemplates personal-primary, mode of service of summons and the manner, in which it is to be served through proper officer, on the defendant who resides within the jurisdiction of the Court, in which suit is instituted. Sub Rule (2) contemplates, who the ‘proper officer’ is. Sub Rule (3) set-forth, modes of service of summons, either by delivering or transmitting copy of summons by RPAD or speed post or by such courier services

as are approved by the High Court or by the Court in which the suit is instituted or by any other means of transmission of documents (including fax message or electronic message) provided by the Rules made by the High Court. The expression 'may', employed in sub-rule (3) implies that the modes of service contemplated therein are in addition to primary mode of service contemplated under sub Rule (1). The mandate of personal service, through proper officer is clearly visible from expression 'shall' being used in sub – Rule (1). Thus, primary mode of service of suit summons, on the defendant or his empowered agent, through proper officer of the Court cannot be dispensed with. In the case in hand, appellant–defendant, was residing outside the jurisdiction of the Bombay City Civil Court. Question is, by which mode suit, summons is to be served on the defendant, who does not reside within the jurisdiction of the Court issuing the summons. Sub Rule (4) makes known, that, defendant who resides outside the jurisdiction of the court issuing summons could be served by modes enumerated in sub Rule (3). It is noticeable that sub Rule(4) employs expression 'may', which signifies the modes of service contemplated, therein are in addition to primary service contemplated under sub Rule (1). Yet, one may argue that sub Rule

(1) and (4) do operate in different situation. In the sense, it is possible to argue, that sub Rule (1) operates, where defendant resides within the jurisdiction of the Court issuing summons; whereas sub Rule (4) operates where defendant resides within the jurisdiction of other Court. However, having regard to the scheme of the Rule 9, it is clearly visible from harmonious reading of sub Rule (1) r/w (2), r/w (3), (4), r/w 21 and 23, that the modes of service of summons enumerated in sub Rule (3) are in addition to personal-primary, service through proper officer contemplated under sub Rule (1) r/w (2) for the following reasons:

- (i) Rule 9 inserted in the Code, by Act of 22 of 2002 w.e.f. 1st July 2002. At a time, Section 19-A came to be omitted from the Code by the Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 1st July, 2002. The Law as contained in Order V Rule 19-A before omission stood as under:

‘(1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the

service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgment purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due, the declaration referred to in this sub-rule be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of summons.”

. In terms of Rule 19-A as it stood, the Court was required to issue summons for service by post, in addition to personal service. It was provided that once the acknowledgment purporting to be signed by the defendant (or the agent) is received by the Court or the

postal articles containing the summons is received back by the Court with endorsement by the addressee of 'refusal' to take delivery, the Court was empowered to declare that summons had been duly served. Experience of working of law relating to service of summons by registered post then embodied in Order V Rule 19A of the CPC as it stood, revealed number of incidents where injustice was occasioned to a litigants, inasmuch as the concerned provision enjoins to the effect that if an article containing the summons is received with the endorsement "refuse", the Court was to declare (shall) that the summons had been duly served. In many cases, instances were noticed and had come to light, where an unscrupulous postman made such an endorsement with dishonest reasons or a negligent postman had tendered the article to a wrong person or a person other than the addressee. In the result, an exparte decrees were passed against the addressee by the reason of the mandatory declaration, that he had been duly served and serious prejudice was occasioned to the addressee/defendant. This hardship resulting from the provisions of Section 19-A "as then stood" has been done away by omitting Rule 19-A from the Code.

9. Thus, to be understood, that service of suit summons on the defendant by RPAD or speed post, who resides outside the jurisdiction of the Court where the suit has been instituted, cannot be held to be duly served. Conversely, if it is held that modes of service of suit summons, contemplated under sub Rule (3) are ‘not’ in addition to primary mode of service, then in that case the intention to omit sub Rule 19-A from the Code would be defeated. To put it differently, if the service of suit summons on defendant or his agent who resides outside the jurisdiction of the court is permitted to be served by Registered Post Acknowledgment Due or speed post, possibility of unscrupulous postman making endorsement like “refuse to accept” for dishonest reason causing serious prejudice to the addressee defendant cannot be ruled out. Thus, it is to be held that modes of service of suit summons contemplated in sub-Rule (3) of Rule 9 of CPC are in addition to the primary mode of service. There is one more reason to hold, as to why service of suit summons by RPAD or Speed Post are not primary mode of service. Sub-Rule 21 contemplates that when defendant resides, within the jurisdiction of the another Court, the Court in which the suit has been instituted, is

required to send summons to the Court having jurisdiction in the place where the defendant resides. Once, the summons is received by that Court in terms of sub-Rule 21, it is the duty of that Court to serve the summons, as it had been issued by such Court and thereafter return the summons to the Court of issue, together with record of its proceedings with regard thereto. In the case in hand, the Trial Court had simply sent summons by speed post and upon receiving the unclaimed packets with an endorsement that suit summons were refused by the defendant, proceeded to set down the suit for exparte by relying on the affidavit of service filed by Mr. Mhatre, Court officer. Obviously, for the foregoing reasons, it was not proper or valid service in terms of Order V Rule 9 of the CPC.

10. For the forgoing reasons, I hold that the appellant defendant was not duly served, with the suit summons. For that reason, impugned order dated 16th September, 2021 passed in Notice of Motion No.698 of 2020 in Short Cause Suit No.925 of 2015 passed by the Judge, City Civil Court, Mumbai is quash set aside. As a result, exparte decree dated 10th June, 2018 in Short Cause Suit No.

925 of 2015 is quashed and set aside. Appeal from Order is allowed in the aforesaid terms.

11. In consideration of the facts of the case and for the reasons stated above, Short Cause Suit No. 925 of 2015 stands revived, on the file of Judge, City Civil Court, Bombay. The parties to the suit shall appear before the learned Trial Court on 13th June, 2022. Thereafter, the learned court shall proceed to decide the suit in accordance with law, preferably on or before 31st March, 2023. Appeal is disposed off including all the pending application therein.

12. Applicants' request to stay the operation of this order for a period of 2 weeks is rejected.

(SANDEEP K. SHINDE, J.)