

MHSCA10002212018



**IN THE COURT OF SMALL CAUSES AT BOMBAY
(APPELLATE COURT)**

Order Below Exh. No. 18

In

Contempt Notice No. 01 of 2018

In

(1)Appeal No. 289 of 2004

In

R.A.D. Suit No. 1489 of 2003

And

(2) Appeal No. 474 of 2009

In

R.A.D. Suit No. 1489 of 2003

And

(3) Appeal No. 306 of 2016

In

In R.A.D. Suit No. 1489 of 2003

Smt. Vasanti Vishnu Bhat

Petitioner (Org. Plaintiff)

V/s.

1. Shri. Jaisinh K Morarji (Deleted)

1. Pradeep Navnitlal Muchhala(Deleted)

1a. Ms. Kosha Amit Bhansali & Ors.

Respondents (Orig. Defendants)

Adv. Shri. D.C. Mehta for Petitioner (Org. Plaintiff)

Adv. Shri. R. S. Maurya Respondents (Orig. Defendants)

**Coram:- Ashok S.Jadhav, Addl. Chief Judge,
&
Arvind M.Bhandarwar, Ad-hoc District Judge
C.R.No.3,
Date :- 09/03/2021.**

ORDER: (As per A.S. Jadhav, Addl. Chief Judge)

1. This is an application by respondent No. 6 to set aside exparte order dated 23/1/2020 and allow him to file affidavit in reply in Contempt petition.

2. The petitioner has taken out contempt petition against respondents. The notice was issued to the respondent No. 6 by R.P.A.D. This postal envelop return with the endorsement "un-claimed". Therefore exparte order passed against him on 23/1/2020. It is the contention of the respondent that since renovation of his office was going on, he had temporarily shifted his office to other place. Therefore he could not collect envelop. According to him on 23/1/2020 when his advocate was present in the court in some other matter, he noticed that ex-parte order has been passed and accordingly advocate informed him. It is further contended that his brother in law was suffering from oral cancer and was residing with him at his residence at Navi Mumbai. For the treatment of brother in law, he was out of town most of the time. These are the reasons for not claiming contempt notice. He prayed for setting aside exparte order and allowing him to file his affidavit in reply by condonation of delay if any.

3. The petitioner filed his reply at Exh. 19 and strongly opposed application. It is contended that respondent deliberately avoided Notice of contempt. His sole intention is to harass the petitioner. It is denied that the

respondent came to know about exparte order from his advocate. It is also denied that this responded has shifted his office to some other place. It is contended that service is deliberately avoided by the respondent. Therefore application may kindly be rejected.

4. Heard Ld. Counsel for the respective parties. Following points arises for our determination and our findings thereon with reasons are as under:

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether applicants have shown sufficient cause for to set aside exparte order dated 23/1/2020 ?	Yes
2. What Order?	As per final order.

REASONS

5. At the very outset it is to be noted that notice was issued to the respondent by invoking postal service and envelope containing notice retured back with endorsement “unclaimed”.

6. No doubt Postal service is also effective service. But record does not disclosed that provision of Order V Rule 17 was invoked while effecting service of notice. Needless to mention that postal endorsement “not claimed” cannot be equated to “refused”. When a postal endoresement found on a notice issued to a person is “not claimed” it cannot be concluded that said person has refused the same. There may be some other reason for not to claiming postal envelop. It may happen that notice may not be claimed for requested person upon which it was to be served is not authorised or competent to accept it. In numerous Judgments Hon'ble Bombay High Court

held that endorsement “not claimed” cannot be read as refuse to accept under Order V of Code of Civil Procedure. The respondent has stated that he had shifted his office and his brother in law was suffering from oral cancer. We find that since there is no endorsement that respondent No. 6 has refused the postal envelop, it was not effective service as urged by the Ld. Advocate for the respondent No. 6. It is to be noted that respondent No. 6 is going to face contempt petition. Therefore, if opportunity of filing reply is not given to him, it will cause prejudice to him. As against this petitioner would not be suffer any manner, if respondent is allowed to file reply in the contempt proceeding. Since he will get an opportunity to substantiated his case on merit. It is settled that party could not be nonsuited on technical ground. We therefore pass following order.

ORDER

1. Application is allowed.
2. The respondent No. 6 is allowed to file his affidavit in rely in Contempt petition.

I agree,

(A. M. Bhandarwar)
Ad-hoc Dist. Judge
Court Room No.3.
Date :- 09/03/2021

(A S Jadhav)
Addl. Chief Judge,
Court Room No.3.
Date :- 09/03/2021