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Court : Mumbai Aurangabad

Decided On : Mar-26-2015

Judge : A.I.S. Cheema

Appeal No. : Civil Revision Application No. 38 of 2012

Appellant : Amin

Respondent : Meerabai

Judgement :

1. The applicant original defendant has filed this revision against the respondent original plaintiff challenging the judgment and order of Adhoc District Judge-2, Nanded, dated 5.9.2011, passed in regular Civil Appeal No.50/2009. By this judgment and order, the Adhoc District Judge dismissed the appeal, confirming the judgment of the 4th Jt. Civil Judge, Junior Division, Nanded in Regular Civil Suit No.115/2008. Regular Civil Suit No.115/2008 was filed by respondent Mirabai for decree of eviction of the applicant, the tenant. The suit was decreed and thus, the appeal had been carried to the Adhoc District Judge.

2. The applicant claims that, the trial Court had proceeded exparte in suit after the bailiff reported refusal of the summons and had relied on the affidavit of the son of respondent and decreed the suit. The suit had been brought by the respondent claiming bonafide requirement and on the basis that, the lease granted by registered agreement of 15 years had lapsed. The revision application raises

grounds that the judgments and orders of the courts below, decreeing the suit, are illegal. Trial Court should not have believed the evidence adduced on behalf of the respondent. Greater hardship would be suffered by the applicant was not considered. The respondent has number of properties and he is not entitled for possession on the ground of bonafide requirement. The applicant has been running the business in suit property since last 36 years. It ought to have been held by the courts below that the service of summons on the applicant was not proper. The evidence of the power of attorney of respondent could not have been relied on as he was not knowing the facts of the matter.

3. I have heard counsel for both sides. The learned counsel for the applicant original defendant submitted that, in this matter, the trial Court had proceeded exparte on the basis of report of the bailiff that the applicant defendant had refused to receive the summons. According to the counsel, Order V Rule 17 of Code of Civil Procedure, 1908 (C.P.C. in brief) required that if the summons were refused, copy of the same should have been affixed on the outer door or conspicuous part of the property, but this procedure was not followed and thus, according to the counsel, in view of judgment in the matter of Sushil Kumar Sabharwal Vs. Gurpreet Singh and ors., reported in AIR 2002 SC 2370, the service was not proper and exparte decree could not have been passed. Learned counsel referred to the reasonings recorded by the District Court to submit that the District Court observed, on the basis of evidence of applicant in the injunction suit that the applicant was aware of the tenancy proceedings being pending and that the suit had proceeded exparte and thus, he had knowledge. Relying on the same judgment of Sushil Kumar (supra), the learned counsel submitted that, in that matter also the Hon'ble Supreme Court found that it was material that the defendant should have knowledge of date of hearing if second proviso of Order IX Rule 13 was to be invoked. Reliance was further placed on the case of Bhagwan Singh and ors. Vs. Ram Balak Singh and anr., reported in AIR 1998 Patna 166 to submit that the report of the process server is required to be affirmed. Reliance was placed on the case of Kunja Vs. Lalaram and ors., reported in AIR 1987 Madhya Pradesh 252 to submit that there was additional provision under Order V Rule 19 that the Court has jurisdiction to examine the serving officer, even if the report is supported by affidavit. On the basis of above arguments, the learned

counsel submitted that the District Court should have allowed the appeal and should have set aside the judgment and decree of the trial Court.

4. Per contra, the learned counsel for respondent submitted that the record of the trial Court shows that earlier one bailiff had made efforts to serve the defendant and the summons was returned as in spite of efforts it was found that the applicant-defendant had no fixed time of coming to the shop. It has been submitted that, record shows that when summons was re-issued, another bailiff made efforts and once returned the summons reporting on oath that the applicant defendant refused taking the summons on the plea that he will ask his Advocate. The summons was re-issued and on the subsequent occasion also the bailiff went to the applicant twice. On the first occasion, he said he will ask his Advocate and then receive the summons and on second occasion, he refused to receive the summons. Bailiff had submitted the report on oath and the oath was verified by the Assistant Superintendent of the Civil Court. Thus, according to the counsel, the summons was refused by the applicant and the trial Court was right in proceeding exparte. Referring to the judgment in the matter of Sushil Kumar (supra), the learned counsel submitted that the facts of that matter were different and in that matter the defendant had moved the Court concerned under Order IX Rule 13 of C.P.C. whereas in the present matter he had directly carried appeal under Section 96 to the District Court. Referring to Order IX Rule 13 of the C.P.C., the learned counsel submitted that, knowledge of the defendant about the suit is material and in the present matter, as the judgment of the District Court shows, there was sufficient material that the defendant kept avoiding the suit summons and ultimately refused to receive the same and there was further material in the form of evidence in the injunction matter, which had been filed by the applicant himself to show that he knew about the eviction suit being pending and that it had proceeded exparte. According to the counsel, in spite of this, the applicant had not come forward during trial and thus, could not challenge the decree passed. It has been argued that, Order V Rule 17 of C.P.C. is required to be read in two parts. The first part deals with refusal and the second part deals with the contingency if the defendant is not found at the time of service. According to the counsel, the question of affixing the summons would arise only in the contingency of defendant not being found at the time of service. The counsel submitted that, in the matter of

Sushil Kumar (supra), the facts were different as in that matter the Supreme court found that the service was not satisfactory, however, this is not the ground raised in the present revision. The learned counsel submitted that, trial Court relied on the evidence of the son of the respondent who had knowledge about the facts and stated so in his affidavit, and the suit was decreed on the basis of the evidence brought on record. The suit was filed on the basis that the 15 years registered agreement of lease had expired and also on the basis of bonafide requirement. The trial Court accepted the affidavit of the son of respondent and thus, according to the counsel, the decree was properly passed. The counsel submitted that, the District Judge has discussed all the evidence and facts in detail and found that the applicant had failed to show in the District Court that the summons was not duly served on him and that the applicant has failed to show that the judgment and decree of the trial Court was liable to be quashed and set aside. The learned counsel submitted that there was evidence to show that the respondent has four sons and two grandsons who are required to set up their business and they had no place or were running their business in rented premises and so, the requirement of the respondent was bonafide and if the respondent will not get possession of the suit premises, which is business premises, the respondent will suffer greater hardship. According to the counsel, the applicant did not come forward in the trial Court to show that he would suffer greater hardship.

5. Learned counsel for the respondent relied on the case of Indu Bhushan Vs. Munna Lal and anr., reported in [2007] 2 Scale 514. Referring to the judgment, the counsel submitted that, in that matter also there were multiple reports of process server which were disputed. It has been submitted that, in that matter also no material was placed before Trial Court or High Court that the endorsements made by the process server were false. The Hon'ble Supreme Court had relied on Order V Rule 9 of the C.P.C. and declined to interfere. According to the counsel, Order V Rule 9 of C.P.C. in sub-clause (5) recognizes report of the postal authority as well as courier regarding refusal without insisting for affixing of summons and thus, according to the counsel, in the present matter also there is no reason why the service should not be held as good service.

6. Point for consideration is:

Whether the impugned judgment and order of the District Judge is illegal or suffers from material irregularity?

7. I have considered the record, arguments and rulings relied on. The record of the trial Court shows that the respondent filed suit for recovery of possession of the rented premises, which is shop near Balaji Mandir, G.G. Road, as described in the suit. The respondent plaintiff claimed that, there was registered lease deed executed between the parties on 27.11.1990 and tenancy for 15 years was created commencing from January 1991. According to the plaintiff, in spite of lapse of the period, the applicant defendant did not vacate. She claimed that, she has 4 sons and 2 grandsons and does not have accommodation for her children to run their own business. Her sons were carrying on business in other rented premises and the grandsons wanted to start their own business. Her son Arvind was carrying on business from rented shop while another son Vinod was also doing business in rented premises. Her son Ravindra, a Chartered Accountant, was also carrying on profession in rented premises. For such reasons, respondent claimed suit premises for reasonable and bonafide requirement. She claimed that the applicant defendant was having alternative accommodation at Old Mondha area and in Gurunanak Market on the first floor. She claimed that she has served notice by registered post on the applicant defendant which was received by him on 16.10.2006 but he had not vacated.

8. Record of the trial Court shows that suit summons was issued on 3.3.2008 vide Exhibit 6, returnable on 2.4.2008. Earlier bailiff G.K. Gawali reported that from 4.3.2008 to 31.3.2008 he had constantly gone to the shop of applicant defendant and the servants of the applicant kept telling him when enquired, that the applicant defendant had no fixed time of coming to the shop. As in spite of constant efforts applicant defendant was not found the said bailiff returned the suit summons on 31.3.2008 swearing above facts on oath and the oath was administered by the Assistant Superintendent of the Court.

9. It appears, the suit summons was re-issued with returnable date extended on 28.8.2008. This time one bailiff D.K. Pawar went to the shop of applicant defendant. He verified the identity of defendant and asked him to receive the

summons. The applicant - defendant told him that he will receive the summons after discussing with his Advocate and thus, refused to receive the summons. The bailiff returned the summons with sworn report dated 25.8.2008. The Assistant Superintendent also recorded on the report that the report had been sworn on oath.

10. The record of the trial Court shows that again summons dated 18.9.2008 was issued returnable on 3.10.2008 vide Exhibit 8 to the applicant defendant. There is report of the bailiff, dated 7.10.2008 sworn on oath and the oath was recorded before the Assistant Superintendent, which report stated that the bailiff D.K. Pawar had gone to the applicant defendant on 25.9.2008 on the given address and he did meet the applicant defendant and asked him to receive the notice which was in his name. The applicant defendant told him that he will ask his Advocate and then he will receive the same. The bailiff reported that he again went to the applicant defendant on 1.10.2008 and asked him to receive the notice. According to the report, the applicant told the bailiff that at present he does not want to receive the same and refused to receive the notice. Consequently, the bailiff submitted the report swearing these facts before the Assistant Superintendent.

11. Record of the trial Court shows that, after receiving such report, the trial Court passed order below Exhibit 1 that suit summons had been refused and hence, the suit should proceed exparte. It appears that, the respondent plaintiff filed power of attorney in the trial Court empowering her son Arvind, inter-alia to lead evidence in the suit. The son of respondent namely Arvind filed affidavit claiming that he also had personal knowledge about the facts and the affidavit proved contents of the plaint. In addition to the affidavit, further oral evidence was recorded of Arvind in the trial Court. Relying on the oral and documentary evidence, trial Court decreed the suit for eviction.

12. The applicant defendant filed the appeal before the District Court under Section 96 of C.P.C. In the appeal, questions regarding merit of the suit of plaintiff and also the questions of service of summons were raised. The District Judge considered the summons which was earlier tried to be served through bailiff Shri G.K. Gawali and the efforts made subsequently by the other bailiff Shri D.K. Pawar

and further considered the fact of applicant defendant having filed Regular Civil Suit No.526/2009 for perpetual injunction against the respondent plaintiff. In para 9, the District Judge made following observations :

9. Record further shows that the appellant is well acquainted with the Court proceeding and in R.C.S. No.526/2009 the appellant had adduced his evidence on 23.01.2009 vide Exh.30 and thereafter on 04.02.2009 the appellant was cross examined on behalf of respondent. Para No.8 of said cross examination shows that the appellant testified that It is true that after issuing notice, the defendant instituted suit No.115/2008 before the Civil Court Nanded. Yet he has not received the summons of that suit. It was suggested to him that the summons of that suit was delivered to him but he refused to accept it and therefore, that suit came to be proceeded exparte against him. So these facts clearly show that on 04.02.2009 the present appellant had knowledge about the institution of R.C.S. No.115/2008 against him and therefore, it was obligatory for the appellant to act as a prudent person. But the record shows that inspite of knowledge of R.C.S. No.115/2008, the appellant did not bother to appear before the Court and now took vexatious defence about non-service of summons to him.

13. After District Judge referred to the above facts, District Judge considered the provisions of Order IX Rule 13 of C.P.C. and the Bombay amendment of proviso in the concerned rule and observed that during the course of the trial in Regular Civil Suit No.526/2009, on 4.2.2009, the present applicant was reminded of Regular Civil Suit No.115/2008 and that the said suit had proceeded exparte against him. District Judge found that the applicant did not try to conduct any enquiry and to appear before the trial Court and subsequently judgment came to be delivered on 20.2.2009. The District Judge was surprised that immediately thereafter on 24.2.2009 the present applicant applied for certified copy within three days, but failed to explain from where he got the knowledge of the said judgment. Discussing the facts, the District Judge concluded that the applicant was keeping a watch on the trial and had intentionally avoided to appear before the Court and just after the judgment, took certified copy to file the appeal. District Judge thus held that the applicant has failed to satisfy him that summons were not duly served on him or that he had sufficient cause for non appearance.

14. Judgment of the appellate Court then discussed the suit of the respondent plaintiff, the agreement and notice served as well as the bonafide need made out by the respondent, and came to the conclusion that the judgment of the trial Court was not required to be interfered with, and dismissed the appeal.

15. In the matter of Sushil Kumar Sabharwal (supra), the Hon'ble Supreme Court dealt with matter in which the process server had reported that the defendant had refused to receive the notice. The Hon'ble Supreme Court found infirmities and lapses on the part of process server in that matter. It was observed that, on tendering of the summons and its refusal, affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The Hon'ble Supreme Court considered the report which had been given by the process server and the evidence which was given by the process server in the proceeding under Order IX Rule 13 of C.P.C. and also considered the evidence of the applicant defendant in that matter and it was found by the Hon'ble Supreme Court that the oath of the appellant was more weighty than the oath of the process server.

If the facts of the present matter are perused, the applicant did not move the trial Court under Order IX Rule 13 of C.P.C. to set aside the exparte decree. He filed appeal under section 96 of C.P.C. The applicant, if he was claiming that he did not refuse summons, did not try to call for the Bailiffs for cross-examination or offer his own evidence. The appellate Court considered the arguments and material as has been discussed above from the records and found the process server reliable.

16. As per Order V Rule 17 of C.P.C., if the summons was refused, the bailiff was required to affix the copy of the summons on the premises in question. This was not done and it can be said that there was irregularity in the service of summons. The District Judge, however, considered the matter on the basis of Bombay amendment of second proviso below Order IX Rule 13 of C.P.C. The observations of the District Judge from para 9 of his judgment reproduced above show that he considered those facts and concluded that the applicant defendant intentionally avoided appearing before the Court. The learned counsel for the applicant defendant argued that, in the matter of Sushil Kumar Sabharwal (supra) also the

Hon'ble Supreme Court had considered the second proviso of Order IX Rule 13 of C.P.C. and found that even if the tenant admitted in interpleader suit that he had knowledge of eviction suit filed by the landlord, still it was material to show that the knowledge was of the date of hearing and not knowledge of pendency of suit. In the matter of Sushil Kumar Sabharwal (supra), Hon'ble Supreme Court relied on second proviso of Order IX Rule 13 of C.P.C. with regard to setting aside of exparte decree from Central Legislation, which reads as under:

Provided further that 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.

17. However, the District Judge has relied on the amended second proviso as inserted by this High Court, which reads as under:

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.

(emphasis supplied)

18. Facts in the present matter show that there are three reports of two bailiffs of multiple efforts made and the second and third reports show refusal by the applicant defendant and material was discussed by the District Judge, demonstrating as to how on 4.2.2009 applicant was confronted with the fact that Regular Civil Suit No.115/2008 was pending against him and had proceeded exparte, and judgment came to be delivered only on 20.2.2009. The applicant defendant does not appear to have made any effort to go and find out about the suit in this present times of right to information and also technology. The District Judge rightly discussed the evidence to express surprise as to how within three days of the judgment the applicant defendant could apply for certified copy to move the appeal while earlier, in spite of knowledge, he kept quiet. District Judge found him to be watching and waiting. Considering the amendment in the second

proviso made by this High Court, it can be said that the applicant defendant would have known the date of hearing, but for his willful conduct. This being so, merely on the ground of irregularity of not affixing the summons on the premises when applicant defendant refused service would not be ground to set aside exparte decree in appeal.

19. The trial Court decreed the suit for possession relying on the evidence brought before it. The same has been maintained by the District Judge. Having gone through the impugned judgment of the District Judge, it cannot be said that the same is illegal or suffers from any material irregularity so as to interfere in revision.

20. There is no substance in the revision application. The same is rejected with costs.

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