IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 573 OF 2024
ALONGWITH
INTERIM APPLICATION NO. 14620 OF 2024
(FOR STAY)

Kokilaben Khimji Shah } ....*Applicant*

Versus

Jayendrakumar Varma } ....*Respondent*

Mr. Ankit Tiwari *i/by. Mr. Rajesh M. Yadav, for the Applicant.*

Mr. Kanhaiya S. Yadav, *for the Respondent.*

CORAM : SANDEEP V. MARNE, J.
DATED : 14 NOVEMBER 2024.

P.C. :

1) Revisionary jurisdiction of this Court is invoked under the provisions of Section 115 of the Code of Civil Procedure (**Code**) to set up a challenge to the judgment and order dated 4 October 2024 passed by the Small Causes Court allowing Misc. Appeal No. 54 of 2024 and setting aside order dated 18th July, 2024 passed by the Trial Court in M.A.R.J.I. Application No. 83 of 2023. The Appellate Court has allowed M.A.R.J.I. Application No. 83 of 2023 by setting aside *ex-parte* decree dated 21st March 2018 passed in R.A.E. Suit No. 76 of 2015 and the suit is restored. The Revision Applicant/Original

MEGHA SHREEDHAR PARAB Digitally signed by MEGHA SHREEDHAR PARAB Date: 2024.11.18 11:59:29 +0530

Plaintiff is aggrieved by the order of the Appellate Court and has accordingly filed the present Revision Application.

2) I have heard Mr. Tiwari, the learned counsel appearing for the Revision Applicant, who would submit that the Plaintiff had taken diligent steps for service of the suit summons on the Defendant. That since suit premises comprise of residential room, address of the Defendant was indicated in the plaint as that of the suit premises. That the Bailiff paid repeated visits to the suit premises which were found locked, on account of which, the suit summons could not be served. He would submit that even neighbours were not aware of the alternate address of the Defendant which finally led to the Bailiff pasting the suit summons on the door of the suit premises. That additionally, the summons was published in local newspaper. That therefore, the summons was duly served on the Defendant. If the Defendant's plea of use of the suit premises is to be accepted, he must have noticed pasting of suit summons. That the Defendant was fully aware about filing of the Suit and deliberately shied away from appearing before the Small Causes Court. He would submit that the notice in the execution proceedings was also addressed at the suit premises which has ultimately been served on the Defendant. That the Defendant conveniently accepted the notice in execution proceedings, appeared therein and thereafter filed an application for setting aside *ex-parte* decree. He would rely upon judgment of the Apex Court in ***Sunil Poddar & Ors. Versus.***

Union Bank of India[1] in support of his contention that once a summons is published in a newspaper having wide circulation in the locality, it does not lie in the mouth of the person sought to be served that he was not aware of such publication.

3) He would further submit that the Appellate Bench has erred in treating the complaint dated 15 May 2011 as an FIR when in fact, the same was merely a non-cognizable complaint, copy of which was not served on the Plaintiff. That, therefore, there was no reason for the Plaintiff to know the alternate address of the Defendant. He would accordingly pray for setting aside the order passed by the Appellate Bench.

4) The revision application is opposed by Mr. Yadav, the learned counsel appearing for Respondent/ Defendant. He would submit that the jurisdiction of a Court in setting aside *ex-parte* decree is discretionary in nature. That the discretion has been properly exercised by the Appellate Court and in absence of any perversity in the findings recorded by the Appellate Court, there is no warrant for interference in exercise of revisionary jurisdiction under Section 115 of the Code. He would submit that the order of the Appellate Bench would merely result in decision of Suit on merits. He would, therefore, pray for dismissal of the revision application.

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1 **(2008) 2 SCC 326**

5) After having considered the submissions canvassed by the learned counsel appearing for the parties, it is difficult to infer that the Plaintiff left any stone unturned in serving the Defendant with the suit summons. Findings recorded by the Trial Court in paragraph 15 of the order would indicate that the Bailiff paid visits to the suit premises on 23 February 2015, 8 April 2015, 13 April 2015, 5 September 2015 and 16 October 2015. It is only after the fifth visit to the suit premises when the Defendant was repeatedly not found thereat and when the suit premises were found locked, that the Bailiff proceeded to paste the suit summons at the suit premises. Additionally, the Defendant also adopted the measure of publishing the suit summons in Free Press Journal. In my view therefore, it cannot be contended that the Defendant was not served with the suit summons.

6) The Appellate Bench is also not correct in holding that the Plaintiff was aware about alternate address of the Defendant and deliberately did not mention the same in the Plaint. The Appellate Court ought to have appreciated that the Suit is filed for recovery of possession of the suit premises in which Defendant is a tenant. The landlord is, therefore, fully justified in reflecting the address of the suit premises in the Plaint.

7) There was no requirement for the landlord to run behind a tenant in search of his alternate premises for the purpose of service of suit summons. Reliance by the Appellate Court on the complaint dated 15 May 2011 also appears to be misplaced. According to the Revision Applicant, what was registered was merely a non-cognizable complaint on 15 May 2011 and there was no reason for the Plaintiff to receive copy of the said complaint or to notice the alternate address of the Defendant. Going one step further, even if it is assumed that the Plaintiff was in receipt of copy of Complaint dated 15 May 2011 and noticed another address of the Defendant specified therein, there was no requirement for the Plaintiff to include the said address in the Plaint. Reflection of the address of the suit premises in the plaint was sufficient.

8) Though I am not in full agreement with the reasons recorded by the Appellate Bench in directing restoration of the Suit, it however must be noticed that restoration of Suit by the Appellate Bench ultimately results in decision thereof on merits. In the present case, there is no doubt to the position that the Defendant has been negligent in not appearing before the Trial Court despite pasting of the suit summons at the suit premises. However, such conduct on the part of the Defendant would at the most invite costs for causing delay in possession of the suit premises, but not denial of opportunity to defend the Suit.

9) The Appellate Court has ultimately exercised discretion in accepting the reason for non-appearance in the Suit for setting aside the *ex-parte* decree. Exercise of such discretion does not wipe out any right in favour of the Plaintiff forever, but merely postpones the final outcome of the Suit. The suit is decided *ex-parte* merely on the basis of version of a Plaintiff. The impugned order results in a situation where the Court would have versions of both the parties for arriving at the correct conclusions. In that view of the matter, though the reasonings adopted by the Appellate Court do not appeal to me, I am not inclined to set aside the order restoring the Suit for the purpose of being decided on merits. The negligent conduct of the Defendant can be taken care of by imposing exemplary costs, which in my view, ought to have been imposed by the Appellate Court. The suit has been instituted in the year 2015 and the proceedings have remained pending for last 9 long years on account of negligent conduct of the Defendant. For such act on the part of the Defendant, he is required to be mulct with exemplary costs.

10) Accordingly, I proceed to pass the following order.

(i) Order dated 4th October, 2024 passed by the Appellate Bench of the Small Causes Court setting aside *ex-parte* decree and restoring the suit is not disturbed. It is, however, modified to the extent of non-imposition of costs.

(ii) Defendant shall pay to the Plaintiff costs of Rs. 1,00,000/- within a period of 4 weeks from today. Payment of costs shall be condition precedent for the purpose of restoration of the suit. If the Defendant fails to pay/deposit in the Court, costs as imposed by this Court within the stipulated time, the *ex-parte* decree dated 21st March, 2018 shall automatically revive.

(iii) The Appellate Court is requested to expedite decision of RAE Suit No. 76 of 2015 by making an endeavor to decide the same as expeditiously as possible, preferably by 31st December, 2026.

11) With the above directions the Revision Application is **disposed of.**

12) With disposal of the Revision Application, the Interim Application taken out for stay does not survive. The same also stands disposed of as infructuous.

[SANDEEP V. MARNE, J.]