REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO 71 OF 2018
[Arising out of SLP(C) No.5847 of 2017]

M/S NEERJA REALTORS PVT LTD ..Appellant

VERSUS

JANGLU (DEAD) THR. LR. ..Respondent

J U D G M E N T

Dr D Y CHANDRACHUD, J

1 Delay condoned.

2 The present appeal is from the judgment of a Single Judge at the Nagpur Bench of the High Court of Judicature at Bombay. While allowing a first appeal, the High Court set aside the judgment and order of the Civil Judge (Senior Division) at Nagpur which had decreed a suit for specific performance instituted by the appellant, *ex-parte*.

3 The subject matter of the suit for specific performance is an agreement dated 15 July 2006 entered into by the appellant with the original defendant in

respect of agricultural land admeasuring 1.66 Hectares (4.07 acres) situated in Mauza-Sondapar, Tahsil Hingna, District Nagpur. The total consideration payable under the agreement was Rs 13,04,391 out of which an amount of Rs 3,26,000 was recorded to have been paid. The balance of Rs 9,78,391 was to be paid at the time of the execution of the sale deed.

4 On 30 June 2007, Shobha, who is the daughter of the original respondent instituted a suit (Old Regular Suit No 726/2007 which was renumbered as Regular Suit No 269/2008) against her father and the appellant for partition, possession and for declaratory and injunctive reliefs in relation to the land. In that suit the plaintiff claimed that her father was in dire financial need and had obtained a loan from the appellant and that as security, the appellant got certain documents executed. According to the plaintiff, the agreement was vitiated by fraud and misrepresentation and the land being ancestral property, the agreement was not binding on her. The original defendant entered appearance and disclosed his residential address in a proceeding under Order VIII Rule 11 of the Code of Civil Procedure, 1908 ('the CPC'). The appellant also filed her written statement. The suit was dismissed on 8 July 2010 on the ground that the land belonged to the original defendant and that the plaintiff had no right, title and interest.

5 On 5 February 2011, the appellant filed a suit for specific performance (Suit 184 of 2011) of the agreement to sell dated 15 July 2006. On 9 February

2011, the Trial Court issued notice to the original defendant for settlement of issues. It appears that summons were issued on two occasions to the original defendant but were returned unserved. On 11 April 2011, the bailiff submitted a report stating that when he went to serve the defendant, he was informed by persons residing in the village that he had left the premises two years earlier and was residing elsewhere. The summons were returned since the defendant was not residing at the address given therein.

6 The appellant filed an application for substituted service under Order V Rule 20 (1-A) of the CPC on 2 September 2011. The Trial Court allowed the application on the same day in terms of the following order:

> "Issue S/S to deft. u/o 5 R 29 (1-A) of CPC at the expense of the Plaintiff."

7 The appellant claims to have effected substituted service by publication in the Marathi daily *Lokmat*. On 29 November 2011, the Trial Court passed the following order:

> "Deft. served on public notice in daily news paper Lokmat on 04.10.2011 but he remained absent. Suit proceeded ex parte against the defendant. Suit proceeded ex parte against the Deft."

8 The suit was decreed on 13 June 2014 and the appellant was directed to deposit the balance consideration of Rs 9,78,391 within one month.

9 The appellant claims to have deposited the amount on 17 July 2014.

10 On 12 September 2014, the original defendant filed a first appeal under Section 96 of the CPC before the High Court. He died on 21 August 2015. The appellant submitted an application for bringing his legal representatives on record. The application was eventually allowed on 23 September 2016.

11 The High Court by its judgment dated 7 July 2015 held that neither the report of the bailiff nor the order of the Trial Court indicate that a copy of the summons was affixed in a conspicuous place on the court house and at the house where the defendant was known to have last resided. The High Court held that there was a breach of the provisions of Order V Rule 20 (1) of the CPC. The High Court observed that the order of the Trial Court permitting substituted service was cryptic and that the Court had not recorded its satisfaction that the defendant was keeping out of the way to avoid service or that the summons could not be served in the ordinary manner for any other reason. Moreover, the serving officer had not followed the procedure stipulated in Order V Rule 17 where the defendant was not found to reside at the place where he was last residing. The Court noted that besides the service to be effected through the bailiff, the summons were not sent to the defendant at the address furnished by the plaintiff by registered post, with acknowledgment due. The High Court also found that the Trial Judge had ignored the provisions of

Chapter III of the Civil Manual issued by the High Court on the Appellate side for guidance of Civil Courts and officers subordinate to it.

12 On behalf of the appellant, it has been submitted that the High Court has misconstrued the provisions of Order V Rule 20. According to the appellant, Order V Rule 20 allows an option to either affix the notice at the court premises coupled with affixation at the home of the defendant or by any other mode including publication in a newspaper. In the present case, service of summons was effected on the original defendant by publication in the newspaper on 4 October 2011. Hence, it was urged that there was no further requirement to affix the summons at the court premises and at the house of the original defendant. Moreover, it was urged that the order of the Trial Court was not cryptic and the report of the bailiff clearly indicated that the original defendant was not residing at the address submitted by the appellant because of which the summons were returned.

13 On the other hand, learned counsel for the respondent urged that the findings of the High Court in the first appeal are borne out from the record and are in accordance with law. Hence no interference is warranted in the present proceedings.

14 The record before the Court would indicate that the Trial Court by its order dated 9 February 2011 directed the issuance of summons to the original

defendant, returnable on 15 March 2011. In pursuance of the order, summons were issued on 4 March 2011. The report of the bailiff dated 11 April 2011 indicates that the summons were returned unserved and the bailiff was informed that the original defendant had left the premises nearly two years earlier and resided elsewhere.

15 Order V Rules 17 provides as follows:

> **"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, 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 'whose presence the copy was affixed."

Evidently as the report of the bailiff indicates, he was unable to find the defendant at the address which was mentioned in the summons. The report of the bailiff does not indicate that the summons were affixed on a conspicuous part of the house, at the address mentioned in the summons. There was a breach of the provisions of Order V Rule 17. 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. Besides this, as observed by the learned Single Judge of the High Court, the Trial Judge ignored the provisions contained in Chapter III of the Civil Manual issued by the High Court on its appellate side for the guidance of civil courts and officers subordinate to it. Paragraphs 33 to 36 of Chapter III are extracted below:

> "33. In addition to the service to be effected through a bailiff, a summons may also be sent to the defendant, to the address given by the plaintiff, by registered post, prepaid for acknowledgement, provided there is a regular daily postal service at such place.
>
> 34. Rules as to service of summons are contained in rules 9 to 30 of Order V. Care should be taken to see that bailiffs follow those rules as well as the instructions given in the Bailiffs' Manual.
>
> 35. It is the duty of the serving officer to follow the procedure and take all the steps laid down in rule 17 of Order V. He has no discretion for not taking the necessary steps, when the conditions laid down in the said rule are fulfilled.
>
> 36. It is for the Court to determine whether the service is good or bad. In determining whether the service is good or not, the attention of Courts is drawn to the necessity of strictly following the provisions of the Civil Procedure Code as to the service of processes. Ordinarily, service should not be considered sufficient unless all the requirements of the law in that behalf are fulfilled. The object of the service is to inform a party of the proceedings in due time. When

> from the return of a serving officer it appears that there is no likelihood that a process will come to the knowledge of the party in due time, or a probability exists that it will not so come to his knowledge, the service should not be considered to be proper. The law contemplates that the primary method of service should be tendering or delivering a copy of the process to the party personally, in case in which it may be practicable to do so. It is the duty of the serving officer to make all proper efforts to find the party, with a view to effect personal service. If it be not possible after reasonable endeavour to find the party, then only the service may be made on an adult male member of the family residing with him."

The submission that under Order V Rule 20, it was not necessary to affix a copy of the summons at the court house and at the house where the defendant is known to have last resided, once the court had directed service by publication in the newspaper really begs the question. There was a clear breach of the procedure prescribed in Order V Rule 17 even antecedent thereto. Besides, the order of the Court does not indicate due application of mind to the requirement of the satisfaction prescribed in the provision. The High Court was, in these circumstances, justified in coming to the conclusion that the *ex-parte* judgment and order in the suit for specific performance was liable to be set aside.

16 In **Bhanu Kumar Jain** v **Archana Kumar[1],** a Bench of three Judges of this Court has held that :

> "An appeal against an ex parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:
>
> (i) the materials on record brought on record in the ex parte proceedings in the suit by the plaintiff would not entail a decree in his favour; and

[1] (2005) 1 SCC 787

(ii) the suit could not have been posted for ex parte hearing."

A defendant against whom an *ex-parte* decree is passed has two options: The first is to file an appeal. The second is to file an application under Order IX Rule 13. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order IX Rule 13. But if the appeal is dismissed as a result of which the *ex-parte* decree merges with the order of the Appellate Court, a petition under Order IX Rule 13 would not be maintainable. When an application under Order IX Rule 13 is dismissed, the remedy of the defendant is under Order XLIII Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96. The three Judge bench decision in **Bhanu Kumar** Jain has been followed by another bench of three Judges in **Rabindra Singh** v **Financial Commissioner, Cooperation, Punjab**[2] and by a two Judge bench in **Mahesh Yadav** v **Rajeshwar Singh**[3]. In the present case, the original defendant chose a remedy of first appeal under Section 96 and was able to establish before the High Court, adequate grounds for setting aside the judgment and decree.

[2] (2008) 7 SCC 663
[3](2009) 2 SCC 205

17 For the above reasons, we find no reason to interfere with the judgment and order of the High Court. The appeal accordingly stands dismissed. There shall be no order as to costs.

..CJI
[DIPAK MISRA]

..J
[A M KHANWILKAR]

..J
[Dr D Y CHANDRACHUD]

New Delhi;
January 29, 2018