



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

WRIT PETITION NO. 4347 OF 2018

- 1) Sushma Vijay Agrawal,
aged about 52 years, Occupation : Agriculturist
and business, Resident of Rajendra
Nagar, Yavatmal, District : Yavatmal.
- 2) Jyoti Ashok Singhaniya,
aged about 52 years, Occupation
Agriculturist and Business, Resident
of State bank Square, Church road,
Yavatmal, District : Yavatmal.

.... **PETITIONER(S).**

// VERSUS //

Vilas Haribhau Wankhede,
aged about 49 years, Occupation
Press Reporter, Resident of Sahayog
Society, Waghapur, Yavatmal,
District Yavatmal.

.... **RESPONDENT.**

Mr. M.M. Agnihotri, Advocate for Petitioners.
Mr. S.M. Bhangde, Advocate for the respondent-sole

CORAM : **ANIL S. KILOR, J.**
DATED : **26.07.2023**

JUDGMENT :

1. Heard.
2. **RULE.** Rule made returnable forthwith. Heard finally by
consent of the learned counsel for the parties.

3. The petitioners are landlords, whereas, the respondent is a tenant. The petitioners filed a suit for recovery of arrears of rent, inquiry of mesne profit and possession of the suit property.

4. The suit was decreed *ex parte* as the respondent failed to appear in the matter though he alleged to be served through Bailiff as well as through Registered Post Acknowledgment Due (RPAD).

5. Thereupon, the respondent filed an application under Order IX Rule 13 of the Code of Civil Procedure (CPC) for setting aside *ex parte* decree, which came to be rejected vide order dated 02.03.2016 passed in M.J.C. No.91 of 2015 by the trial Court.

6. The respondent thereupon, filed Misc. Civil Appeal No.16 of 2016 under Section 104 read with Order XLIII Rule 1(d) of the CPC, which came to be allowed vide impugned order dated 06.11.2017 passed by the District Judge-II, Yavatmal. The same is the subject matter of the present writ petition.

7. The only question arises for consideration in the present writ petition is, whether a proper service of summons was made on the defendant/respondent ?

8. The record shows that the Court Bailiff visited the shop of the respondent on 24.04.2010, 12.07.2010, 11.10.2010, 17.11.2010,

19.01.2011, 29.03.2011, 12.12.2011 and visited daily from 10.08.2012 to 21.08.2012 and again visited on 22.07.2013. On some occasion, the shop of the respondent was found closed and on other occasions the respondent was not found present in the shop.

9. The record shows that the Bailiff pasted the notices on the open door of the shop in presence of the servant of the respondent, namely Arvind Sable.

10. Thus, the learned counsel for the petitioners submits that there was a proper service and it was made repeatedly. The record further shows that the respondent was also alleged to be served through RPAD.

11. An endorsement on the returned envelope, dated 31.08.2013 and 02.09.2013 says that "the respondent was not found" and an endorsement dated 03.09.2013 says that "an intimation was given". Therefore, a presumption was drawn that the service has been properly made and the learned trial Court proceeded *ex parte* against the respondent.

12. The learned counsel for the petitioners therefore, submits that, the learned lower Appellate Court committed error in allowing the appeal by holding that no proper service was made. It is submitted that the respondent has not examined the Bailiff or the Postman to establish

the fact that the notice was not served upon him.

13. It is further submitted that the postman's remark on the envelope that "an intimation was given" cannot be doubted. He accordingly, prays for setting aside the impugned judgment and order. In support of his submission he has placed reliance upon the judgments of the Co-ordinate Bench of this Court in the cases of *Vishwasrao ... vs. ... Bachharam*¹ and *P.A. Kowli Vs. Narayan Jagannath Mahale*².

14. On the other hand, the learned counsel for the respondent argues that, the service was not made as per Order V Rule 15 of the CPC.

15. It is submitted that the record shows that whenever the Bailiff found the shop open, he found that, the respondent was not present but his servant was present and he intimated the servant and pasted the notice on the door. It is submitted that the service on the servant is not valid.

16. Moreover, he submits that, there is also no compliance of the Order V Rule 19 of the CPC. He therefore, submits that the learned lower Appellate Court has rightly allowed the appeal. In support of his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court of India in the case of *State of J. and K. and others v. Haji*

1 1995(2) Mh.L.J. 403

2 1981 Mh.L.J. 355

*Wali Mohammed and others*¹.

17. In the light of the rival contentions of the parties, I have perused the record and the impugned order.

18. The Hon'ble Supreme Court of India, in the case of *State of J. and K. and others* (supra), has held thus:

“11. It cannot be and indeed it has not been disputed that notices were not served in accordance with the procedure prescribed for service of summons in the Civil Procedure Code. Even if we accept what Dr. Singhvi says that there was a refusal to accept the summons and that was the reason for effecting service by affixation the provisions of O.5 R.19 of the Code were not complied with by the filing of an affidavit of the serving officer etc. All that has been pointed out by Dr. Singhvi is that the notices were produced along with the writ petitions which showed that they had been affixed to the premises and that in the writ petitions it was admitted that notices had been affixed on January 9, 1968 on the properties of the petitioners. We do not consider that any such averment dispensed with the requirement of the statutory provision contained in S. 239 of the Municipal Act in the matter of service of notices.”

19. Undisputedly, in the present matter, there is no compliance of the Order V Rule 19 by filing an affidavit of Serving Officer. Moreover, no compliance has been shown of Order V Rule II and Order V Rule 15 of the CPC.

20. As per the Bailiff's report whenever he found the shop of the respondent open, he intimated the servant and pasted the notice on the door under Order V Rule 17 of the CPC. In the matter at hand, the

1 AIR 1972 SCC 2538

service on the servant cannot be treated as valid service, because it is not the case of the petitioners that, the said servant was authorized to receive the summons and despite he refused to accept the summons.

21. The Co-ordinate Bench of this Court in the case of the *Udhav Baliram Adawale V. Babruwan Papanarsh Gaikwad*¹ by relying upon the judgment and order of the Co-ordinate Bench of this Court in the case of *New India Assurance Co. Ltd. Vs. Smt. Nasibunnisa Mohd. Israr Khan and others*², has held thus:

“10. However, in the judgment delivered by this Court (Coram : Abhay S. Oka, J.) in The New India Assurance Co. Ltd. case (Supra), the issue is practically identical to the issue involved in this case, where notice issued by the Court was alleged to be served upon the defendant. This Court while considering the said position, has considered the law laid down by the Hon'ble Apex Court in (M/s. Madan and Company Versus Wazir Jaivir Chand), AIR 1989 SC 630, and dealt with the issue of service of Court notice, either through the bailiff or through the postal department. In order to ensure that the service is proper and complete, in so far as Court proceedings are concerned, this Court concluded that it would be unsafe to hold that the remark "intimation posted or unclaimed" would significantly indicate that the notice of the Court was actually served upon the defendants/respondents. It is further concluded that in such a situation, there is no scope to invoke the rebuttable presumption that the notice was never served and hence the Court must ensure that the notice is properly served.

11 to 13 [*]**

14. As pointed out earlier, when summons or notice is issued by Registered Post A.D. by invoking Rule 9 of Order V, there is no specific provision either in the said Code or in the Appellate Side

1 2017(6) Bom.C.R. 55

2 Civil Application No.1979 of 2011 dt. 14.10.2011

Rules which deals with the contingency where the postal article containing the summons or notice is returned with remark "intimation posted" and "unclaimed" or "not claimed". The Sub-Rule (5) of the Rule 9 of Order V which provides that in certain cases the Court shall declare that the summons has been duly served significantly does not cover a case where the summons or notice issued by Registered Post A.D. is returned with remark "intimation posted" and "unclaimed" or "not claimed". Now the question is whether in such a case the presumption under Section 27 of the General Clauses Act or Section 114 of the Evidence Act can be invoked. Such presumption is held to be a rebuttable presumption. Essentially a presumption is a rule of evidence and the question of invoking presumption arises only after parties adduce evidence. The presumption under both the sections is a rebuttable presumption. The presumption is a rule of evidence which can be applied only after the parties adduce evidence inasmuch as only at that stage, there is an opportunity to rebut the presumption. When it comes to service of summons or notice as required by the said Code, at the stage of service of summons or notice, the Court cannot invoke the presumption either under Section 27 of the General Clauses Act or under Section 114 of the Evidence Act and hold that the service effected in such manner is a good service. The decisions which hold such service as "good service" are rendered in relation to the service of statutory notice by the landlord to the tenant or notices exchanged between the parties. In these cases, such presumption was invoked after the parties adduced evidence. Therefore, when summons or notice of the Court issued by Registered Post A.D. is returned with a remark "intimation posted" and "not claimed" or "unclaimed", the same cannot be accepted as a good service. The reason is that at that stage there is no scope to invoke the rebuttable presumption. As pointed out earlier, apart from the fact that the presumption as aforesaid is a rule of evidence, even assuming that there is a proper service of an intimation, the postal authorities do not keep the postal articles in the post office for more than few days and the same are returned to the sender. In case of the Defendant who is away for more than few days, even if he visits the post office for collecting the postal article, he will not get the postal article if it is already returned. It is pertinent to note that while substituting the Rule 9 of Order V of the said Code, though the legislature has expressly provided that if a postal article containing the summons is received back with an endorsement of refusal, the same shall be treated as good service, there is no such provision made in a case

where summons or notice issued by Registered Post A.D. is returned with a remark "intimation posted" and "not claimed" or "unclaimed". Therefore, in such a case, the service of summons or Court notice cannot be treated as a good service. The settled law of invoking presumption of service of notice by landlord to the tenant will not apply to service of summons or notice." (emphasis supplied)

22. Thus, from the above observations, it is evident that while substituting the Rule 9 of the Order 5 of the CPC, though the legislature has expressly provided that if a postal article containing the summons is received back with an endorsement of refusal, the same shall be treated as good service, there is no such provision made in a case where summons or notice issued by RPAD is returned with a remark "intimation posted" and "not claimed" or "unclaimed". Therefore, in such case, service of summons or the Court notice cannot be treated as 'good service'.

23. As in the cases *Vishwasrao (supra)* and *P.A. Kowli (supra)* cited by the learned counsel for the petitioners, the Co-ordinate Bench of this Court has not taken into consideration the fact that the postal authority do not keep postal article in the Post Office more than few days, same are returned to the sender. In case a defendant, who is away for more than few days, even if visited the Post Office for collecting postal article, he will not get the same, if it is already returned.

24. Similarly, in the said judgment, it is not considered the

situation which has been discussed by the Hon'ble Supreme Court of India in the case of *M/s. Madan and Company Versus Wazir Jaivir Chand*¹ that, a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served, such possibility cannot be excluded.

25. In the circumstances, I am of the view that the authorities cited by the learned counsel for the petitioners are of no help to the petitioners. In the circumstances, I do not find any perversity committed by the learned lower Appellate Court in passing the impugned order.

26. Moreover, it has been found that the clauses (III), (IV) and (VI) of the impugned order have already been complied with.

27. Thus, in light of the above referred observations and findings, I do not find any merits in the present writ petition. Accordingly, the writ petition is **dismissed**.

Rule is discharged. No costs.

(ANIL S. KILOR, J)

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