

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Writ Petition No.4214/2021

Ashok V Mahesh and another

Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's Orders

Mr. C.S. Samudra, Adv for petitioner.

Mrs. Bhondwe, ADv h/f Mr. V.S. Kukday, Adv for resp. Nos.1 and 2.

CORAM : AVINASH G GHAROTE, J.

DATE : 19-04-2023

Heard learned Counsel for the petitioner and
 the learned Counsel for the respondent nos.1 and 2.

2. The petition challenges the order dated 30-09-14 passed in MJC No.10/13 (pg 43), whereby the application for setting the aside exparte decree dated 19-04-12 passed in Spl.CS No. 30/11 (pg 43) and the judgment in MCA No. No.22/17 dated 29-01-20 have been rejected.

3. It is contended by Mr Samudra, learned Counsel for the petitioner that the petitioner who was the defendant in a suit for specific performance instituted by the respondent was never served as a result of which an exprate decree came to be passed on 19-04-12. The same having been put to execution in Special Darkhast No.8/12, upon receipt of notice, the

petitioner on 9-7-13 filed MJC No.10/13 for setting aside the ex parte decree under Order 9 Rule 13 of the Code of Civil Procedure. To demonstrate that there was no service, Mr Samudra, learned Counsel for the petitioner invites my attention to the bailiff report in the suit dated 5-09-11 (pg 132-A) and the report of the Post Master on the subsequently issued suit summons by RPAD (Pages 135 to 137). It is also contended that the petitioner throughout has been residing at the same address, which is demonstrated from the fact that the notice of the execution was served upon the petitioner on the same address. It is therefore submitted that the impugned orders which do not take this position into consideration cannot be sustained and are required to be quashed and set aside.

4. Mrs Bhondwe, Advocate holding for Mr. V.S. Kukday, Advocate for respondent nos. 1 and 2, supports the impugned orders and contends that the presumption of service, once the suit summon is sent by RPAD upon the address of the petitioner, where he claims to reside, would stand substantiated and the impugned judgments therefore ought to be sustained.

5. It is not in dispute that at the first instance the suit summons was issued to the petitioner/defendant. The bailiff report at dated 05-09-2011 (pg 132-A)

categorically states that upon inquiry at various places the address of the petitioner was not discernible and therefore since the complete address of the petitioner, was not upon the suit summons, the same was returned back. This report of the bailiff dated 05-09-11 was duly certified by his superior by endorsement of the same date. The suit summons thereafter were sent to the petitioner/defendant by RPAD. As the acknowledgments were not forthcoming, the trial Court had written a communication on 21-11-11 to the concerned Postmaster making an enquiry regarding the service to which a reply was received dated 26-11-11 (pg 135) in which it has been stated that the since there was no response from the petitioner the envelope was sent back. The copy of the envelope is at page 137 and does not contain any endorsement of any intimation having been given by the Postman to any one present on the address to which the envelope was addressed. In absence of such an endorsement, it was not permissible for the learned trial Court to have arrived at a conclusion that the suit summons was not claimed. There is thus a factual error in the finding recorded by the Courts below regarding service upon the petitioner/defendant, which position is not borne out from the documents at Exhs- 23 and 24. This position has not been taken into consideration by the Courts below which has resulted in passing of the

impugned judgments. Though, much time has flown, however, on account of the aforesaid situation the exparte decree dated 19-04-12 cannot be sustained on that count alone. Any delay which has been occasioned, the can be compensated by a suitable cost.

6. In view of the above position, the impugned judgments are hereby quashed and set aside and application and the MJC No.10/13 are hereby allowed by setting aside the exparte decree dated 19-04-12, however at a cost of Rs. 20,000/- to be deposited with the High Court Bar Association, Nagpur, as a condition precedent, which shall be used for the purchase of High Speed Scanner Machine, as per the request of Mrs Bhondwe, learned Counsel for respondent nos.1 and 2. The costs shall be deposited by 26-04-2023 and receipt of the same shall be placed on the record of this petition.

7. Since the suit now stands restored and is of the year 2011, the parties shall appear before the concerned Court on 02-05-2023 without any further notice, on which date the petitioner shall file his written statement on record with all documents which he relies upon.

8. The trial Court thereafter to proceed to

frame the issues and decide the suit as expeditiously as possible and in any case within a period of one year from 02-05-2023.

JUDGE

Deshmukh