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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Appeal from Order No. 218 / 2019
Alongwith
Civil Application (CAA) No. 259 / 2019
in
Appeal from Order No. 218 / 2019

Mohammad Ismail Rangari Rajkumar
J. Kochar @ Rajkochar

... Appellant

Versus

Rajkumarz J. Kocharz @ Razjkochar

... Respondent

Mr. Shakeeb Shaikh a/w Mr. Hamid Ahmed i/by MZA Associates,
Advocate for Appellant.

Mr. Induprakash Tripathi a/w Bhagyashree Gawas i/by C.K. Tripathi,
Advocate for Respondent.

CORAM : SANDEEP K. SHINDE, J.
DATE : 23rd MARCH, 2022.

P.C.

Heard. Learned Counsel for the parties.

1. This appeal under Order-43 Rule-1(d) read with Section 104 of the Civil Procedure Code, challenges the order dated 15th October,

2018, by which the learned Judge, declined to set aside the exparte decree dated 15th October, 2018 passed against the Appellant-Defendant in S.C. Suit No. 2290/2012. The subject suit was instituted by the Respondent-Plaintiff in October, 2012 under Section 6 of the Specific Reliefs Act. The trial Court issued writ of summons on 16th October, 2012, returnable on 7th October, 2012. The Bailiff made attempts on three occasions i.e. 20th November, 2012; 23rd November, 2012 and 29th November, 2012 to serve the summons on the Appellant-Defendant; however since his house no. 2/10 was found locked, it could not be served. Reports of Bailiff show that he enquired with Mr. Sayed, a next door neighbour, whereabouts of the Defendant. Accordingly Bailiff submitted the reports. Whereafter the Plaintiff moved an application Exhibit-6 dated 7th December, 2012, seeking an order to serve the Defendant by substituted mode of service. Paragraph No. 1 and 3 of the application reads as under;

“ 1. I say that when Bailiff of this Hon'ble Court visited the residence of Defendant at the address mentioned in the cause title of the plaint on 20.11.2012 at about 2.00 p.m. on 23.11.2012 at about 1.00 p.m. and on 29.11.2012 at about 9.00 a.m. at building No.2/10, Kidwai Nagar, RAK Marg, Wadala,

Mumbai 400 031 where defendant's premises was found lock and upon inquiries with the neighbors Sayed Shabid Room No.11 & 12 who informed that defendant has got out bailiff was accompanied by Sarvesh Tripathi advocate clerk.

3. I say that the defendant despite being aware of the above plaint and proceedings deliberately and intentionally keeping himself out of the way for the purpose of avoiding the service upon him personally, by the bailiff of this Hon'ble Court."

. Thus, to be understood that Plaintiff moved an application to serve the Defendant in accordance with Order-V Rule-20 of the CPC. On 7th October, 2012, the learned Judge permitted to serve by substituted mode of service. After which, Bailiff effected the service, by affixing a copy of summons on the door of the Defendants' house and accordingly filed a report. The trial Court upon accepting the service of writ of summons proceeded with the suit and decided it exparte on 10th December, 2015. Whereafter, Plaintiff instituted the execution proceeding. When Bailiff went to serve the execution application, Defendant's house was found locked. Yet, one person, claiming to be a brother of the Defendant, residing in the same building, accepted the service. Thereafter the Defendant came to know about the exparte decree passed against him. Defendant thus,

moved, an application under Order-9 Rule-13 of CPC for setting aside the exparte decree, and prayed that delay caused in preferring the application may be condoned. The learned trial Court declined to condone delay, as such the application to set aside the exparte decree was rejected. That order was challenged in appeal before this Court, wherein vide order dated 1st September, 2016 delay was condoned and the trial Court was directed to decide the Defendant's application, made under Order-9 Rule-13 of CPC on merits. In the course of the hearing, the Defendant had filed affidavit of one Sayed Shoeb, his immediate neighbour as well as the Bailiff was also examined.

2. The trial Court upon appreciating the arguments and evidence on record, dismissed the application. Thus, this appeal.

3. It is Appellant case that;

- (i) Plaintiff in collusion with Bailiff and Clerk of the Advocate prepared a false report;
- (ii) the reports of Bailiff were prepared in breach of mandatory

requirements of Order-V Rule-17, 19 and 20 of CPC;

(iii) the trial Court ought to have made enquiry about genuineness of service and ought to have called for affidavit of witnesses and Bailiff before proceedings with passing of ex parte decree.

(iv) the Bailiffs' reports were not supported by independent witnesses and therefore the trial Court ought not to have relied on it.

(v) Order-V Rule-19 of CPC requires the verification by affidavit of service of serving Officer. However, this mandate was not complied with.

(vi) the learned Court ought to have directed the Plaintiff to serve the Defendant by advertisement in news paper, as contemplated under Order-V Rule-20 (1A) of CPC.

. To substantiate, that Plaintiff in collusion with Bailiff had prepared a false service report, the learned Counsel for the Appellant has taken me through the evidence of Sayed Shoeb, next door neighbour of the Defendant and evidence of Mr. Naik, Bailiff attached to the Court. Learned Counsel submitted that evidence of Sayed Shoeb in clear terms falsifies the Bailiff's report inasmuch as

Mr. Sayed in evidence stated that on 20 23 and 29th November, 2012 nobody had enquired with him the whereabouts of Defendant. Learned Counsel submitted that the learned trial Court did not properly appreciate the evidence of Mr. Sayed and thereby erroneously held that Defendant could not satisfy the Court that writ of summons was not duly served on him. On the other hand, learned Counsel for the Respondent supported the impugned judgment.

4. Question is whether Defendant has satisfied the Court that writ of summons was not duly served on him? AND whether order impugned calls for interference ?

5. My answer is in negative, for the following reasons.

Mr. Naik, Bailiff, in his evidence has proved report at Exhibit-05. Although, he was subjected to searching cross-examination Defendant's could not elicit any material to disbelieve him. His evidence was consistent with reports, which conveyed that he visited

the house of the Defendant and also enquired whereabouts of Defendant with Mr. Sayed Shoeb, next door neighbour of the Defendant. Now, let me assess the evidence of Sayed Shoeb. Defendant has filed affidavit of Sayed, wherein he denied that on 20th 23rd and 29th November, anyone had enquired with him the whereabouts of Defendant. However, it is interesting to know that affidavit of Mr. Sayed, was sworn before Consulate General of India, at Jeddah. Mr. Sayed admitted in cross-examination that the affidavit was prepared by the Defendant and sent it to Jeddah for affirmation. This admission by Mr. Sayed, in cross-examination is sufficient to disbelieve his affidavit. In the backdrop of these facts, reports of the Bailiff prepared in discharge and in performance of his duty enjoyed by law, itself being “relevant fact”, I have no reason at all to disbelieve him. In the case of **Heramba Nuth Bandopadhyaya Vs. Surendra Nath Mittra**, AIR 1919 Patna 454, Division Bench has held that; “The peon’s return in execution proceedings, being an official record made by a public servant in the discharge of his official duty, is admissible in evidence.” Thus, having regard to the facts of the case, the service of summon on the Defendant by

substituted mode of service contemplated under Order-V Rule-20 cannot be faulted with. Even otherwise, it is not Plaintiff case that the house, in which copy of writ of summons was pasted, does not belong to him. Moreover, many more relatives are residing in the same building, where summon was pasted. Additionally, once the trial Court has recorded the satisfaction that Defendant was duly served with writ of summons, in appeal this Court cannot interfere with the satisfaction reached by the trial Court, unless it is shown it was not founded on evidence which is not the case here. For all that reasons, I do not see any reason to interfere with the impugned order. Appeal is dismissed alongwith Civil Application.

(SANDEEP K. SHINDE, J.)