

(1999) 02 BOM CK 0023

In the Bombay High Court

Case No : Civil Revision Application No. 478 of 1990

Baburao Soma Bhoi

APPELLANT

Vs

Abdul Raheman Abdul Rajjack Khatik

RESPONDENT

Date of Decision : 22-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17, Order 5 Rule 18, Order 5 Rule 19

Citation : (1999) 3 ALLMR 423 : (2000) 1 BomCR 306 : (2000) 1 CivCC 457 : (2000) 1 MhLj 481

Hon'ble Judges : S.B. Mhase, J

Bench : Single Bench

Advocate : Pradip R. Patil, for the Appellant; Gulam Mustafa, for the Respondent

Judgement

S.B. Mhase, J.—This Civil Revision Application is directed against the order passed by the Civil Judge, Junior Division, Chalisgaon on 1-9-1989 rejecting the Misc. Application No. 11 of 1987 filed by the present Petitioner for Condonation of delay and restoration of the Regular Civil Suit No. 59 of 1983.

2. The main crux of the matter is as to whether the service of summons in Regular Civil Suit No. 59 of 1983 was proper one.

3. The Regular Civil Suit No. 59 of 1983 was filed by the respondent for getting the possession of the suit land from the defendant. At present this Court is not supposed to go into the main controversy. However, the summons which was issued to the defendant in the present matter was served on the petitioner under Order V, Rule 17 of the CPC and when it was found that on 13-7-1983 the defendant is absent, the suit proceeded ex parte and decree for possession has been passed.

4. Mr. P.R. Patil, learned Counsel appearing for the petitioner-defendant submitted that the service of summons in the present matter was not proper and therefore, the decree which is passed against him may be set aside and the suit may be restored to the file. He submitted that it is necessary for the learned Civil

Judge, Junior Division after the summons is returned under Rule 17 of Order V to make a further inquiry under Rule 19 of the said order and thereafter to pass the order that summons has been duly served. However, the said procedure has not been followed. Mr. Mustafa, learned Counsel for the respondent submitted that summons has been duly served and that affidavit which is referred to in the certified copy can not be filed by the present petitioner as Part-III and IV of lower Court file have been destroyed, and therefore, non availability of the affidavit as required under Rule 19 cannot be considered in favour of the present petitioner so as to hold that the summons was not duly served.

5. The certified copy of the summons has been filed. From the endorsement it is revealed that the Bailiff has made a report on 8-7-1983 that "the defendant on inquiry was found and he refused to accept the summons. He was identified in the presence of the panch witnesses and thereafter the summons has been affixed on the door of the house of the petitioner-defendant". Below that there is signature of Bailiff so also the signature of one Ananda Jadhav. Thereafter there is following material. "Affidavit. Contents of report as true and then signature." Thereafter there is endorsement that "accepted on oath in presence and signed by the Nazir." There is an endorsement that the summons has been served by affixing the same on the door of the house of the defendant. All endorsements are dated 13th and 14th and there is signature of Registrar of the said Court dated 21-11-1989. It is further pointed out that on Exhibit 1 there is endorsement signed by the Civil Judge, Junior Division that "defendant though duly served with D/S vide Exh. 5 absent. Suit to proceed ex parte against the defendant." On the basis of this material whether it can be said that the summons has been duly served.

6. Order V, Rules 17 and 19 of the CPC are to the following effect:

ORDER V, Rule 17.

"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant 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.

Order V, Rule 19

"19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit"

7. In the present matter we are concerned with Rule 19, which states that where the summons is returned under Rule 17, the Court shall, if the return of summons under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit. The form No. 11 provided in First Schedule of Appendix "B" provides form of affidavit of process server to accompany the return of the summons or notice and therefore while returning the summons after having served as provided under Rule 17, the affidavit in the said form shall accompany because this affidavit requires to state whether the person served has signed or refused to sign the process and in whose presence, and the signature of the process server. This form further provides that the manner in which the process was served with Special reference to Order 5, Rule 17 shall be stated. So is the case in respect of other portion of the said form. That means the compliance of Rule 17 in what manner it has been carried out has to be stated in the prescribed affidavit. In the present matter, such affidavit is not accompanying. However, below the report submitted by the Bailiff there is only endorsement that contents in the report are true and they have been solemnly affirmed in the presence of Nazir. It is not known who has verified that means whether the Bailiff has verified or somebody else has verified, it and unless and until it is made clear that this is affidavit of Bailiff it will not carry any force in law. Above all, the name of the Bailiff who has sworn it is not disclosed anywhere. In fact, one of the requirements of the affidavit is that the name of the person who has sworn that affidavit must be disclosed and then the person who has administered the oath, and seal and the certificate shall appear below that. However in the present matter, we find that seal affidavit of the Nazir but we do not find description of the Bailiff and oath administered to him. Apart from this the endorsement cannot be said to be a complete endorsement because the CPC requires that affidavit should be in the prescribed form and therefore that affidavit should have been accompanied the report of the Bailiff. In the result I find that this summons is served under Rule 18 of Order 5 however returned without the affidavit verified by the Bailiff or the process server.

8. Rule 19 of Order 5 of CPC requires that in case it is returned without verification by way of an affidavit, then the Court shall record the statement of the process server and thereafter making further inquiry shall state whether the summons has been duly served or not, and therefore, option to make the inquiry may arise when the affidavit has been accompanied the said summons because

in the later part of the said Rule word "may" has been used.

9. In the result, while Court made the endorsement that it is duly served proceed ex parte, as stated in the earlier part of the judgment, the Court has not recorded the statement of the Bailiff as required under Rule 19 and without recording the statement of the Bailiff it has been declared that the summons has been duly served on the present petitioner-defendant and therefore there is no proper service. The suit should not have been proceeded ex parte. Not only as there is no service in law on the petitioner-defendant that is valid ground for condonation of delay because in that eventuality the petitioner is not aware of any part of the proceeding. Therefore, the order passed by both the courts below are not just and proper and therefore the same are required to be set aside.

10. At this stage, it may be stated that the land of the plaintiff-respondent is in possession of the petitioner-defendant. As a result of restoration of the suit, further proceedings are likely to linger up in the courts below, and therefore, while condoning the delay and restoring the suit, it is further necessary to compensate properly the respondent plaintiff, and therefore, I am inclined to impose cost while allowing this Civil Revision Application .

11. Mr. Gulam Mustafa, learned Counsel appearing for the plaintiff-respondent submits that costs of Rs. 5000/- will be appropriate. Mr. Paul, learned Counsel appearing for the petitioner submitted that costs of Rs. 2000/- will be appropriate.

12. Under these circumstances, I am inclined to impose costs of Rs. 3000/ - which will meet the ends of justice. It is revealed that the value of the property which is in possession of the petitioner-defendant at the present market rate is of Rs. 8 Lakh and therefore, Mr. Mustafa learned Counsel for the respondent insisted that security to that effect may be directed to be furnished. Mr. Patil, learned Counsel for the petitioner vehemently opposed for giving such security, and ultimately submitted that in case the Court directs to furnish the security, longer time may be granted to furnish the security. Looking to the dispute I am inclined to direct the security.

13. In the result, the Civil Revision Application is allowed. The delay is condoned and the Regular Civil Suit No. 59 of 1983 is hereby restored to the file by setting aside the ex parte decree passed in the said suit. However, this is subject to the payment of cost of Rs. 3000/- to be paid by the petitioner-defendant within a period of four months in the trial Court, as condition precedent. The petitioner shall submit the security of Rs. 8,00,000/- (Rupees Eight Lakh only) within a period of two months.

124. Rule made absolute in the above terms. The parties are directed to appear before the trial Court on 22nd June, 1999. Office is directed to send the Record and Proceedings immediately.

Petition allowed.