
(2013) 08 BOM CK 0223

In the Bombay High Court

Case No : Civil Revision Application No. 173 of 2013

Smt. Manju and Sapna

APPELLANT

Vs

Prakash and Others

RESPONDENT

Date of Decision : 14-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, Order 5 Rule 17, Order 5 Rule 19, Order 5 Rule 19A, Order 5 Rule 5
Maharashtra Rent Control Act, 1999 — Section 7(d)

Citation : (2013) 6 ABR 563 : (2013) 6 ALLMR 32 : (2014) 3 BomCR 474 :
(2013) 6 MhLj 810

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : M.M. Patil Beedkar, for the Appellant; R.R. Karpe, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. With the consent of the learned counsel for the parties, taken up for final hearing. This Civil Revision Application takes exception to the judgment and decree, dated 14.2.2013 in Regular Civil Appeal No. 209 of 2007, passed by the Principal District Judge, Ahmednagar, thereby confirming the judgment and decree, dated 14.7.2005, passed by the IInd Joint Civil Judge, Junior Division, Ahmednagar, in Regular Civil Suit No. 555 of 2004.

2. It is the case of the applicants that they are the original defendant nos. 1 and 2 in Regular Civil Suit No. 555 of 2004, filed by the respondents herein. The applicants herein are the tenants of the suit premises and the respondent nos. 1 to 4 herein are the original plaintiffs, who filed the suit for recovery of possession of tenanted premises and for recovery of arrears of rent.

3. According to the plaintiffs, the suit shop admeasuring 10 feet North-South and 18 feet East-West constructed on C.T.S. No. 958 bearing House No. 1050 at Telikhunt, Ahmednagar was given on rent to defendant no. 4 for carrying out the

business of selling cloths. It is their further case that defendant no. 4 had allotted the said shop to her son Baldev Narang, who is husband of present applicant no. 1 and father of present applicant no. 2 and respondent no. 5. Baldev Narang expired on 20.5.2004 and defendant nos. 1 to 4 are the heirs of said deceased Baldev.

It is further case of the plaintiffs that after the death of Baldev, the defendants are not in need of suit shop and neither said Baldev nor the defendants have paid the rent at the rate of Rs. 140/- per month since 1.1.1988. The defendants have other properties in Ahmednagar and the plaintiffs are in need of suit shop for their bona fide requirement. According to the plaintiffs, they issued notice on 9.8.2004. However, the defendants did not vacate the suit shop. Therefore, the plaintiffs filed the suit for eviction and recovery of possession and also for arrears of rent of Rs. 27,860/- in the court of Civil Judge, Junior Division, Ahmednagar.

4. The Trial Court on 27.1.2005 passed an order to proceed ex parte against defendant nos. 1, 2 and 4 and defendant no. 3 on 15.2.2005. It is the case of the applicants that the said suit proceeded virtually ex parte and uncontested, which resulted in passing of decree by the Trial Court on 14.7.2005, thereby directing the defendants to hand over possession of the suit property to the plaintiffs and to pay the arrears of rent and future rent from December, 2005 till delivery of possession.

5. It is further case of the applicants that after getting the information about the judgment and decree, dated 14.7.2005, they verified the record and found that concerned bailiff in collusion with the plaintiffs, had prepared a false report of service of summons on defendant nos. 1, 2 and 4, without, in fact, making any service or attempt of service as required under law and thereby the suit could be decreed uncontested. Therefore, the applicants preferred Regular Civil Appeal No. 209 of 2007 in the District Court, Ahmednagar, thereby challenging the judgment and decree, passed by the Trial Court, however, the said appeal came to be dismissed. Hence this Civil Revision Application.

6. Learned counsel appearing for the Revision applicants submits that from the bailiff report at Exh. 9, dated 14.12.2004, if perused, on the face of it, it can be gathered that the same is fabricated and made without due compliance of the mandatory provisions of procedure under Order V of the Civil Procedure Code. The bailiff report Exh. 9 bears signature of the plaintiffs witness and below it the date is put by the said witness as 13.12.2004, specially when as per bailiff report he visited and served the summons on 14.12.2004. It is submitted that the plaintiffs witness i.e. plaintiff no. 1 had signed on the said report one day before the so called service of summons dated 14.12.2004. Thus, the same is illegal. It is submitted that the bailiff report does not bear the name and address of the person witnessing delivery of summons. Similarly, plaintiff no. 1 being interested person in the suit, he cannot be accepted as witness for service of summons. Therefore, the summons was not served on the defendants according to law. It is submitted that in absence of proper pleadings by the plaintiffs regarding

commencement of tenancy, the agreed rent, the period of tenancy, as well as who was the person carrying business with deceased Baldev Narang at the time of his death, the defendants cannot be fastened with liability of payment of arrears of rent.

7. Learned counsel further submits that the Appellate Court framed only two points for its determination and by cryptic reasoning disposed of the appeal. It was incumbent for the appellate court to draw necessary points for its determination on all aspects and then only decide the suit. However, the appellate court failed in its duty. Therefore, it is submitted that the impugned judgment and order deserves to be quashed and set aside.

8. Learned counsel appearing for the Revision applicants in support of his contention that the appellate court was duty bound to frame all necessary points for its determination, pressed into service the reported judgment of this court in the case of Khatunbi and Others Vs. Aminabai, and submitted that the mandate of Order XLI Rule 31 of the CPC unequivocally states that the requirement of formulation of point for determination by the appellate court is mandatory.

9. Learned counsel also invited my attention to the judgment of this court in the case of G.S. Ramchandran Vs. M.M. Rajadhyaksha, , and another judgment of this court in the case of Mahmood Khan s/o Noot Khan vs. Govardhan s/o Shankar Pardeshi, reported in LAWS (BOM)-1982-2-2 and submits that the provisions of Order V Rules 17 and 19 of the CPC are mandatory in nature and in absence of following the procedure under the said Rules, in the facts of the present case, it is crystal clear that there was no service of summons on the original defendants.

10. Learned counsel also invited my attention to the definition of the tenant and submits that the service of summons should have been on the original tenant. However, there is no service of summons on the original tenant, though she was alive till the judgment and decree was passed by the Trial Court and died during the pendency of appeal filed by the Revision applicants. Therefore, relying upon the grounds taken in the Revision Application, annexures thereto, the judgments cited (supra) and the provisions of the Maharashtra Rent Control Act, learned counsel appearing for the Revision applicants prays that this Revision Application may be allowed.

11. On the other hand, learned counsel appearing for the respondents submits that both the courts below have adjudicated the rival claims on merits and concurrently held that the respondents/plaintiffs are entitled for decree of eviction and also for recovery of the rent. It is further submitted that there was proper service of summons and accordingly after satisfying about the same the Trial Court has endorsed that the original defendants are duly served, and accordingly, hearing of the suit was proceeded. Learned counsel appearing for the respondents invited my attention to the reported judgment of this Court in the case of Heena Restaurant and Bar and Others Vs. Madhukar M. Dewadiga

and Others, and the reported judgment of the Calcutta High Court in the case of Chiranjilal Agarwalla and Another Vs. Jai Hind Investments and Industries Pvt. Ltd. and Another, and submits that there was proper service of summons in the facts of the present case. The bailiff went to the place of the defendants and defendants refused to accept the service of summons. Therefore, after following the proper procedure summons was affixed on the conspicuous place of the house, and accordingly, panchanama was drawn. It is submitted that the Superintendent has endorsed that the bailiff had taken steps to serve the defendants. Learned counsel also invited my attention to the reasons recorded by the Trial Court and also the lower Appellate Court, and submits that both the courts below have held that summons was properly served and thereafter proceeded to decide the proceedings on merits, and therefore, this court may not interfere in the concurrent findings recorded by the courts below.

12. I have heard the learned counsel for the parties at length. With their able assistance, perused the entire material placed on record and also the provisions of the Civil Procedure Code, the judgments cited (*supra*) and the provisions of the Maharashtra Rent Control Act, 1999.

13. At the out set, it would be relevant to make mention that this court at least in three authoritative pronouncements have taken a view that the provisions of Order V Rules 17 and 19 of the CPC are mandatory in nature, while procedure for service of summons as contemplated under Order V Rules 17 and 19 of the CPC is required to be followed and in absence of that there cannot be proper service of summons and if summons is not properly served, the adjudication on merits and the decree passed by the court will be nullity. The provisions of Order V Rules 17 and 19 of the CPC read thus:-

Order V-Issue and Service of Summons:-

17] Procedure when defendant refuses to accept service, or cannot be found:- When the defendant or his agent or such other person as afore said refuses to sign the acknowledgment, 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.

19] Examination of serving officer:-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, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry 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.

14. While interpreting the afore said provisions, this court in the case of Mahmood Khan (supra) held that it is not disputed that the provisions of the CPC are required to be followed in the matter of service of summons or notice to the opposite party in such cases. In the facts of that case, this court held that while service of summons the plaintiff accompanied the bailiff and endorsement of the landlord on the said service of summons is sufficient to entertain grave doubt about the endorsement made by peon effecting the service upon the tenant. Therefore, this court observed that the court is satisfied that the said endorsement of the service of summons does not appear to be true and there is no service whatsoever on the tenant. In the facts of that case this court further observed that in view of the non-service of summons on the tenant, it cannot be said that any decision in absence of proper service of the summons on the tenant is not bad and is not a nullity and it has got to be set aside. Therefore, the court held that the matter which is decided without proper service of summons/notice on the tenant, there is clear error of law apparent on the face of record, and hence, Revision application came to be allowed.

15. Yet in authoritative pronouncement in the case of G.S. Ramchandran (supra), this court held that the court can make an order that suit be heard ex parte only when it is proved that the summons was duly served. Such a proof is to be obtained by following the procedure under Order V Rule 19 of the Civil Procedure Code. In the said judgment, this court discussed in greater detail about the provisions of Order V Rules, 6, 17, 19 and 19A of the CPC and held that the provisions of Order V Rule 19 of the CPC are mandatory in nature and ultimately set aside the ex parte decree passed by the courts below. In para 19 of the said judgment this court observed that, the procedure to be followed before ex parte decree is passed is to be strictly complied with. The Legislature also has thought it fit to make that procedure some what rigorous. The courts have naturally to follow the said procedure.

16. Yet in another judgment, this court, in the case of Baburao Soma Bhoi Vs. Abdul Raheman Abdul Rajjack Khatik, , held that Rule 19 Order V of the 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 then after 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.

17. This court in the said judgment has taken a view that without recording the statement of verification as required under Rule 19 of Order V of the CPC is not

proper service on the party and the suit should not have been proceeded ex parte, and therefore, the orders passed by the courts below are not just and proper and those are required to be set aside.

18. The judgment relied upon by the counsel appearing for the respondents i.e. original plaintiffs in the case of Heena Restaurant and Bar and Others Vs. Madhukar M. Dewadiga and Others, is not applicable in the facts of the present case, as much as said judgment interprets the provisions of Order IX Rule 13 of the CPC and in the present case interpretation of Order V Rules 17 and 19 of the CPC is involved. The heavy reliance placed by the learned counsel appearing for the respondent in the case Chiranjilal (supra) is wholly misplaced in the facts of the present case. On reading the facts in the case of Chiranjilal (supra), it is abundantly clear that the court was dealing with altogether different fact situation in the said case, as much as in that case the opposite party already had knowledge about pendency of the proceedings. There is a detail discussion in paras 8 and 9 of the said judgment. It is not necessary for this court to go into the details at great length in the said judgment. Suffice it to say that the facts of the case in hand are totally different than the facts in the case of Chiranjilal (supra).

19. In the facts of the present case, as it is evident from the perusal of page 27 (the photo copy of the summons) of the compilation of the Civil Revision Application, the plaintiff has signed the said summons on 13.12.2004. On refusal of the service of summons by the defendants, it was open for the bailiff to prepare the panchanama signed by independent persons. However, such procedure has not been followed. It appears that, the plaintiff accompanied the bailiff, and indisputably the plaintiffs signature finds place on the said copy of the summons, and below said signature the date is mentioned 13.12.2004. However, there are other two signatures on the copy of summons, one by Server and another by the Assistant Superintendent of the Civil Judge, Senior Division, Ahmednagar.

20. As rightly contended by the learned counsel appearing for the Revision applicants that, before proceeding with the hearing of the suit, the Joint Civil Judge, Junior Division, Ahmednagar ought to have followed the mandate of provisions of Order V Rules 17 and 19 of the Civil Procedure Code, and thereafter only ought to have proceeded with hearing of the suit. It was open for the concerned court to examine the bailiff taking recourse to provisions of Order V Rule 19 of the Civil Procedure Code, so as to satisfy itself that, there was proper service of summons on the defendants.

21. As observed earlier, this court repeatedly on interpretation of provisions of Rules 17 and 19 of Order V of the Civil Procedure held that, the provisions of Order V Rules 17 and 19 of the CPC are required to be followed scrupulously and the said procedure is mandatory to be followed. Therefore, if there is no proper service of summons on 3 defendants including the original tenant, the contention of the counsel appearing for the original plaintiff that, there was proper service of

summons on the original tenant, cannot be accepted. The counsel appearing for the Revision applicants is right in contending that if the definition of tenant under the Maharashtra Rent Control Act, 1999 is read carefully, there is no doubt that tenant means any person by whom or on whose account rent is payable for any premises and includes a person, who is a tenant, or who is a deemed tenant, or who is a sub-tenant as permitted under a contract or by the permission or consent of the landlord, or who has derived title under a tenant, or to whom interest in premises has been assigned or transferred as permitted.

22. As rightly contended by the learned counsel appearing for the Revision applicants that in view of the definition of tenant as appearing in Section 7(d) of the Maharashtra Rent Control Act, 1999, in relation to any premises, when the tenant dies, whether the death occurred before or after the commencement of this Act, any member of the tenants family, who, where they are let for residence, is residing, or where they are let for education, business, trade or storage, is using the premises for any such purpose, has to be taken into consideration or any business of such members, with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided, in the absence of agreement, by the court, has to be taken into consideration.

23. Upon careful perusal of the judgment and order, passed by the appellate court, there is no doubt that, not only that the First Appeal is decided by assigning cryptic reasons which are not sustainable in law, but the appellate court has not followed the mandate of Order XLI Rule 31 of the Civil Procedure Code, as much as all the points which fall for determination, are not framed by the appellate court.

24. The Supreme Court time and again reminded all the courts that, in First Appeal, the court is duty bound to frame all necessary points for its determination, so as to get proper opportunity to the parties to lead evidence and put forth their contentions.

25. In the facts of the present case, the District Court framed only two points and proceeded to decide the appeal. The counsel appearing for the Revision applicants is right in inviting my attention to those grounds taken in the appeal memo on merits of the matter and submitting that, the appellate court has not adverted to the said grounds and did not frame necessary points. It is difficult to fathom that the appellate court did not pay the proper attention to the documents on record and in particular copy of the summons which was placed on record. It appears that the appellate court observed that the summons is duly served on 23.12.2004, in presence of panch and the appellants/defendant nos. 1, 2 and 4 and they were directed to appear in the court on 15.12.2004, but they refused. In fact, it is nobody's case that panchas have signed the panchanama or they have endorsed that there was service of summons. Therefore, perverse findings are recorded by the appellate court in respect of service of summons upon the defendants.

Therefore, in the peculiar facts of this case, when there is no service of summons on 3 defendants, and importantly when the original tenant was alive at the time of service of summons, it will have to be held that, non-service of summons and not following mandatory procedure laid down under Order V Rules 17 and 19 of the Civil Procedure Code, goes to the root of the matter, and there is error of law apparent on the face of the record. The courts below have also committed irregularities and illegalities while passing the impugned judgment and order, and therefore, this is a fit case in which interference of this court under the Revisional jurisdiction is called for. Hence the following order:-

(i) The impugned judgment and order, passed by the IInd Joint Civil Judge, Junior Division, Ahmednagar in Regular Civil Suit No. 555 of 2004 on 14.7.2005 and the impugned judgment and order, passed by the Principal District Judge, Ahmednagar in Regular Civil Appeal No. 209 of 2007 on 14.2.2013 are quashed and set aside.

(ii) Regular Civil Suit No. 555 of 2004 is restored to its original file.

(iii) Learned counsel appearing for the parties, on instructions, make a statement that they will appear before the IInd Joint Civil Judge, Junior Division, Ahmednagar on 4.9.2013.

(iv) In view of the statement by the counsel appearing for the parties, the procedure of issuance of summons, etc. need not be followed, and concerned court can proceed in the matter directly on merits.

(v) Counsel appearing for the Revision applicants i.e. original defendants make a statement that the Revision applicants will file the written statement within 15 days from 4.9.2013.

(vi) The concerned court to frame the necessary issues and after recording the evidence dispose of the suit as expeditiously as possible, however, within eight months from today.

(vii) Counsel appearing for the parties assure this court that the parties will not ask for unnecessary adjournment, unless there is genuine reason to seek adjournment.

(viii) Civil Revision Application is allowed in above terms. Rule is made absolute.