

Order below Exh.33 in RCS No.174/2024

01. Defendant no.3 filed present application under Rule 4 of Order 39 of the Civil Procedure Code,1908 (Hereinafter referred as 'CPC' for the sake of brevity) for setting aside or discharging order of temporary injunction passed below Exh.5 on the ground that the plaintiffs made a false or misleading statement in the application for temporary injunction and supporting affidavit regarding a material particular about status of construction of house by defendant no.3 in the suit property and said order of temporary injunction was passed without giving notice to defendant no.3 due to which said order of temporary injunction caused the hardship to defendant no.3.

02. The plaintiffs filed say at Exh.39 and resisted the present application stating that, suit summons and notice of application for temporary injunction was duly served to defendant no.3 by registered post (RPAD) and grounds mentioned in present application are false and vexatious. Hence, the plaintiffs prayed to reject present application.

03. Defendant no.3 produced on record photographs of construction in suit property, agreement for construction executed by defendant no.3, bank statement of defendant no.3, copy of house tax extract bearing village Panchayat Kheradi Wangi house no.391 alongwith list of documents at Exh.36. Defendant no.3 relied on decision of Hon'ble Supreme Court in *Neerja Realtors Pvt. Ltd. Vs Janglu [2018 (5) Mh.L.J.24]* wherein it is held that, substituted service of summons is an exception to the normal mode of service and the Court must apply its mind to the requirements of Rule 20 of Order 5 of the CPC and its order must indicate due consideration of provisions contained in it.

04. Perused record. Heard both sides at length. On perusal of record it is seen that present suit came up for hearing before this Court on dt.19/09/2024 for the first time alongwith application for temporary injunction vide Exh.5. Order to issue suit summons and order to issue show cause notice of application for temporary injunction (Exh.5) through Special Bailiff subject to payment of Special Bailiff Bhatta were passed on dt.19/09/2024 below Exh.1 and Exh.5 respectively. Thereafter, suit summons vide Exh.10 and show cause notice of application for temporary injunction vide Exh.11 were issued to

defendant no.3 on dt.19/09/2024 through bailiff of this Court which returned unserved vide reports of bailiff dtd.21/09/2024 stating that defendant no.3 was not found on given address and while taking information regarding whereabouts of defendant no.3, said bailiff met defendant no.2 Vilas Motiram Gaikwad who informed the bailiff that, defendant no.3 resides at Mumbai. The plaintiffs filed application dtd.23/09/2024 for status quo order against defendant no.3 vide Exh.15 upon which order to issue show cause notice to defendant no.3 was passed on dt.23/09/2024. Thereafter, the plaintiffs filed application dtd.23/09/2024 at Exh.17 by mentioning new address of defendant no.3 at Mumbai and prayed for reissue of summons and notice to defendant no.3 on address given at Exh.1 through Court as well as on the address of defendant no.3 at Mumbai through registered post (RPAD). Order dtd.23/09/2024 stating that “Reissue summons and notice to defendant no.3 through regular Court procedure and simultaneously through RPAD” was passed on application at Exh.17 and according to said order dtd.23/09/2024, summons and notice to defendant no.3 on his address at Mumbai were issued through registered post (RPAD) envelope at vide Exh.11 i.e. O.No.2479 and it's envelope returned with remark of postal department as ‘Intimation given. Unclaimed’. The summons and notice on the address of defendant no.3 given in Exh.1 plaint according to order dtd.23/09/2024 passed below Exh.17 were issued through bailiff of this Court vide Exh.20A and Exh.21 which returned unserved vide reports of bailiff dtd.11/10/2024 stating that defendant no.3 was not found on given address and while taking information regarding whereabouts of defendant no.3, said bailiff met brother of defendant no.3 viz., Vilas Motiram Gaikwad who informed the bailiff that, defendant no.3 resides at Mumbai. Thereafter, plaintiff no.1 filed affidavit dtd.15/10/2024 vide Exh.22 stating that summons and notice were duly served on defendant no.3 through RPAD. In view of registered post (RPAD) envelope at Exh.11 having remark of postal department as ‘Intimation given. Unclaimed’ and affidavit of plaintiff no.1 vide Exh.22, summons was held as ‘duly served’ on defendant no.3 and this suit was proceeded ex-parte against defendant no.3 vide order dtd.17/10/2024 passed below Exh.1 and application for temporary injunction

at Exh.5 was posted for argument vide order dtd.17/10/2024 passed below Exh.5.

05. After hearing argument of plaintiffs, application for temporary injunction at Exh.5 was allowed vide order dtd.24/10/2024 thereby temporary injunction restraining defendant no.3 from raising construction in village Kheradi Wangi Gat no.1509 was granted in the present suit. Now, defendant no.3 prayed for setting aside or discharging order of temporary injunction passed below Exh.5 on the ground that the plaintiffs made a false or misleading statement in the application for temporary injunction and supporting affidavit regarding a material particular about status of construction of house by defendant no.3 in the suit property and said order of temporary injunction was passed without giving notice to defendant no.3 due to which said order of temporary injunction caused the hardship to defendant no.3.

06. Rule 4 of Order 39 of the CPC states that any order for an injunction may be discharged, or varied or set aside by the Court, on application made thereto by any party dissatisfied with such order provided that if an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice and provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party. The power under Rule 4 of Order 39 of the CPC can be exercised in two situations viz. First situation where order for an injunction was passed without giving notice to the opposite party and second situation where an order for injunction has been passed after giving to a party an opportunity of being heard but there is change in circumstances or the Court is satisfied that the order has caused undue hardship to that party. Thus, the party seeking relief under Rule 4 of Order 39 of the CPC on the ground of

order for an injunction without giving notice to the opposite party; should establish two conditions i.e. firstly, an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and secondly, the injunction was granted without giving notice to the opposite party.

07. In present case, defendant no.3 sought relief under Rule 4 of Order 39 of the CPC stating three grounds i.e. firstly, an order of temporary injunction was passed without giving notice to him, secondly, the plaintiffs made a false or misleading statement in the application for temporary injunction and supporting affidavit regarding a material particular about status of construction of house by defendant no.3 in the suit property and thirdly, said order of temporary injunction caused greater hardship to defendant no.3. Defendant no.3 submitted that, summons and notice were not duly served on defendant no.3. In present case, summons and notice issued to defendant no.3 on the address given in the plaint (Exh.1) through bailiff of this Court vide Exh.10,11,20A,21 were returned unserved with bailiff report stating that defendant no.3 was not found on the address mentioned therein and defendant no.3 resides at Mumbai according to information given by defendant no.2 Vilas Motiram Gaikwad. It was argued by Ld.Adv.Shri.Hajare for defendant no.3 that the bailiff did not comply the requirements under Rule 17 of Order 5 of the CPC when the bailiff attempted service of summons and notice vide Exh.10,11,20A,21 but service of summons and notice was allowed through RPAD as substituted service without compliance of requirements under Rule 17 and Rule 20 of Order 5 of the CPC due to which service of summons and notice to defendant no.3 was not due service as per law. Ld.Adv.Shri.Hajare for defendant no.3 further argued that summons and notice were not served on defendant no.3 through RPAD but ex-parte order was passed against defendant no.3 due to wrong remark by postal department as 'Unclaimed'.

08. The plaintiffs prayed for service of summons and notice to defendant no.3 through registered post (RPAD) on address at Mumbai vide Exh.17 which was allowed vide order dtd.23/09/2024 below Exh.17. The address of defendant no.3 given in application at Exh.17 for service of summons and notice through RPAD was situated at Mumbai, i.e. outside the

jurisdiction of this Court. Thus, procedure to be adopted for service of summons and notice on defendant no.3 at the address situated at Mumbai would be governed by Sub-rule 3 to 5 of Rule 9 read with Rule 21 of Order 5 of the CPC which permits service through registered post (RPAD) as one of the mode of service of summons and notice. Further, summons and notice was issued to defendant no.3 on his address at Mumbai through registered post (RPAD) [envelope at vide Exh.11 i.e. O.No.2479] and it's envelope [envelope at vide Exh.11 i.e. O.No.2479] returned with remark of postal department as 'Intimation given. Unclaimed'. It is not case of defendant no.3 that the address mentioned on RPAD envelope [envelope at vide Exh.11 i.e. O.No.2479] was incorrect or wrong. The Hon'ble Supreme Court held in *Priyanka Kumari Vs Shailendra Kumar [IA No.126261/2019 in Transfer Petition (Civil) No.2090/2019 decided on dt.13/10/2023]* that it shall be deemed to be duly served upon the addressee and it is the proper service of notice when notice is returned as 'Unclaimed' as the word 'Refusal' can be interpreted in synonymous to the word 'Unclaimed'. Hence, in view of provisions under Sub-rule 3 to 5 of Rule 9 read with Rule 21 of Order 5 of the CPC and registered post (RPAD) envelope at Exh.11 having remark of postal department as 'Intimation given. Unclaimed' alongwith affidavit of plaintiff no.1 vide Exh.22, it is clear that summons and notice to defendant no.3 was duly served. Thus, objection of defendant no.3 stating that an order of temporary injunction was passed without giving notice to him does not sustain.

09. It was argued on behalf of defendant no.3 that the plaintiffs did not bring on record the status of construction of house by defendant no.3 in the suit property and thus, the plaintiffs made a false or misleading statement in the application for temporary injunction and supporting affidavit regarding a material particular due to which injunction order passed against defendant no.3 is liable to be set aside, or varied or discharged. The plaintiffs pleaded in the plaint (Exh.1) and the application for temporary injunction (Exh.5) as well as supporting affidavits that defendant no.3 started raising construction of house in the suit property. The plaintiffs also filed photographs showing the status of construction of house by defendant no.3 in the suit property and affidavit of photographer alongwith list of documents at Exh.3. The construction of house

at the hands of defendant no.3 as alleged by the plaintiffs is admitted by defendant no.3. Thus, it cannot be said that the plaintiffs made a false or misleading statement in the application for temporary injunction and supporting affidavit regarding a material particular about status of construction of house by defendant no.3 in the suit property.

10. Defendant no.3 also contended that said order of temporary injunction caused greater hardship to defendant no.3 as construction of his house is completed but work of plaster and tiles is only remaining. Defendant no.3 submitted that he spent the amount more than Rs.10,00,000/- for construction of house and purchased the material for further construction work. Defendant no.3 also submitted that he does not have residential house, he spent the amount received after his retirement and he came to reside at village after his retirement due to which he would suffer greater hardship in case construction of his house is not completed and his family would not have shelter. Therefore, defendant no.3 prayed to set aside, or vary or discharge the injunction order passed against him. However, in view of second proviso to Rule 4 of Order 39 of the CPC, the order of injunction can be set aside or varied or discharged only when the Court is satisfied that the order has caused undue hardship to the party. In present case, defendant no.3 contended various circumstances as mentioned above to show that the injunction order passed below Exh.5 in present case caused greater hardship to him. However, it is not sufficient to show only greater hardship on the part of defendant no.3 for exercise of power under second proviso to Rule 4 of Order 39 of the CPC but defendant no.3 must show reasonable ground that the hardship caused to defendant no.3 due to injunction order is undue hardship. In present case, the injunction order was passed below Exh.5 after giving opportunity of being heard to defendant no.3 whereby the application for temporary injunction at Exh.5 was decided after considering the documentary evidence on record. The plaintiffs averred that defendant no.3 is raising construction of house in village Kheradi Wangi Gat no.1509 without any permission; though, said landed property is undivided ancestral joint family property of the plaintiffs and the defendants. Defendant no.3 did not produce on record any construction permission given by any Government authority entrusted with the function of

giving permission for construction. Thus, nothing is on record to show that construction of house by defendant no.3 was raised by following legal procedure or defendant no.3 was legally entitled to raise construction of said house. Therefore, it is clear from record that defendant no.3 failed to show that the hardship caused to him due to injunction order passed below Exh.5 was undue hardship. In such situation, present application of defendant no.3 is liable to be rejected and the costs shall follow the event. With these considerations, following order is passed -

Application at Exh.33 is rejected with costs.

Place : Kadegaon

Date : 18-01-2025

Madhavi R. Patkar
Jt.CJJD & JMFC, Kadegaon.