

Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.819 OF 2022

WITH

INTERIM APPLICATION NO.30078 OF 2022

IN

SECOND APPEAL NO.819 OF 2022

Bhimashankar Narayan Patil (Died) ...Appellants/
(Since deceased through legal heirs) Applicants
1A. Sangita Bhimashankar Patil & Ors.

V/s.

Yashodabai Narayan Patil & Ors. ...Respondents

Mr. R. S. Alange, for the Appellants/Applicants.

Mr. Hrishikesh S. Shinde a/w Ramesh Patil, for the
Respondents.

CORAM : MADHAV J. JAMDAR, J.
DATED : 6th APRIL, 2023

P.C.:

1. Heard Mr. Alange, learned counsel appearing for the
Appellants and Mr. Shinde, learned counsel appearing for the
Respondents.

2. By the present Second Appeal, the Appellants are
challenging the legality and validity of the impugned
judgment and order dated 3rd August, 2022 passed by the
learned Additional Sessions Judge, Solapur below Exh.1 in
Civil Misc. Application No.154 of 2022. By the impugned

Digitally
signed by
ARJUN
VITTHAL
KUDHEKAR
Date:
2023.08.02
16:05:11
+0530

order, the said Application was rejected which was filed seeking condonation of delay of 8 years and 16 days in filing the Appeal.

3. The Respondents have filed Regular Civil Suit No.975 of 2011 on 22nd December, 2011 seeking partition and possession. The learned 4th Joint Civil Judge, Senior Division, Solapur in the judgment and decree dated 28th April, 2014 passed in said Suit has specifically recorded that, Order Below Exh.1 in said Suit dated 17th September, 2012 points out that suit summons (Exh.8) was refused by Defendant-Bhimashankar on 29th December, 2011 and, therefore, bailiff has affixed copy of summons on the house of Defendant on 14th July, 2012 under Order V Rule 20 of CPC and, accordingly, the suit proceeded ex-parte against Bhimashankar i.e. sole Defendant.

4. The present Appellants are the heirs and legal representatives of said sole Defendant. The only contention raised by Mr. Alange, learned counsel appearing for the Appellants is that, said Bhimashankar-original Defendant was not properly served the suit summons. To substantiate this contention, he has relied on the decision of the Division

Bench of this Court in the matter of *Deepali w/o Pratap Sonawane Vs. Pratap s/o Irappa Sonawane*¹.

5. On the other hand, it is the contention of Mr. Shinde, learned counsel appearing for the Respondents that, suit summons was properly served. He also filed additional paper book and relied on various documents including relevant Bailiff Reports. He also relied on certain observations in the above said decision of *Deepali w/o Pratap Sonawane (supra)* as well as the decision of the Supreme Court in the matter of *The Commissioner of Income-Tax, Punjab, Jammu and Kashmir and Himachal Pradesh Vs. Daulat Ram Khanna*².

6. Before considering the rival submissions, it is necessary to set out certain factual aspects. The suit was filed seeking partition and possession on 22nd December, 2011. The said Bhimashankar was the sole Defendant. On Page 77 of the additional paper book the Bailiff Report dated 27th December, 2011 is annexed. The said Bailiff Report specifically mentions that, although, the Defendant was personally present, he refused to acknowledge the receipt of the suit summons by putting his signature or thumb

1 (2015) 4 Mh.L.J. 378

2 AIR 1967 SC 1552

impression and, therefore, the suit summons was served by affixing in view of Order V Rule 17 of the CPC. It is also mentioned in the said Bailiff Report dated 27th December, 2011 that, the persons available at the same place, refused to act as panchas and, therefore, the requirements of Order V Rule 17 could not be fulfilled. Therefore, the Respondents filed Application for substituted service under Order V Rule 20(1) and the learned Trial Court directed that, suit summons be served by affixing and the relevant Bailiff Report is at page 78. In the said Bailiff report, it has been specifically mentioned that, "Gaon Kamgar Kotwal" was present at the place, the residential house of the Defendant was found closed and the suit summons was served by affixing in the presence of "Gaon Kamgar Kotwal" and, accordingly, the suit summons was served. The said Bailiff report dated 14th February, 2012 was also signed by said "Gaon Kamgar Kotwal". The said Bailiff report mentions that the contents in the said Bailiff report are true and are stated on affirmation and verified the same.

7. Mr. Alange, learned counsel has very heavily relied on the decision of this Court in the matter of *Deepali w/o Pratap*

Sonawane (supra) and particularly on paragraph Nos.12, 13 and 14 of the same. After quoting the provisions of Order V Rule 17 and Order V Rule 19, this Court has held as follows :-

"12. Basically service of summons is to be made by delivering a copy thereof to the concerned party apart from modes of service prescribed in the Code of Civil Procedure. In the instant case, the attempt of service is shown to have been made at the premises of the Family Court, Aurangabad. Perusal of Rules 17 and 19 of Order V of the Code of Civil Procedure show that **in order to accept the service as valid service, particularly, when the report is to the effect that the respondent refused to accept the summons then, it become duty of the Court to examine the Process Service Officer/Bailiff if his report is not on affidavit. Even if the Process Serving Officer gives his report on affidavit, discretion is with the Court to examine the Process Serving Officer in order to ascertain, whether his report of is correct or not in order to hold the service valid. After complying with these mandatory requirements, the Court is required to declare, whether the summons is duly served or not.**

13. Harmonious construction of Rules 17 and 19 of Order V of the Code of Civil Procedure goes to show that **acceptance of report of the service of the summons is a serious and solemn act and not**

merely an empty formality. Object to serve summons on the respondent is to enable him to know about institution of the proceedings against him and enable him to resist the said proceeding filed against him. Law of procedure is framed in such a manner that principle of natural justice is scrupulously followed. The basic requirement of this rule is that the decision should not be reached behind back of the affected party and such party should not be precluded from participating in the proceeding. Therefore, it becomes the prime duty of the Court concerned to see that all procedural requirements are duly adhered to prior to proceeding ex-parte against the concerned party to the litigation.

14. Proof of due service of summons is essential condition for proceeding ex parte against the concern respondent. If record of case in hand is perused, it appears that though **the Process Serving Officer / Bailiff has submitted his report** stating that, respondent wife has refused to accept the summons in the court premises at 10.45 a.m. of 17-11-2011, **he has not filed the same along with his affidavit.** Another endorsement on summons Exh. No.5 shows that, **the Process Serving Officer has made efforts to serve the original respondent - wife at given address i.e. N-12, B-Sector, 48/7, T.V. Center, HUDCO, Aurangabad, however said report also not accompanied with an affidavit. Order**

passed below Exh. No.1 on 17-11-2011 by which the learned Judge, Family Court proceeded ex parte against the respondent - wife, does not show that mandatory provisions as envisaged by Rules 17 and 19 of the Code of Civil Procedure were complied with by the learned Judge of Family Court. There is no record to show that the Process Serving Officer / Bailiff was examined by the learned Judge Family Court, Aurangabad prior to proceeding ex parte against the respondent wife. As report of the Process Serving Officer / Bailiff at Exhibit 5 relied upon by the learned Judge was to the effect that original respondent / wife has refused to accept the summons when it was sought to be served on her, as per mandate of Rule 19 of Order V of the code of Civil Procedure, it was incumbent on the part of the learned Judge to examine said Process Serving Officer / Bailiff on oath or to cause him to be so examined by another Court touching his proceedings. Obviously, the intention of such examination is to see that chances of a false endorsement of such attempt to serve the summons and refusal thereof are minimized. If the Process Serving Officer / Bailiff is examined on oath and during such examination, it is found that the statement so made by him is false, then such Process Serving Officer / Bailiff makes himself liable for prosecution. Thus, there is inbuilt guard against false report regarding

service of summons. The learned Judge of the Family Court has not taken precaution to adhere to the provisions of Rule 19 of the Code of Civil Procedure while passing order below Exhibit 1 regarding service of summons on original respondent / wife. In fact, it is seen that the said order below Exhibit 1 was passed in a casual manner not even declaring that the summons has been duly served on respondent/wife. There seems to be no application of mind to this aspect by the learned Judge of the Family Court at Aurangabad. At least the order below Exh. No.1 does not show such application of mind."

(Emphasis added)

8. Thus, the Division Bench of this Court in *Deepali w/o Pratap Sonawane (supra)* has held that, perusal of Rule 17 and 19 of the Order V of the CPC shows that in order to accept the service as valid service, particularly, when the report is to the effect that the Respondent refused to accept the summons then, it becomes duty of the Court to examine the Process Serving Officer / Bailiff if his report is not on affidavit. Even, if, the Process Serving Officer gives his report on affidavit, discretion is with the court to examine the Process Serving Officer in order to ascertain, whether the report is correct or not in order to hold the service valid and

after complying with these mandatory requirements, the Court is required to declare, whether the summons is duly served or not. It has been held that, harmonious construction of Rule 17 and 19 of Order V of the CPC goes to show that acceptance of the service of report of the summons is a serious and solemn act and not merely an empty formality.

9. If the factual aspects on record in the present case are examined in view of above legal position then, it is clear that, the first Bailiff report, wherein, the Defendant refused the service is not on affidavit. However, the second Bailiff Report regarding service is on affidavit. Apart from that, the said service report is also signed by "Gaon Kamgar Kotwal" and, his presence is specifically noted in the said report. It is also significant to note that the said Bailiff Report has been accepted by the learned Trial Court before proceeding the suit ex-parte against the Defendant.

10. Mr. Alange, learned counsel failed to point out any illegality in acceptance of the said service report as held by this Court as acceptance of the Bailiff Report is a serious and solemn act and not merely an empty formality. Mr. Alange, learned counsel is right as far as first Bailiff Report is

concerned as the same was not on affidavit. However, the facts and circumstances of this case shows that said second Bailiff report is on the affidavit. Apart from that, the same is also counter signed by "Gaon Kamgar Kotwal" and his presence is specifically noted in the said report. Therefore, the learned Trial Court has properly exercised the discretion in accepting the said Bailiff Report. In any case, there is no illegality or perversity in accepting the said Bailiff report.

11. Mr. Shinde, learned counsel appearing for the Respondents is right in pointing out that, original Defendants are staying on the address which has been shown as the address of the Defendants in the suit. He is right in pointing out that, in the Special Civil Suit No.483 of 1989 which was filed by the Original Defendant, the same address which was shown in the Regular Suit No.975 of 2011 is shown. Apart from that, the said Measurement Notice dated 2nd May, 2022 was served on the Respondents on the same address in the Civil Misc. Application No.154 of 2022 and in the present Second Appeal No.819 of 2022, the same address is shown as the address of the Appellants. Therefore, there is no substance in the contention that the Defendant is not

properly served.

12. The Second Appeal is dismissed, however, with no order as to costs.

13. In view of dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also dismissed.

14. Ad-interim relief granted earlier by order dated 14th December, 2022 stands vacated forthwith.

[MADHAV J. JAMDAR, J.]