

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CIVIL APPLICATION NO. 9006 OF 2021
IN
SECOND APPEAL NO. 363 OF 2021**

**HOTAPPA TIMMARAJ TIMMARAYAN AND ANOTHER
VERSUS
KISHOR KISANRAO JEJURKAR**

...
Advocate for applicants : Mr. Rudrawar S.G. Mr. A.N. Irpatgire
Advocate for respondent : Mr. N. B. Narwade
...

**CORAM : S. G. MEHARE, J.
DATE : 27.09.2023**

PER COURT :

1. Heard the learned counsel for the applicants and the learned counsel for the respondent.
2. The ex-parte decree was passed against the present applicants. They received the summons of the executing Court on 07.06.2019. They claimed that they got knowledge about the ex-parte decree after the summons of the Executing Court, and that is the cause of action for preferring the appeal. Hence, they approached the District Court by way of appeal as it was the ex-parte decree. Hence, a delay of 209 days caused for preferring the appeal.

3. The present appellants have come with a case that the suit summons was not duly served upon them. However, without verifying the fact, the Court proceeded and passed the impugned judgment and decree. The Court unnecessarily went into the issues which were to be considered on merit. It is argued that the so-called report of bailiff Mr. Gore does not bear the signature of defendant No.2, who allegedly received the summons for herself and her husband.

4. The learned counsel for the applicants would vehemently argue that earlier, the summons report of the same bailiff was returned with the remark that the present applicants/defendant Nos. 1 and 2 did not reside at the given address. In such a case, the plaintiff/ respondent ought to have furnished the address pursis of the new address, and the Court was to issue the notice afresh. But, surprisingly, a summons was again issued on the same address where defendant Nos. 1 and 2 were not residing. The bailiff also exceeded his jurisdiction and searched out the present applicants at another place and allegedly served the summons there on 18.05.2017. He would submit that it was not the legally admissible service of the summons. The decree for specific performance of the contract has been obtained by keeping the Court in the dark that, highly prejudice the interest of the applicants/appellants.

5. The learned counsel for the applicants/appellants would argue that the learned District Judge, Ahmednagar, has erroneously held that it was a valid service of summon, though served on the place other than the address mentioned in the summons at the most can be an irregularity but not illegality. He would submit that no lenient view has been taken as per the pronouncements of the Hon'ble Supreme Court. He prayed to allow the appeal on the following substantial question of law.

Whether the service of the summons by the bailiff on the address not supplied to him by the Court is an irregularity and not illegality?

6. The learned counsel for the respondent has vehemently opposed the application. He would submit that after the summons was served, the applicants/appellants had a case where compromise talks were going on, revealing that the present applicants/appellants knew the suit was filed against them. The bailiff report is specific that he had served upon defendant No.1 personally, and the summon of defendant No.2 was received by defendant No.1. Bailiff had no reason to create a false report against the applicants/appellants. Except for no service of the report, there was no explanation why the delay was caused. He would submit that the first Appellate Court has correctly held that serving summons by the bailiff on an address other than the address

mentioned in the suit is irregularity but not illegality. He supported the impugned order and prayed to dismiss the appeal.

7. It is admitted that earlier in time, the summons issued against the present applicants/appellants by the Court returned with a remark that they do not reside at the given address. In such a situation, the duty was cast upon the plaintiff/respondent eighter to furnish a fresh address or, if he did not know the new address, serve them by paper notice. But the facts of the case reveal that summons were again issued at the same address. The serving bailiff did not find them at the given address. Then, he made extra efforts to find out the present applicants/appellants at another address. He served the summons upon appellant No.2 for herself and her husband at another address not supplied to him by the Court. The appellants stated that on 3.9.2019, they learned about the ex-parte decree when they received notice from the executing Court; therefore, they approached the Court with a prayer to condone the delay in preferring the appeal against the ex-parte decree.

8. There are catena of judgments of the Supreme Court and the High Courts that no one should be deprived of the right to protect his property. Therefore, while constituting the term “sufficient cause” mentioned in section 5 of the Limitation Act, it shall be construed

liberally. It appears that this way or other, the summons was served upon appellant No.2 at the address that was not supplied by the Court or mentioned in the plaint. When the same bailiff has reported to the Court that they were not residing at the said address, exceeding jurisdiction by a public officer is illegality and not irregularity. Many tactics are adopted to avoid the summons and to serve the summons. In a normal course, when there was a report that the parties were not residing at the given address, the fresh summons at the same address was not issued, but due to advertence, the Court might have issued the summons at the same address at which they were not residing. In such a case, it was the duty of the Baillif to bring such a mistake to the notice of the Court or refuse to serve the summons at the address which was not supplied to him by the Court. Why he had made extra efforts is best known to him. The appellants have a specific case that, till 3 October 2019, they were not aware of the decree. In the facts and circumstances of the case, it cannot be held that it was a good service of the summons.

9. The substantial question of law is answered that such a service of summon in the facts and circumstances of the case is not the irregularity but an illegality.

10. The appellant had sufficient reason for not filing the appeal in time.

11. For the reasons discussed above, taking a liberal view, the delay is condoned on costs as the respondent was to wait for further time in the Court.

ORDER

- (I) The appeal is allowed.
- (II) The impugned order passed in Criminal M.A. No. 299 of 2019, dated 30.07.2021 by the learned District Judge-3 Ahmednagar, is quashed and set aside.
- (III) The Civil Application No. 9006 of 2021 stands disposed of.
- (IV) The applicants/ appellants shall pay cost of Rs. 10000/- (Rupees Ten thousand) to the respondent within three weeks from today.

(S. G. MEHARE)
JUDGE

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