

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO.220 OF 2018
IN
NOTICE OF MOTION NO.920 OF 2014
IN
SUIT NO.60 OF 1998**

Ajit Ratnakar Bagwe : Appellant
(Original Defendant No.2)

Vs.

Prime Builders & ors. : Respondents

Dr. Milind Sathe, Senior Advocate a/w Mr. Bhushan Deshmukh
and Mr. Amar Mishra i/by SRM Law Associate for the Appellant.

Mr. V. Y. Sanglikar for Respondent No.1.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.**

DATE : 15th JANUARY 2024

P.C.

1. The present Appeal impugns an Order dated 21st February 2018 by which the Appellant's Notice of Motion for setting aside the *ex-parte* decree dated 11th August 2009 passed in the captioned Suit came to be dismissed.

2. Before advertizing to the rival contentions, it is useful to first set out a few facts which will give context to the challenge in the present Appeal.

- i The captioned Suit seeks specific performance of a Memorandum of Understanding ("MOU") for sale of a plot of land being Plot No.32 Dadar-Matunga Estate CTS No. 6/10 Vineet St. No.3 Dadar; Bombay 400 014 admeasuring about 821.07 Sq. Mt. entered into between Respondent No. 1 i.e. the Plaintiff in the captioned Suit and one Usha Bagwe i.e. the Original Defendant in the captioned Suit.
- ii. Usha Bagwe passed away on 9th October 2001 leaving behind her brother one Ratnakar Bagwe as her legal heir. Respondent No. 1 therefore after the demise of Usha Bagwe amended the plaint to bring Ratnakar Bagwe on record in place and stead of Usha Bagwe.
- iii. Ratnakar Bagwe then passed on 29th May 2003 leaving behind him the following three persons as his legal heirs

(a) Rajesh Ratnakar Bagwe (b) Suman Ratnakar Bagwe and (c) Ajit Ratnakar Bagwe i.e. the Appellant. Respondent No. 1 therefore took out a Chamber Summons (being Chamber Summons No.1508 of 2005) seeking to bring on record the legal heirs of Ratnakar Bagwe as party Defendants to the Suit.

- iv. The Chamber Summons was served upon the Appellant and Respondent No. 2 and 3 under cover of the Respondent No.1's Advocate's letter dated 6th December 2005. It is useful at this stage to set out that the said letter had two addresses namely (a) Ghatkopar and (b) Dadar. Service of the Chamber Summons was accepted by the Appellant as the constituted attorney of Respondent No. 2 and 3. The Chamber Summons then came to be allowed by an Order dated 27th June 2006 which reads thus viz.

"Heard Mr. Patil for plaintiff and Mr. Saraf for defendant. Perused the chamber summons, proposed amendments and affidavit in

support. For the reasons set out therein, delay of 95 days is condoned. Chamber Summons is made absolute in terms of prayer clauses (b) an (c). Amendments to be carried out within two weeks from today. Amended copy of plaint to be served on parties within four weeks thereafter. Written statement/additional W.S. to be filed within twelve weeks from the date of receipt of amended copy of plaint."

3. It is useful at this stage to also note that the addresses of the newly impleaded Defendants to the Suit i.e., the Appellant and Respondent No. 1 and 2 were all shown as Ghatkopar in the cause title of the Plaint. It appears that thereafter, Respondent No. 2 and 3 were served with a copy of the Plaint. Insofar as the Appellant was concerned, two attempts to serve the Appellant at Dadar were made, however the packets were returned unclaimed. Subsequently, a copy of the Writ of Summons was sent by RPAD to Appellant at the Ghatkopar address which was returned with the remark "*unclaimed*".

4. Thereafter, by and Order dated 11th August, 2009 the Suit came to be decreed *ex parte* after recording that all the Defendants had been duly served.

5. The Appellant then filed the captioned Notice of Motion under the provisions of Order IX Rule 13¹ of the Code of Civil Procedure, 1908 (CPC) seeking to set aside the *ex parte* Decree on the ground that the Appellant had never been served with a copy of the Writ of Summons. The Notice of Motion however come to be dismissed by the Impugned Order and it is thus that the present Appeal came to be filed.

Submissions of Dr. Sathe on behalf of the Appellant.

6. Dr. Sathe Learned Senior Counsel appearing on behalf of

1 13. Setting aside decree *ex parte* against defendant.—In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further than no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

the Appellant at the very outset submitted that the present case, was not one of *irregular service* of the writ of summons but was infact a case of complete *non-service* of the writ of summons as required in law. He went on to submit that the non-service upon the Appellant was infact deliberate and calculated since Respondent No. 1 was well aware that the Appellant had his address in Dadar and not Ghatkopar.

7. Dr. Sathe then, invited our attention to the Order dated 27th June 2006 by which the Chamber Summons was allowed and pointed out that the appearance of the Learned Advocate who had appeared on that date was shown "*for Defendant*" and not on behalf the Respondents to the Chamber Summons i.e. the Appellants and Respondent No. 2 and 3. That apart, he submitted that even if the appearance of the Advocate was on behalf of the Respondents to the Chamber Summons, the Order specifically directed that the amended Plaint was to be served on all the parties within four weeks and that the order did not record that service of the writ of summons was waived.

Basis this he submitted that it was incumbent upon Respondent No. 1 to have ensured that each of the newly added Defendants were duly served which he submitted that Respondent No. 1 had not done. He pointed out that since the packets of service upon the Appellant were returned unclaimed, it was thus incumbent upon Respondent No. 1 to have complied with the procedure as prescribed under Order 5 Rule 17² of the Code of Civil Procedure, 1908 ('CPC') by affixing the copy of summons etc. He submitted that this was admittedly not done and thus Respondent No. 1 had not complied with the procedure prescribed for service of the Summons at all and was not a case where there was mere irregularity in complying with the procedure prescribed.

8. Dr. Sathe, then in support of his contention stated that

2 **17. Procedure when defendant refuses to accept service, or cannot be found.—** Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, 2[who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

failure to serve the Appellant was willful and deliberate and pointed out the following, viz

- i. That Respondent No. 1 was well aware that the address of the Appellant was "Dadar", despite which the same was stated to be "Ghatkopar" in the Plaint.
- ii. That a copy of Chamber Summons was infact served at the Dadar address and the letter under cover of which the same was served specifically mentioned the "Dadar" in addition to the "Ghatkopar" address.
- iii. That Respondent No. 1 had specifically admitted in the Affidavit in Reply, filed to the captioned Notice of Motion that they learnt that the Defendants were residing at Dadar.
- iv. That instead of taking under the provisions of Order 5 Rule 17 of the CPC, to complete service upon the Appellant, Respondent No.1 deliberately sent the Writ of

Summons to the Ghatkopar address by Registered Post only to obtain the 'unclaimed' endorsement.

Basis the above, he submitted that there was no manner of doubt that the Respondent No.1 had deliberately not served the Appellant with either the writ of summons or the amended Plaintiff.

9. Dr. Sathe then submitted that the Learned Single Judge had solely on the basis of preponderance of probability held that the Appellant had knowledge of the Suit since Respondent No. 2 and 3 were served and the Appellant was stated to be the constituted attorney of Respondent No. 2 and 3 and they were all close family members. He firstly submitted that no such power of attorney was even produced by Respondent No. 1 but even assuming so, the same would not dispense with the requirement of Respondent No. 1 having to serve the Appellant independently. He then placed reliance upon a judgement of the Hon'ble Supreme Court in the case of

Sushil Kumar Sabharwal Vs. Gurpreet Singh and others³ to submit that what Respondent No. 1 was required to establish to the satisfaction of the Court, was that the Appellant (a) had knowledge of "*the date of hearing*" and (b) had "*sufficient time to appear and answer the claim*" of the Plaintiff and not merely knowledge of "*the pendency of suit*". Basis this he submitted that merely because the Appellant had accepted service of the Chamber Summons and could be stated to have knowledge of "*the filing of the Suit*", the same would not dispense with the requirement of service Writ of Summons by which the Appellant would have been given details of both date of hearing of the Suit as also time to appear and answer the Plaintiffs claim in the Suit. He reiterated that in this case, admittedly service of the Writ of Summons had not been waived and the order allowing the Chamber Summons had specifically directed service of the amended Plaint on all Parties. He also submitted that even assuming, since no such power of attorney/authority had been produced, the same would not in any manner make a difference to requirement of having to serve the Appellant individually.

3 (2002) 5 SCC 377

10. Basis the above, Dr. Sathe submitted that the present Appeal was required to be allowed and *ex-parte* decree be set aside.

Submissions of Mr. Sanglikar on behalf of Respondent No.1.

11. *Per contra*, Mr. Sanglikar, learned counsel appearing on behalf of Respondent No.1, invited our attention to the second proviso⁴ to Order XI Rule 13 of the CPC (as applicable to Bombay) and pointed out that no *ex-parte* decree shall be set aside if the Court was satisfied that the Defendant knew, or *but for his willful conduct would have known*, of the date of hearing of the Suit. He submitted that in the facts of the present case, there could be no manner of doubt that the Appellant was aware of the Suit and that if the Appellant was not aware of the date of the hearing of the Suit, then the same was only on account of his willful conduct.

⁴ Provided also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

12. In support of his contention that it was only on account of the Appellant's willful conduct that the Suit was decreed *ex parte*, he placed reliance upon the following, viz.

- i. That notice of the Chamber Summons was accepted by the Appellant on behalf of Respondent No. 2 and 3.
- ii. That the Appellant and Respondent No. 2 and 3 were duly represented by an Advocate at the hearing of the Chamber Summons and was thus aware of the same and amendment which was sought for.
- iii. That the Appellant and Respondent No. 2 and 3, both of whom were duly served were close family members and the Appellant was infact the constituted attorney of Respondent Nos. 2 and 3.

Basis the above he submitted that if the Appellant did not know of the hearing of the Suit, it was only on account of his willful

conduct. He thus submitted that it was not open for the Appellant now seek to have the decree set aside on the ground of non-service. In support of his contention that in the facts of the present case proof of service of summons could be dispensed with, he placed reliance upon a judgment of the Hon'ble Supreme Court in the case of ***Sunil Poddar Ors. Vs. Union Bank of India***⁵ and a judgement of this Court in the case of ***Meena Ramesh Lulla & Ors Vs. Omprakash A Alreja & Ors***⁶.

13. Mr. Sanglikar then submitted that the Notice of Motion seeking to set aside the *ex-parte* decree was itself barred by limitation having been filed after a period of over a period of four years from the date of the decree and such delay could be condoned by the Court only if the Court was satisfied that the party seeking condonation of delay had made out a case of sufficient cause and not otherwise. In the present case he submitted, by inviting our attention to the Appellant's Affidavit in Support of the Notice of Motion that absolutely no case of

5 2008 2 SCC 326

6 Order dated 21/09/2011 in Appeal No.616 of 2011.

sufficient cause was made out therein. He then in support of his contention that a party was not entitled to the condonation of delay as a matter of right and same was entirely within the discretion of the Court to be exercised only after sufficient cause was shown, placed reliance upon a judgement of the Hon'ble Supreme Court in the case of **Ramlal and others Vs. Rewa Coalfields Ltd**⁷. He submitted that in the present case it was not open for the Appellant to contend that the Appellant was unaware of the *ex-parte* decree since there were other testamentary proceedings pending in this Court in which the same advocate was representing the Appellant.

14. Mr. Sanglikar then in conclusion submitted that the Impugned Order was passed by the Learned Single Judge by exercising his discretion and such discretion having been exercised judiciously was not liable to set aside and/or interfered with in appeal. He then placed reliance upon the judgements of the Hon'ble Supreme Court to in the case of **Wander Ltd Vs. Antox India P. Ltd.**⁸ and **Manjunath Anandappa Urf**

⁷ AIR 1962 SCC 361

⁸ Aironline 1990 SC 156

Shivappa Hansi Vs. Tammanasa and others⁹ to submit that an order passed by a Learned Single Judge which is passed by exercising his discretion was not liable to be set aside unless it was demonstrated that the exercise of such jurisdiction was arbitrary, capricious, perverse or where the Court had ignored settled principles of law. He pointed out that in the present case it was not even the case of the Appellant that the Learned Single Judge had acted in an arbitrary, capricious or perverse manner or had ignored settled principles of law. Basis this, he submitted that the Appeal must necessarily be dismissed.

15. After having heard Learned Counsel, what emerges for our consideration in the facts of the present case is whether (a) the Appellant was infact never served with the Writ of Summons and/or amended Plaint or (b) the Appellant *but for his willful conduct would have known*, the date of hearing of the Suit and thus could not make a grievance of non-service of the writ of summons. In order to decide this, we must note the following, viz.

9 AIR 2003 SC 1391

A. *First*, Order 5 the CPC mandates that service of a Writ of Summons on the Defendant and in cases where there are several Defendants¹⁰ service of summons shall be made on each Defendant. Thus, unless notice of the Writ of Summons was expressly waived, it was incumbent upon Respondent No. 1 to have served the Writ of Summons/amended Plaint upon all the Defendants to the Suit, individually. In the present case, it is not in dispute that the Appellant had not waived notice of the Writ of Summons. Thus, the Writ of Summons would have to be served in accordance with the provisions of the CPC, more particularly, Order 5. This mandatory requirement was admittedly not complied with in the present case.

B. *Second*, by the Order dated 27th June 2006 Respondent No. 1 was specifically directed to serve

10 **11. Service on several defendants.**— Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant

the amended copy of the Plaint on all parties. While Respondent No. 1 is stated to have served Respondent No. 2 and 3, qua the Appellant, admittedly, the packets remained unclaimed. Given this, it was then incumbent upon Respondent No. 1 to have as per the provisions of Order 5 Rule 17 of the CPC to affix the copy of the summons on the outer door or some other conspicuous part of the house in which the Appellant ordinarily resided or carried on business or personally worked for gain. Again, Respondent No. 1 did not do so. What is indeed curious and lends credence to the submission of the Appellant that the failure to serve the Appellant was willful and deliberate is the fact that Respondent No. 1 has admitted knowledge of the fact that the Appellant's address was at Dadar yet sent the RPAD packet to the Ghatkopar address.

C. *Third*, even accepting the fact that Appellant had

appeared through Counsel at the time when the Chamber Summons was allowed, would not in any manner dispense with the requirement of service of the Writ of Summons, unless such service was expressly waived. The Hon'ble Supreme Court has in no uncertain terms held in the case of **Sushil Kumar Sabharwal** (supra) that what is essential is the Defendant had knowledge of the "*date of hearing*" and not merely knowledge of "*the pendency of suit*". In the facts of the present case, the Learned Single Judge has entirely on the basis of *preponderance of probabilities* concluded that the Appellant had notice of the pendency of the Suit and the dates of hearing. We find that it is here that the Learned Single Judge has fallen into error since there is absolutely no material placed before us that the Appellant had knowledge of the "*dates of hearing*". Nothing has been placed on record to show that after the Chamber Summons was allowed, the Appellant either engaged

and advocate or appeared in any interlocutory proceedings or the Suit itself. The only stage where the Appellant is stated to have appeared is at the hearing of the Chamber Summons, which is admittedly *pre suit*.

16. Hence, for the aforesaid reasons, we find that in the present case, there has been no service of the Writ of Summons upon the Appellant as contemplated under Order 5 of the CPC at all. The case is thus not one of mere irregularity in service but is one of non-service of the Writ of Summons since Respondent No. 1 has (a) admittedly not complied with the procedure prescribed in Order 5 of the CPC for service (b) failed to establish that the Appellant had knowledge of the “*date of hearing*” and (c) failed to show that the Appellant had either appeared or instructed an Advocate to appear in the Suit or in any interlocutory proceeding in the Suit. Thus, the judgements in the case of **Meena Ramesh Lulla** and **Sunil Poddar** (supra) upon which strong reliance was placed by Respondent No. 1

would be entirely inapplicable to the facts of the present case. Similarly, the Learned Single Judge having committed an error in law to hold that the Appellant was duly served. Hence, the judgements in the case of ***Wander Ltd*** (supra) and ***Manjunath Anandappa Urf Shivappa Hansi*** (supra) upon which reliance was placed would also not apply.

17. Resultantly, the Appeal is allowed. The Impugned Order is set aside and consequently, the order dated 11th August 2009 is also set aside. The Suit to be placed under the caption “*For Directions*” before the Learned Single Judge before whom the Suits of the year 1998 are listed for final hearing to enable the Learned Single Judge to issue the necessary directions. Given that the Suit is of the year 1998, the hearing of the Suit is expedited.

18. There shall be no order as to costs.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)