

Arjun

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

**SECOND APPEAL NO.284 OF 2021
WITH
INTERIM APPLICATION NO.3521 OF 2020
IN
SECOND APPEAL NO.284 OF 2021**

ARJUN
VITTHAL
KUDHEKAR
Digitally
signed by
ARJUN
VITTHAL
KUDHEKAR
Date:
2023.03.02
10:51:32
+0530

Mahadeo Pandharinath Bagal & Anr. ...Appellants/
Applicants

V/s.

Chhayya Yashwant Aakale (Ranawat) ...Respondent

Mr. Sandesh D. Patil i/b Ms. Anusha Amin, for the
Appellants/Applicants.

Mr. S. P. Rajepandhare, for the Respondent.

**CORAM : MADHAV J. JAMDAR, J.
DATE : 8th FEBRUARY, 2023**

P.C.:

1. Heard learned counsel appearing for the Appellants and
learned counsel appearing for the Respondent.

2. This Second Appeal has been admitted by order dated
27th September, 2021 by a learned Single Judge on the
following substantial questions of law :-

“B) Whether the hyper technical approach of the
Learned Lower Appellate Court was detrimental to
the interest of the parties in as much as the

Learned Lower Appellate Court has virtually held that every days delay should be explained minutely?

H) Whether the public summons which was served in pursuance of the report dated 16.11.2017 has got any sanctity in law especially in light of the fact that the summons ought to have been served under the provision of Order 5 Rule 20 only when there is a specific finding recorded by the Court that the appellants were avoiding service of the summons?”

3. The impugned order in the present Second Appeal is order dated 13th January, 2020 passed by the learned District Judge-2, Pandharpur in Civil Miscellaneous Application No.130 of 2018. By the impugned order, the said Miscellaneous Application No.130 of 2018 filed seeking condonation of delay of about 4 months in filing the Appeal was dismissed.

4. Before considering the substantial questions of law framed by a learned Single Judge by order dated 27th September, 2021, it is necessary to set out certain factual aspects :-

(i) Admittedly, the suit bearing Regular Civil Suit No.591 of 2017 was filed by the

Respondent who is original Plaintiff on 13th October, 2017 and the same was decreed ex parte on 17th April, 2018.

(ii) The Civil Miscellaneous Application No.130 of 2018 seeking condonation of delay in filing Appeal challenging said Judgment and Decree dated 17th April, 2018 passed by the learned Trial Court was filed on 25th September, 2018. Therefore, there is delay of about 130 days in filing the Appeal.

(iii) The Applicants have *inter alia* stated in the said Civil Miscellaneous Application seeking condonation of delay that, the Applicants came to know about the said exparte Decree on 19th September, 2018 when the said Decree was sought to be executed by filing Police complaint dated 19th September, 2018, by alleging that in violation of the Judgment and Decree dated 17th April, 2018 passed by the learned Trial Court, the Appellants are obstructing the possession of

the Respondent. Thereafter, immediately the said Miscellaneous Civil Application was filed on 25th September, 2018.

5. During hearing of the said Civil Miscellaneous Application No.130 of 2018 following facts have come on record.

i) The suit summons were sought to be served on the present Appellants on 16th November, 2017. The Bailiff report dated 16.11.2017 specifically states that, Appellant No.2 i.e. Uddhav Pandharinath Bagal is not well and, therefore, he has been admitted at Hyderabad in Asian Hospital and the Appellant No. 1- Mahadeo Pandharinath Bagal who is real brother of Appellant No. 2 has gone with him. It appears that, inspite of said Bailiff report, the suit summons were directed to be served by publication and accordingly, they were shown to be served by publication in December, 2017. Thereafter, immediately, the suit was decreed ex parte on 17th April, 2018.

ii) As far as the Bailiff report dated 16th

November, 2017 stating that the Appellant No.2 is admitted at Asian Hospital, Hyderabad, the same is substantiated by the medical record. The record shows that Appellant No. 2 was admitted at Asian Hospital, Hyderabad from 11/11/2017 to 29/01/2017. The medical record further shows that, thereafter, the Appellant No. 2 went to Global Hospital, Chennai on 29th December, 2017 and medical tests were conducted on 30th December, 2017.

6. Order V Rule 20 of the Code of Civil Procedure, 1908 regarding substituted service reads as under :

“20. Substituted service.—(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason 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.

[(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

(2) Effect of substituted service.—Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.”

(Emphasis added)

7. The above provision makes it very clear that, the Court should record satisfaction that, there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or summons cannot be served in ordinary manner and, then order of substituted service can be passed.

8. In the present case, the Bailiff report itself was very clear. Bailiff report dated 16th November, 2017 specifically

states that, the Appellant No. 2 is admitted in Asian hospital at Hyderabad. The same is substantiated by the medical record of the Appellant No.2. Apart from that, it has also come on record that when the suit summons was sought to be served by publication in December, 2017, the Appellant No. 2 was at Chennai for conducting medical tests in Global Hospital. Therefore, this is a case where, the factual position for directing substituted service as contemplated under Order V Rule 20 of C.P.C. is not in existence. The factual position on record clearly shows that, the learned Trial Court could not have recorded satisfaction that Defendants were avoiding the service of the suit summons or summons can not be served in the ordinary manner as the non-availability of the Appellants is only for temporary period and for valid reasons.

9. Learned counsel appearing for the Appellants has relied on the decision of the Supreme Court in *Smruti Pahariya Vs. Sanjay Pahariya*¹ and more particularly, on Paragraph Nos.14 and 15 of the same. The said paragraph Nos.14 and 15 read as under :

“14. Looking at the service return, the court found

¹ (2009) 13 SCC 338

that service was not a proper one and the court was also not satisfied with the endorsement of the courier. Under such circumstances, the court's direction on the prayer of the appellant wife, for substituted service under Order 5 Rule 20 of the Civil Procedure Code is not a proper one. Direction for substituted service under Order 5 Rule 20 can be passed only when the court is satisfied "that there is reason to believe that the defendant is keeping out of the way for the purpose of evading service, or that for any other reason the summons cannot be served in the ordinary way".

15. In the facts of the present case, the court did not, and rather could not, have any such satisfaction as the court found that the service was not proper. If the service was not proper, the court should have directed another service in the normal manner and should not have accepted the plea of the appellant wife for effecting substituted service."

(Emphasis added)

10. The Supreme Court has held that, direction for substituted service under Order V Rule 20 can be passed only, when the Court is satisfied that, there is reason to believe that Defendant is keeping out of the way for the purpose of evading service, or that for any other reason the

summons cannot be served in the ordinary way.

11. In paragraph No. 15 of the above decision, the Supreme Court in the facts and circumstances of that case recorded and observed that, the Court did not and rather could not have recorded any such satisfaction as the Court found that the service was not proper. If, the service was not proper, the Court should have directed another service in the normal manner and should not have accepted the plea of the effecting substituted service. The said observations of the Supreme Court are squarely applicable to the present case.

12. The Bailiff report itself states that, the Appellant No.2 was admitted in the Asian Hospital at Hyderabad. The Bailiff visited for service of suit summons on the Appellants on 16.11.2017. The Bailiff report further states that, Appellant No. 1 who is real brother of Appellant No. 2 has accompanied the Appellant No. 2 at Hyderabad. Therefore, there was no occasion to pass order under Order V Rule 20 of C.P.C. directing substituted service. Therefore, this is a case where, there is no proper service on the Appellants. Therefore, there is substance in second substantial question of law as framed by learned Single Judge.

13. The first substantial question of law framed by this Court is whether the hyper technical approach of the learned Appellate Court was detrimental to the interest of the parties as the learned First Appellate Court has virtually held that every day's delay should be explained minutely.

14. The impugned order of the learned First Appellate Court, by which, the Miscellaneous Civil Application seeking condonation of delay in filing Appeal was dismissed shows that, apart from other reasons, the learned First Appellate Court observed that family of Appellant No.2 also consists of his wife and two major sons and any man of common prudence during severe illness will either carry his wife alongwith him or his sons. The said reasoning of the learned First Appellate Court is without any basis. This is a case where, the Bailiff has specifically observed that, Appellant No. 2 has been admitted in the hospital and Appellant No. 1 who is real brother of Appellant No.2 has accompanied him. The said observations are without any basis. The impugned order of the learned First Appellate Court clearly shows that, hyper technical approach has been adopted by the learned First Appellate Court. Apart from that the Bailiff report as

well as the medical record clearly shows that, the reasons given in the Civil Miscellaneous Application No.130 of 2018 are genuine reasons and, therefore, the learned First Appellate Court should have condoned the delay. Assumption of the learned First Appellate Court that suit summons have been properly served is contrary to the material on record.

15. As held by the Supreme Court in *Smruti Pahariya (supra)*, unless, the factual position on record supports the recording of satisfaction of the Court that, there is reason to believe that, the Defendant is keeping out of the way for the purpose of avoiding service or summons cannot be served in ordinary manner, substituted service cannot be directed.

16. In view of the Bailiff report, it cannot be said that, this is a case where, there are reasons to believe that the Defendants i.e. Appellants are keeping out of the way for the purpose of avoiding service or summons cannot be served in ordinary manner. Once such conclusion is recorded, the impugned ex parte Judgment and Order of the learned Trial Court also deserves to be quashed and set aside. In view of above reasoning, the Second Appeal deserves to be allowed.

17. The Second Appeal is allowed by passing following

order :

- (a) The impugned Judgment and order passed by the learned District Judge-2, Pandharpur dated 13th Janaury, 2020 in Civil Misc. Application No.130 of 2018 is quashed and set aside and said Civil Misc. Application is allowed.
- (b) As it has been found that there is no proper service of suit summons on the Appellants i.e. Defendants, ex parte Judgment and Decree of the learned 6th Joint Civil Judge, Junior Division, Pandharpur in Regular Civil Suit No.591 of 2017 is also quashed and set aside.
- (c) The said Regular Civil Suit No.591 of 2017 is restored to the file of learned Civil Judge, Junior Division, Pandharpur.
- (d) Both the Appellants and Respondent i.e. the Plaintiff and Defendants to appear in the Court of concerned learned Civil Judge, Junior Division, Pandharpur on 13th March, 2023 at 11:00 a.m. for fixing the schedule of hearing. The parties to produce copy of this order before the

concerned learned Civil Judge, Junior Division,
Pandharpur.

- (e) As the suit is of the year 2017, the learned concerned Civil Judge, Junior Division, Pandharpur is requested to dispose of the same expeditiously by taking into consideration pendency of prior suits.

18. The Second Appeal is disposed in above terms with no order as to costs.

19. As the Second Appeal is disposed of, nothing survives in the Interim Application and the same is also disposed of.

20. It is clarified that, this Court has not considered the merits and all the contentions of both the parties on merits are expressly kept open.

(MADHAV J. JAMDAR, J.)