

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL WRIT PETITION NO.10792 OF 2013

Mohammed Irfan Husain Kazi.] ... Petitioner

Versus

Kirti Vasantji Shah.] ... Respondent

Mr. Kunal Bhanage for Petitioner.
Mr. Sanjeev R. Singh for Respondent.

CORAM :- M. S. SONAK, J.

DATE :- JUNE 24, 2015

P. C. :-

1. This petition challenges orders dated 11/10/2013 and 16/01/2012 made by the Appeal Bench of the Small Causes Court and the Small Causes Court respectively, both of which have the effect of setting aside *ex-parte* decree dated 03/09/2010 directing the eviction of the Respondent and restoring the possession of the suit premises to the Respondent.

2. The learned Counsel for Petitioner has basically made the following two submissions in respect of this petition :-

(a) That the Respondent, for reasons attributable to himself, could not be served with the process of the Court in the eviction suit instituted by the Petitioner. This was despite

several efforts on the part of the Petitioner to effect service. Besides, even after the knowledge of the *ex-parte* decree, there was no sufficient explanation with regard to the delay in seeking the setting aside of the same;

- (b) In any case, there is overwhelming material on record which establishes that the Respondent was not in possession of the suit premises. In the situation of this nature, there was no question of directing restitution virtually as a consequence to the recall of the *ex-parte* decree. The necessary parameters with regard to restitution have not been considered by the two Courts.

3. Having heard the learned Counsel for parties and perused the material on record, there is no warrant to interfere with the impugned orders in the exercise of extraordinary jurisdiction of Article 227 of the Constitution of India. The Petitioner had instituted the suit for eviction of the Respondent from the suit premises, on the ground that the Respondent is not using the suit premises and in fact has virtually abandoned the user thereof. The material upon which the Respondent seeks to place reliance with regard to service of processes in the eviction proceedings indicates that the so called efforts at service was made at the suit premises, which according to the Petitioner, have been virtually abandoned by the Respondent. The two Courts, upon appreciation of the material on record, have commented upon the so called effort at service, including in particular the manner in which substituted service was effected by pasting the

summonses at the suit premises, which according to the Petitioner, were not being used by the Respondent. Besides, the provisions contained in Order 5 of the CPC were also not complied with in the matter of service of summons as also substituted service.

4. The learned Counsel for Petitioner however submits that the Petitioner had no knowledge of any alternate address of the Respondent. This is again found to be incorrect by two Courts on the basis of material on record. The material is in form of money-order receipts, which clearly states the address from which the money-order was sent by the Respondent. The two Courts have concurrently held that the Petitioner was aware of the alternate address and despite the same, so called efforts were made to effect service at the suit premises. Clearly therefore, there is no reason or justification to interfere with the impugned orders in the matter of setting aside of the *ex-parte* decree after record of satisfaction that the Respondent was not served.

5. Insofar as restitution is concerned, it is to be noted that the Respondent has furnished explanation as to why at the relevant time, the Respondent was not found in the suit premises. The explanation is that the premises required major repairs and it is the Petitioner who was not carrying out the such repairs. It is further explained that the Respondent's mother had to be hospitalized at a hospital in the neighbourhood of the alternate premises. The issue is really not whether such explanation constitutes any sufficient cause

for non-user. The issue of non-user and sufficient cause thereof will have to be gone into in the suit for eviction which has since been restored. What is material at this stage however is the circumstance that the Petitioner attempted to effect service at the suit premises, despite the case of the Petitioner that the Respondent is not using or has abandoned the suit premises. What is further significant is that the Petitioner had knowledge of the alternate premises where the Respondent could be accessed for the purposes of service of process, but no attempts were made to serve the process at such alternate premises. The material on record does indicate that there was no service of summons upon the Respondent and the so called efforts upon which the Petitioner relies, were neither genuine nor intended to genuinely serve the summons upon the Respondent. The Petitioner again, in such circumstances, be permitted to retain the possession of the suit premises. The two Courts have considered the entire material on record from the proper perspective and there is neither any jurisdictional error nor any perversity of approach in directing restitution. This is not a case where restitution has been granted as a matter of course or simply as a corollary to the setting aside of *ex-parte* decree of eviction. The two Courts have neither committed any jurisdictional error nor is there any perversity of approach in directing restitution.

6. Accordingly, no case is made out to warrant interference with the impugned order. Writ Petition is dismissed. There shall be no order as to costs.

7. The learned Counsel for Petitioner requests for continuation of ad-interim order granted by this Court on 21/11/2013 for a period of eight weeks from today. Since the interim order has been continuing from 2013, the same is continued for a period of eight weeks from today. This shall, however, be subject to undertaking to be filed by the Petitioner in this Court, that he shall not, in the meanwhile, create any third party rights or induct any other person in the suit premise and further, shall hand over the suit premises to the Respondent upon expiry of period of eight weeks from today, subject of course, to any order that may be made in the meantime by the Hon'ble Apex Court. The undertaking to be filed within one week from today.

(M. S. SONAK, J.)