

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

WRIT PETITION NO. 2918 OF 2015

Smt.Vimladevi Purushottam Sarwagi. .. Petitioner
Vs
Smt.Shirin Taherali .. Respondent

Mr.Shyam Kapadia a/w Darshan Mehta i/b M/s Dhruve Liladhar &
Co., for the Petitioner.
None for the Respondent.

***CORAM : N.M.Jamdar, J.
Friday, 30 September 2016.***

P.C. :

On 5 February 2015 following order was passed-

'1 Heard Shri Shyam Kapadia, the learned counsel appearing for the Petitioner.

2 Issue notice to the Respondent, returnable on 05/03/2015. In addition to service of notice through Court, the advocate for the Petitioner shall serve a private notice by Registered Post A.D. and/or by Courier service and/or by hand delivery on the Respondent and shall file affidavit of service before the returnable date. Hamdast permitted.

3 In view of the narrow controversy involved in the above Petition viz. as to whether the Petitioner/original Plaintiff is entitled to lead secondary evidence in respect of some of the documents which are mentioned in the Chamber Summons, the parties are put to notice that the above Writ Petition may be heard and disposed of finally at the stage of admission. In the meantime there would be ad-interim relief in terms of prayer clause (b).'

-Thereafter on 27 February 2015 following order was passed-

'1. In the above petition, notice came to be issued on 5th February, 2015. The Learned Counsel for the Petitioner states that the Respondent however has shifted residence and her new address is now available to the Petitioner and therefore, the cause title of the Petition be allowed to be amended in terms of draft handed in which the new address of the Respondent is mentioned. Leave granted. Amendment to be carried out forthwith. On amendment being carried out, issue fresh notice to the Respondent returnable 13.03.2015. The earlier returnable date would accordingly stand substituted.'

-On 26 June 2015 following order was passed-

*'Heard Mr. Kapadia, learned Counsel for petitioner.
2. At his request, issue fresh notice to respondent, returnable on 16.07.2015. Humdast is permitted.'*

-On 6 October 2015 following order was passed-

'1 In the above Petition notice came to be issued on 05/02/2015, however, the notice could not be served as the Respondent was not available on the address mentioned in the suit. The Petitioner thereafter has given the fresh address of the Respondent pursuant to which the returnable date was extended by the order dated 27/02/2015. Thereafter a fresh notice came to be issued on 26/06/2015 by another learned Single Judge of this Court. However, the bailiff report indicates that the premises are found locked. The Petitioner thereafter was directed to make a fresh attempt to serve the Respondent by private advocate's notice, pursuant to which an affidavit of service of the clerk of the attorney's of the Petitioner, which has been affirmed on 05/10/2015, has been filed by the Petitioner in which it has been stated that the premises were found locked and that the

neighbours informed the clerk of the attorney's of the Petitioner that the premises are always locked and that they are not aware of any alternate address of the Respondent. In view, thereof the Petitioner to take steps to effect service on the Respondent by taking recourse to Order V Rule 20 of the Code of the Civil Procedure. The same to be done within one week from date. Liberty to apply after the steps are taken.'

-On 10 June 2016, following order was passed.

- '1 Heard the learned counsel for the petitioner.*
- 2 Office note shows that service is completed on respondents by publication in newspaper.*
- 3 As service is completed, office is directed to place the matter on board for admission on 1.7.2016.'*

2. Heard learned counsel for the Petitioner. In spite of the orders above none has appeared to contest the petition. It is informed that none has appeared in the suit as well as for the Respondent.

3. By the impugned order the learned City Civil Court Judge has rejected the Chamber Summons No.2130 of 2014 taken out by the Petitioner for leading secondary evidence. The ground given in the impugned order is that the Petitioner has not established the ingredients required for leading secondary evidence as provided under Section 65 of the Indian Evidence Act, 1872.

4. I have gone through the affidavit in support of Chamber Summons. The Petitioner has stated that the deponent, on the instructions of the Petitioner, had taken photocopies of all documents

thereafter they were handed over to the advocate. The photo copies were annexed. The documents were preserved in the file pertaining to the case by the Petitioner-Plaintiff and she had stated that it would be handed over to the deponent, who is her nephew. The Plaintiff is senior citizen and is around 75 year old. Some time in the year 2004 and 2005 the building, where the Petitioner-Plaintiff was staying, was redeveloped and the documents were not traceable. In spite of due diligence the documents could not be found. These are the averments made in the affidavit in support of the Chamber Summons. If these averments are accepted, they conclude sufficient compliance of the requirement of Section 65 of the Evidence Act. The learned City Civil Judge ought to have seen that there is no contest at all by Respondent in the suit nor she has appeared and therefore, the averments made in the affidavit will have to be accepted having gone uncontroverted. As stated above, once these reasons are accepted they constitute sufficient ingredients for leading secondary evidence.

5. In the circumstances, the Writ Petition deserves to be allowed and it is accordingly allowed in terms of prayer clause (a). The ad-interim relief granted in this Petition to the Petitioner stands vacated. Registry to communicate the order to the learned City Civil Court, Mumbai, at the earliest.

(N.M.Jamdar, J.)