

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 378 OF 2025

Bhimaji Shalji Kukade	...Applicant
Versus	
Anand Kumar Asharam Jain	...Respondent

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Mr. Surel Shah, Senior Advocate, a/w Mohit Jadhav, Shubham Shinde, Manish Shirke, Kajal Chourasia and Khushboo Singh, for the Applicant.

Mr. Shreepad Murthy, i/b N. Raja, for the Respondent.

**CORAM: N. J. JAMADAR
DATED: 13th AUGUST, 2025**

Order:-

1. This revision application is directed against a judgment and order dated 15th April, 2025 passed by the Appellate Bench of the Court of Small Causes in Misc. Appeal No.91 of 2024, whereby the appeal preferred by the applicant – defendant against an order dated 3rd April, 2024 passed by the learned Judge, Court of Small Causes, in MARJI Application No.193 of 2023, thereby declining to set aside the *ex parte* decree dated 15th April, 2023 passed in RAE Suit No.365 of 2021, came to be dismissed by affirming the said order dated 3rd April, 2024.

2. Shorn of unnecessary details, the background facts leading to this application can be stated in brief as under:

2.1 The respondent is the landlord in respect of Room No.6, Chawl No.7, Anil and Anant Estate, Bhandup, Mumbai, (“the demised premises”). The defendant was a tenant therein.

2.2 The respondent instituted suit for eviction on the ground that the defendant had not been using the demised premises for the purpose for which it was let for more than six months preceding the date of the institution of the suit without a reasonable cause. The summons was served on the defendant by way of substituted service as the repeated efforts to serve the summons on the defendant in the regular mode did not succeed. Initially on 21st April, 2022, the trial court passed an order to proceed *ex parte* and, eventually, the suit came to be decreed *ex parte* by a judgment and order dated 15th April, 2023.

2.3 The defendant took out MARJI Application No.193 of 2023 to set aside the *ex parte* decree asserting, *inter alia*, that the suit summons was not duly served on the defendant. When the Bailiff allegedly attempted to serve the suit summons, the defendant was at his native place. The defendant had met with an accident in the year 2012. On account of the injury in the said accident, the defendant was unable to walk and stand properly. The defendant had gone to his native place to take

rest, in the month of December, 2020. Taking undue advantage of the adverse situation in which the defendant found himself, the plaintiff alleged that there was non-user of the demised premises and eventually obtained the decree *ex parte* though the suit summons was not properly served on the defendant. It was further contended that the passing of the *ex parte* decree came to light when the Jai Amber Co-operative Housing Society (proposed) checked the website of the Court whether any case was pending against the member(s) of the society. Thereupon, the defendant collected the information and filed the application to set aside the *ex parte* decree.

2.4 The application was resisted by the plaintiff.

3. After appraisal of the material on record the learned Judge was persuaded to reject the application observing, *inter alia*, that the service report indicated that the defendant was not at all residing at the demised premises and the same was in the occupation of the third parties. The summons was duly served on the defendant by way of pasting. The reasons ascribed by the defendant for not appearing before the trial court were not borne out by the material placed on record. In fact, there was no material to substantiate the claim of the defendant that he

had been to his native place and returned to Mumbai. in the year 2023.

4. The Appellate Bench of the Court of Small Causes found no reason to take a different view of the matter and, thus, concurring with the view of the trial court, the appeal came to be dismissed.

5. Mr. Surel Shah, the learned Senior Advocate for the applicant, submitted that the courts below have erred in not properly appreciating the fact that, in the circumstances of the case, the order of substituted service itself was fraught with infirmities. The record does not reveal that the learned trial Judge had satisfied himself that a case for effecting the service of summons on the defendant by way of substituted service was made out. Thus, the summons cannot be said to have been duly served on the defendant.

6. In any event, according to Mr. Shah, the courts below have taken a very rigid and hyper-technical view of the matter. The defendant has filed the MARJI Application under few months of the passing of the decree. The reasons ascribed by the defendant for not appearing before the trial court were not such that they could have been discarded as unsustainable. In the

circumstances of the case, the courts below were expected to adopt a justice oriented approach, submitted Mr. Shah.

7. To lend support to these submissions, Mr. Shah placed reliance on a Three-Judge Bench judgment of the Supreme Court in the case of *Neerja Realtors Private Limited vs. Janglu (Dead) Through Legal Representative*¹ and a Division Bench judgment of this Court in the case of *Deepali w/o Pratap Sonawane vs. Pratap s/o Trappa Sonawane*².

8. In opposition to this, Mr. Murthy, the learned Counsel for the respondent – landlord, stoutly resisted the submissions on behalf of the applicant. Mr. Murthy would submit that the material on record would make it abundantly clear that the trial court was wholly justified in declining to set aside the *ex parte* decree. Mr. Murthy urged with a degree of vehemence that, none of the reasons sought to be ascribed by the defendant for not appearing before the trial court qualifies as a sufficient cause. On the contrary, the Bailiff report makes it explicitly clear that the defendant had divested himself of the control over the demised premises long back and was indulging in profiteering.

1 (2018) 2 Supreme Court Cases 649.

2 2015(4) Mh.L.J. 378.

9. Taking the Court through the reasons ascribed in the application to set aside the *ex parte* decree, Mr. Murthy would submit that the impropriety of each of the causes is writ large. Therefore, the impugned order does not warrant any interference.

10. Under Order IX Rule 13 of the Code of Civil Procedure, 1973, an *ex parte* decree against the defendant can be set aside if he satisfies the Court that the summons was not duly served or that there was sufficient cause for his failure to appear when the suit was called on for hearing. Thus, the question as to whether the summons was duly served on the defendant assumes importance. If the defendant could demonstrate that the summons was not duly served on him, then, the *ex parte* decree can be set aside on that count alone. If there is material to show that the summons was duly served on the defendant, then the sufficiency of the cause ascribed by the defendant for not appearing before the Court when the suit was called on for hearing is required to be judged.

11. In the case at hand, the material on record indicates that the summons could not be served on the defendant in the ordinary mode. Thus, by an order dated 11th October, 2021, the substituted service was permitted to be effected by pasting the

summons on the conspicuous part of the demised premises. Consequently, on 30th October, 2021, the summons was served by affixing a copy of the plaint on the conspicuous part of the demised premises.

12. Order V Rule 20 requires the Court to be satisfied either that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any of the reasons, the summons cannot be served in the ordinary way. In the very nature of the scheme of service of summons, the substituted service is an exception to the service in the normal mode. The Court is expected to satisfy itself about the necessity of effecting the service by way of substituted service. In the least, the order permitting the service by way of substituted service ought to reveal due consideration of the legislative mandate. In the case of *Neeraja Realtors* (supra), the Supreme Court observed as under:

“14. When the application for substituted service was filed before the Trial Court under Order V Rule 20, a cryptic order was passed on 2 September 2011. Order V Rule 20 requires the Court to be satisfied either that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the summons cannot be served in the ordinary way. Substituted service is an exception to the normal mode of service. The Court must apply its mind to the requirements of Order V Rule 20 and its order must indicate due consideration of the provisions contained in it. Evidently the Trial Court failed to apply its mind to the requirements of Order V Rule 20 and passed a mechanical order.”

(emphasis supplied)

13. From the perusal of the order dated 6th October, 2021, allowing substituted service, it appears that the learned Judge has recorded adequate reasons in support of such order. Therefore, it cannot be said that substituted service was ordered in a mechanical manner. Adequate consideration is evident from the said order dated 6th October, 2021.

14. Even if the courts were to proceed on the premise that the summons was duly served the defendant, the reasons ascribed by the defendant for failure to appear before the Court when the suit was called on for hearing were required to be appreciated by the courts below with deserving consideration. Both the courts discarded the case of the defendant on the ground that there was no documentary evidence to show that the defendant had gone to his native place, stayed thereat and, returned to Mumbai, in the year 2023. The courts below ought to have been alive to the exigency of the situation which then obtained in the wake of Covid-19 Pandemic. The efforts to serve the summons on the defendant were made during the period April, 2021 to October, 2021. By that time, though the situation has eased off, yet, Covid-19 restrictions were in force during the said period as well. If viewed through the said prism, the reasons assigned by

the defendant could not have been jettisoned away as wholly unsustainable.

15. Another factor which bears upon the prayer to set aside the *ex parte* decree was the relatively short interval between the passing of the decree and the application to set aside the *ex parte* decree. Under three months of the passing of the decree, the defendant approached the Court to set it aside. Though some amount of delay or indolence is bound to occur in such cases, a liberal approach was expected of the courts while considering the prayer to set aside the *ex parte* decree. It was not the case that by the passage of time the position of the parties was irretrievably altered or equities intervened.

16. The submission of Mr. Murthy that the Bailiff report indicated that third parties were in the occupation of the demised premises and the defendant appeared to have been residing at Mumbai itself, at a different address, are the matters which bear upon the merits of the suit for eviction, on the ground of non-user.

17. For the foregoing reasons, I am inclined to hold that the defendant deserve an opportunity to contest the suit on merits. Resultantly, the application deserves to be allowed. However, for the expenses of defending the application for setting aside the *ex*

parte decree, delay, inconvenience and travails the plaintiff deserves to be adequately compensated and the defendant put to terms as regards the trial.

18. Hence, the following order:

: O R D E R :

- (i) The application stands allowed.
- (ii) The impugned order and the order passed by the learned Judge, Court of Small Causes in MARJI Application No.193 of 2023, stand quashed and set aside.
- (iii) MARJI Application No.193 of 2023 stands allowed.
- (iv) The *ex parte* decree in RAE Suit No.365 of 2021 stands set aside.
- (v) RAE Suit No.365 of 2021 stands restored to file of the trial court.
- (vi) The parties shall appear before the trial court on 15th September, 2025.
- (vii) The applicant/defendant do pay costs of Rs.50,000/- to the plaintiff on or before 15th September, 2025.
- (viii) Payment of costs shall be a condition precedent for the restoration of the suit.

- (ix) The defendant shall file written statement within 30 days of the date scheduled for the appearance of the parties before the trial court.
- (x) The trial court is requested to make an endeavour to hear and decide the suit as expeditiously as possible and, preferably, within a period of one year from 15th October, 2025, the last date for filing the written statement by the defendant.
- (xi) The parties shall co-operate with the trial court in hearing of the suit and shall not seek unnecessary adjournments.

Application disposed.

[N. J. JAMADAR, J.]