



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3148 OF 2023

Mr. Ashfaque Abdulla Saudagar
adult, Indian Inhabitant of Mumbai,
age about 48 years,
Occupation : Business,
Residing at Flat Nos.1 to 5 AB/Wings,
Ground Floor, Razia Manzil,
Behram Baug Junction, S.V.Road,
Jogeshwari (West), Mumbai-400012

... *Petitioner.*

Versus

1. Mr. Shaheen Gulam Rasool Bhorania,
Aged : 39 years,
Occupation : Business,
2. Mr. Zubair Gulam Rasool Patel,
Aged : 55, Occ.: Business,
3. Mr. Yunus Suleman Charolia
(Since Deceased)
Aged : 48 years, Occ.: Business,
All Indian Inhabitants of Mumbai
Having office at Hafizi House,
2 B/2, Opposite Cafe Alif,
S.V. Road, Jogeshwari (W),
Mumbai-400 102.
- 3(a). Mrs. Yasmin Charolia
wd/o Yunus Charolia,
An Indian Inhabitant,
aged about 54 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.

- 3(b). Mr. Fujel Charolia s/o. Yunus Charolia,
an Indian Inhabitant,
aged about 24 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.
- 3(c). Mr. Tufel Charolia s/o. Yunus Charolia,
an Indian Inhabitant,
aged about 21 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.
- 3(d). Mr. Mohammed Charolia s/o. Yunus Charolia,
an Indian Inhabitant,
aged about 20 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.
- 3(e). Ms. Juveriya Charolia d/o Yunus Charolia,
an Indian Inhabitant,
aged about 32 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.
- 3(f). Ms. Munera Charolia d/o Yunus Charolia,
an Indian Inhabitant,
aged about 30 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.
- 3(g). Ms. Sahista Charolia d/o Yunus Charolia,
an Indian Inhabitant,
aged about 28 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.

3(h). Ms.Fuziya Charolia d/o Yunus Charolia,
an Indian Inhabitant,
aged about 26 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.

3(i). Ms. Fajila Charolia d/o Yunus Charolia,
an Indian Inhabitant,
aged about 23 years,
having their address at Village Bhilvan,
Taluka Saraswati, District Patan,
North Gujarat, India.

... Respondents.

Mr. Prasad Dani, Senior Advocate, Mr. Hasan Mushabher, Ms.Rujuta Patil, Mr.Yohaam Shah i/by Negandhi Shah & Himayatullah, for the Petitioner.

Mr.R.D.Soni alongwith Mr.Sujay Gawade, Ms.Mudita Pawar, Ms.Manasi Sawant and Ms.Akshika Thakur, i/by Shree and Co. for the Respondents.

CORAM : SHARMILA U. DESHMUKH, J.
Reserved on : October 31, 2023.
Pronounced on : November 10, 2023.

JUDGMENT :

1. Rule. Rule made returnable forthwith and taken up for final disposal with consent of the parties. Learned counsel waives service for respective parties.

2. The challenge in the Petition is to the judgment dated 25th January, 2023 passed by the Appellate Bench, Small Causes Court in Misc. Appeal No.27 of 2014 filed against the judgment and order of

the trial Court passed in MARJI Application No.95 of 2014, rejecting the petitioner's application seeking setting aside the ex-parte decree passed in R.A.E. and Suit No.392/554 of 2011 dated 12th February, 2013 and for restoration of possession. For the sake of convenience, the parties are referred to by their status before the trial Court.

3. Shorn of unnecessary details the facts of the case as borne out from the record are as under:

(a) The Respondents herein are the Plaintiffs, in the Suit for eviction filed against the defendant in respect of the suit premises described in R.A.E. Suit No.392/554 of 2011 as Flat Nos.1 to 5, Ground Floor, A & B Wings of Raziya Manzil admeasuring 1200 square feet situated at S.V. Road, Behram Baug Junction, Mumbai. The suit premises was let out to the defendant by tenancy agreement dated 7th October, 2006 entered into between the Defendant and the predecessors-in-title of the Plaintiffs. The Plaintiffs by virtue of Sub-Lease dated 11th May, 2009 acquired rights in respect of Raziya Manzil. Eviction was sought on the ground of arrears of rent, sub-letting, change of user, additions and alterations and bonafide requirement.

(b) The suit was filed on 30th July, 2011. On 26th

August, 2011, at about 2.50 p.m. the writ of summons was sought to be served upon the defendant through the Bailiff Shri V.C.Kamble, however Defendant was not found at the address of the suit premises and it was found locked. The second and third attempt made on 29th August, 2011 at 9.55 a.m and on 26th September, 2011 at 6.00 p.m. to 6.20 p.m. by Bailiff Shri S.N. Salve met the same fate. On 1st October, 2011, the postal envelope containing the summons sent by registered speed post through Bailiff Shri S.N. Salve was returned with a postal remark “unclaimed”. On 15th October, 2011, after finding the door locked and making inquiry with the neighbours, the service was effected by pasting the writ of summons pursuant to the order of the Trial Court through Bailiff Shri S.D. Shinde.

(c) On 19th November, 2011, the summons was sent by registered post which was returned with the remark “unclaimed”. On 8th December, 2011, the suit was ordered to proceed ex-parte. On 21st April, 2012, the plaintiff led his evidence. On 12th February, 2013, the trial Court pronounced the judgment. On 19th July, 2013, MARJI Application No.189 of 2013 was taken out to issue notice before execution. The said application was attempted to be served on the defendant by Bailiff Shri D.A.Yadav. Second

attempt was made on 22nd July, 2013 and third attempt was made on 26th July, 2013. On 6th August, 2013, the summons was pasted on the suit premises by Bailiff Shri S.N. Kutwal.

4. The notice sent by registered post was returned with remark ‘intimation posted’. On 26th November, 2013, the plaintiff instituted Execution Application No.77 of 2013. Bailiff Shri D.V. Tawde tried to execute warrant on 27th November, 2013. As the premises was found locked, he made inquiry with the with the occupant and room no.13 and 5, 2nd floor of ‘B’ Wing in the same building, and returned the warrant unexecuted. On 4th December, 2013, the warrant was executed by Bailiff Shri D.V. Tawde by breaking open the lock. On 6th December, 2013, application under Order 9 Rule 13 of CPC was filed by the defendant for setting aside ex-parte judgment and decree which came to be rejected on 6th April, 2014, as against which the appeal was filed on 30th June, 2014 and the same was dismissed by the order impugned in the present Petition.

5. Heard Mr.Dani, learned Senior Advocate for the Petitioner and Mr.Soni, learned Advocate for the Respondent.

6. Mr. Dani, learned Senior Advocate appearing for Defendant submits that the Defendant became aware of the passing of the ex-parte decree on 4th December, 2013 through his labourers working

in the premises who informed him that some court persons had come and the lock of the premises was broken and another lock was put. He submits that the writ of summons was not served upon the Defendant. Drawing attention to the tenancy agreement dated 7th October, 2006 he contends that the agreement mentions the residential address of the defendant and as such, the plaintiff was well aware of the residential address of the defendant and despite thereof no summons was sent to the residence address. He submits that the suit has been decreed on the ground of arrears of rent, though the suit for eviction was filed on many grounds. He would point out that despite the tenancy agreement permitting sub-letting, one of the grounds in the suit for eviction was sub-letting.

7. He would point out the discrepancy in the description of the suit property in the schedule to the tenancy agreement which describes the premises being shop No.1-A/B and in the suit, which describes it as Flat Nos 1 to 5. Pointing out the Bailiff's report, he would submit that in event of the premises being found locked, the provisions of Order 5 Rule 20 of CPC had to be resorted to. According to him, service by registered post after pasting is not contemplated by the statutory provisions.

8. He would submit that the trial Court rejected the application under Order 9 Rule 13 of CPC, on the ground that the

defendant has not been able to establish that the suit summons was duly served. He submits that the Appellate Court rejected the application filed under Order 41 Rule 27 of CPC for leading evidence to show that the summons was never pasted on the suit building/property nor bailiff has visited their service of summons and has thereafter held that the defendant had not sought permission of the trial Court for leading evidence and that there is no evidence produced on record. He would submit that the postman has not been examined to show that the Registered envelope had come back unclaimed.

9. *Per contra*, Mr. Soni, learned counsel appearing for the Respondent submits that five attempts were made to serve the defendant, three through bailiff and two by the registered post. He submits as of today, the premises does not exist and as such, remedy of the defendant lies elsewhere. He submits that the case of the defendant was of fraud on the ground that the bailiffs reports are manipulated, false and bogus and that the summons was not served upon him at all, which the Defendant has failed to establish. He points out the finding of the Appellate Court that there was no evidence produced by the defendant and that the bailiff and the postal employees are public servants and they have no reason to

prepare the false reports. He submits that there was sufficient compliance of Order 5 Rule 20 of CPC.

10. He would contend that that the suit premises were residential premises which is evident from the description of the property alongwith list of tenants attached to the document of sub-lease at page no.234 of the petition. He submits that even at the time of the execution of warrant of possession, the defendant was not found in the premises. He submits that the premises does not exist, and the issue has been rendered academic. In support of his submissions, Mr. Soni, relies on the decision of Apex Court in the cases of *M/s.Madan and Co. vs. Wazir Jaivir Chand*, reported in *(1989) 1 SCC 264* and decision of this Court in the case of *David K.N. vs. S.R.Chaubey (Chaturvedi)*, reported in *2003 SCC OnLine Bom 237*.

11. In rejoinder Mr. Dani, would submit that a suit for specific performance cannot lie in event the tenancy is held to have been terminated.

12. Rival contentions now fall for determination.

13. The rejection of the application for setting aside the ex-parte decree has led to the present Petition. As such the issue to be determined is whether the service of the summons was properly

effected on the Defendant. It will be necessary to consider the case put forth by the Defendant in his application under Order 9 Rule 13 of CPC. The application being MARJI Application No.95 of 2013 was filed on 6th December, 2013. The grounds stated in the application can be summarised as under:

- (a) suit summons was not served to the defendant,
- (b) premises of the defendant is shown as flat Nos.1 to 5 in A and B Wings on the ground floor of Razia Manzil, whereas the premises is commercial premises being shop No.1 in A/B Wings,
- (c) defendant was available at the suit premises and the report of the bailiff is false as regards the visit to the premises for serving and pasting of the suit summons.
- (d) the postal remarks as unclaimed are false remarks of the postal authorities,
- (e) fraud has been played by the plaintiff in respect of service of suit summons, notice for execution and the demand letter.

14. The pleadings in the application would indicate that the factual position as regards the service of the summons is sought to be disputed. For establishing his case of non service of summons and his availability at the suit premises, it was necessary for the Defendant to step in the witness box and lead evidence. For that purpose, it would

have been easier for the defendant to bring on record the evidence of other occupants of the said building, to support the case of the defendant that the defendant was available at the suit premises during working hours, as it is claimed that the premises is shop premises. Admittedly before the trial Court the defendant did not lead any evidence in support of his pleadings. This is sought to be countered by Mr.Dani, learned Senior Advocate appearing for the defendant by pointing out the order of the Appellate Court in an application filed under Order 41 Rule 27 in the appellate proceedings seeking to file affidavits of tenants to show that the summons of the suit was never pasted nor the bailiff visited the premises for service of summons. It is the contention of Mr.Dani, that once the application to lead further additional evidence is rejected by the Appellate Court, the Appellate Court thereafter, cannot come to a finding that no evidence has been led. In that respect, if we consider the reasoning of the Appellate Court while dismissing the application filed under the Order 41 Rule 27 of CPC, in paragraph 8, the Appellate Court has held that the affidavits could have been produced before the trial Court and that it is not the case of the defendant that in spite of due diligence, he could not have filed the affidavits.

15. The Appellate Court further held that it is not the case of the defendant that the trial Court had refused to admit the documents. The Appellate Court held that the application was under the provisions of Order 41 Rule 27(1)(aa) and as the ingredients thereof were not satisfied rejected the application. The Defendant accepted the rejection and did not carry the matter further.

16. The Trial Court has therefore decided the MARJI Application on the basis of the pleadings of the parties. Based on the pleadings, the trial Court framed the issues as to whether the plaintiff had obtained the decree by playing fraud and whether the suit summons was not duly served upon the defendant and answered both the issues in the negative. While doing so, the trial Court has gone through the suit proceedings as well as the execution proceedings and noted the reports of the bailiffs in respect of the service of the summons as well as the postal remarks. The trial Court held that the defendant has not chosen to lead the evidence and the burden is on the defendant to establish the facts alleged in the application. The trial Court observed that if the contention of the defendant was that he was present at the premises, there is no document produced showing his possession/occupation at the relevant time and that the defendant had not examined the

occupants, whose name are mentioned in the bailiffs report neither the workmen were examined, who were stated to be carrying out repair work in the suit premises. As regards the submission that the plaintiffs were aware of the another address of defendant, the Trial Court held that there is no document produced on record to show that except the address of suit premises the plaintiffs were aware of residence address of the defendant.

17. Mr. Dani, has sought to assail the finding by relying upon the agreement of tenancy dated 7th October, 2006 executed between the out-going tenants of the suit premises, the defendant and the landlady in which the residential address of the Defendant has been given. From the perusal of the record, it does not appear that the agreement was produced for consideration of the trial Court. The present plaintiffs are not parties to the agreement of tenancy dated 7th October, 2006 but have obtained sublease on 11th May, 2009 and has thereby acquired rights in respect of the building including the suit premises. The trial Court is therefore right to the extent that there is no document produced to show that the plaintiffs were aware of any other address of the defendant.

18. Now coming to the contention as regards the discrepancy in the description of the suit premises in the plaint and in the schedule

to the tenancy agreement of the year 2006. The suit premises is described as shop in the tenancy agreement, whereas in the eviction suit the same is mentioned as Flat Nos.1 to 5, A-B wings. The document of sublease in favour of the plaintiffs contains the list of tenants in building at Annexure 'A', in which the name of the defendant appears at Sr.No.1 against Flat Nos 1 to 5 A/B Wings at ground floor. Nothing much turns on whether the premises has been described as flat or the shop for the reason that the location of the premises being on the ground floor of the building known as Raziya Manzil is not disputed.

19. Coming now to the pivotal issue for consideration as regards the service of summons in view of the rival claims put forth by the Plaintiffs and Defendants. As per the Plaintiffs, all attempts were made to effect service upon the Defendant at the suit premises through all permissible modes of service which stands substantiated by the Bailiffs reports and the postal remarks. According to the Defendant, the Bailiffs' reports as well as the postal remarks are false as the Defendant was available at the suit premises. It would be necessary to briefly advert to the provisions of Rule 9 of Order 5 of CPC, which deals with the issue of service of summons which provides that in respect of Defendant residing within the jurisdiction

of the Court in which the suit is instituted, 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 service as are approved by the Court. Sub-Rule (3) of Rule 9 of Order 5, provides that the service of summons may be made by transmitting by Registered Post Acknowledgment Due or by speed post or by such courier service as are approved or by any other modes of transmission of documents including fax messages, electronic mail services as approved.

20. Rule 9 of Order 5 of CPC provides the various permissible modes for effecting service of summons. Rule 20 of Order 5 provides that upon satisfaction of the court that the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. Another mode of substituted service is where the Court orders service by an advertisement in the newspaper.

21. In the present case, the Plaintiff's claim to have effected

service through Bailiff, through Registered post and by way of pasting, all of which are permissible modes of service. The Trial Court as well as the Appellate Court has satisfied itself on this factual aspect of service through Bailiff and by registered post. Nothing has been brought on record by the Defendant to demonstrate otherwise. What can be found is that the writ of summons was sought to be served on two occasions by two different bailiffs, pasting was done by yet another bailiff. The notice before execution was sought to be served by another bailiff and the pasting was done through different bailiff. Similarly in execution there was another Bailiff. In all there were attempts by six different Bailiffs and it is highly improbable that all the six Bailiff's have prepared false reports to favour the Plaintiff. Similarly as regards the postal remarks, the Appellate Court has rightly observed that there is no reason to doubt the Bailiff's reports and reports of postal authority.

22. An objection has been taken by Mr.Dani, learned Senior Advocate for the plaintiffs that after the pasting has been done, the summons is stated to be served by RPAD. According to him, firstly the service through registered post should be effected and thereafter summons can be pasted. I do not find any merit in the submission as these are different modes of service of summons. There is no

provision found that unless the summons are served by registered post, the order of substituting the service under Order 5 Rule 20 cannot be effected.

23. After repeated attempts to serve through Bailiff failed, writ of summons was sent through registered post and summons was pasted. It is only after all efforts were taken by the plaintiff to effect the service on the defendant that the trial Court passed an order for the suit to be proceeded ex-parte on 8th December, 2011. After the suit came to be decreed on 12th December, 2013 in MARJI Application No.189 of 2013 for execution of the decree, show cause notice was issued to the defendant, which notice also could not be effected on the defendant as the premises were found locked. Even for effecting the show cause notices three attempts were made by the bailiff, firstly, on 19th July, 2013, 22nd July, 2013 and 26th July, 2013, however, notice could not be served as the premises were found locked. The notice before the execution was also pasted on the premises and the service through RPAD was returned back with 'unclaimed'. Even when the decree was sought to be executed, the same could not be executed as the suit premises was found locked. Upon an application made to the Court on 29th November, 2013, the bailiff was ordered to execute warrant of possession by breaking

open the lock of the suit premises which was done on 4th December, 2013 and the possession of the premises were handed over.

24. The sequence of the above events coupled with the bailiffs report substantiating the attempts made to serve the defendant as well as the postal remarks whereby the envelope had come back unclaimed is more than sufficient to conclude that there was valid service upon the Defendant. The contention of the defendant as found in application under Order 9 Rule 13 of CPC is that the defendant was present at the shop and no service was effected and fraud as sought to be played is a contention which is only liable to be rejected. In event, the defendant was present in the premises at least one of the occasion, he would have been well aware of the notices which were pasted on the conspicuous part of the premises. Even if he was unavailable at any time from the suit premises, it was incumbent upon him to make arrangements to ensure that all correspondence is received on his behalf. In my view, the plaintiffs have effected valid service upon the address of the suit premises by permissible modes. The Defendant has been unable to satisfy the ingredients of Order 9 Rule 13 of CPC to justify setting aside of the ex-parte decree.

25. Considering the record of the proceedings, the trial Court as

well as the Appellate Court has held that the defendant has failed to establish that the suit summons was not served and neither the allegation of fraud is established and as such, dismissed the application. The Appellate Court has rightly drawn the presumption as regards the service by registered post in view of Section 27 of General Clauses Act and have held that the summons was duly served. The decision in the case of *David K.N. vs. S.R. Chaubey (Chaturvedi)* (supra), relied upon by learned counsel for the Respondent squarely applies to the facts of the present case.

26. As discussed above, I have already observed that the defendant had failed to show that the plaintiff was aware of the residence address of the defendant. As such, the plaintiff has adopted all possible modes as provided under Order 5 of CPC regarding the service of summons upon the address of the suit premises. It can therefore be inferred that there was valid service upon the Defendant and no fault can be found with the impugned order. As I have taken the view that there is no warrant for interference with the impugned order, the submissions vis-a-vis the demolition of the suit premises are not being dealt with.

27. For the foregoing reasons, I am not inclined to interfere in exercise of jurisdiction under Article 227 of Constitution of India with

the concurrent findings of fact as regards the service of summons.

Petition fails and is dismissed.

(Sharmila U. Deshmukh, J.)