

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.979 OF 2014

Mr. Dattatray Gangadhar Kulkarni

(Since deceased through his legal heirs)

Smt. Sunita Dattatray Kulkarni and another

.. Applicants

Versus

Mrs. Suvarna V. Bhosle and others

.. Respondents

Shri. D. S. Mhaispurkar i/by Ms. V. S. Mhaispurkar, for the Applicants.

Shri. A. S. Khandeparkar i/by Khandeparkar & Associates, for the Respondents.

CORAM : R.M. SAVANT, J.

DATE : 29th FEBRUARY 2016

PC.

1. The revisionary jurisdiction of this Court is invoked against the order dated 19.11.2013 passed by the Learned Adhoc District Judge-3, Kalyan, by which order, the Appeal filed by the Applicants being Civil Appeal No.156 of 2009 came to be dismissed and resultantly, the judgment and decree passed by the Trial Court dated 03.10.2008 came to be confirmed.

2. The Applicant herein is the original Defendant in the suit in question being RCS No.471 of 2007. The suit premises is Block No.4,

admeasuring 336 sq.ft. on the ground floor of the building known as Ashirwad Building, Rajaji Cross Road, Ram Nagar, Dombivali (E), District Thane. The Respondents herein are the original landlords. The suit was founded on the ground of non-user for the preceding six months. It was the case of the Plaintiffs that the Defendant had shifted his residence to another place and was not residing in the suit premises since six months prior to the filing of the suit. The suit summons came to be served on the Petitioner/Defendant by having recourse to Order V Rule 20 of the CPC by publishing a notice in the local newspaper "Konkan Sakal". However, in spite of notice being published in the local newspaper and the Defendant i.e. the Petitioner being served in terms of the said paper publication, the Defendant neither filed his written statement nor appeared in the suit. The suit came to be decreed by the Trial Court on the ground of non-user for the preceding six months. The Trial Court took into consideration the relevant material produced by the Plaintiffs in support of their said case which included the electricity bills of the suit premises.

3. The decree passed by the Trial Court dated 03.10.2008 was taken exception to by the Petitioner/original Defendant by filing Civil Appeal No.156 of 2009. Though two avenues are open to challenge an ex-parte decree, namely an Appeal or an application under Order IX Rule 13. Pertinently, the Defendant chose the first mode namely of filing a

substantive Appeal against the decree. In the Memo of Appeal, there is neither any averment to the effect that the summons were not served upon the Defendant nor in the grounds raised in the Appeal there is any ground raised by the Defendant revolving around non-service of summons on the Defendant. The solitary ground by way of ground (f) is to the effect that the Konkan Sakal in which the notice was published does not have circulation at the place of residence of the Applicant. The aforesaid fact is to be considered in the context of the challenge now sought to be raised on behalf of the Petitioner/original Defendant that the summons were not served and that the report of the Bailiff was not in terms of one mandated by Order V Rule 18 and 19 of the CPC. In support of the said contention the Learned Counsel for the Petitioner sought to place reliance on the judgment of the Apex Court reported in **AIR 2002 SC 2370** in the matter of **Sushil Kumar Sabharwal Vs. Gurpreet Singh** and the judgment of the Learned Single Judge of this Court reported in **1999(3) ALL MR 423** in the matter of **Baburao Som Bhoi Vs. Abdul Raheman Abdul Rajjak Khatik**. The said fact has been further compounded, as it seems that no application was moved on behalf of the Defendant before the Lower Appellate Court for framing of the issue as to whether the Defendant was properly served in the suit which is now the main plank of challenge to the impugned order. The Lower Appellate Court therefore framed only two

issues namely, whether the Plaintiffs/Respondents prove that the Appellant/Defendant was not using the suit premises without reasonable cause for the purpose for which it was let out for a continuous period of six months immediately preceding the date of the suit, whether the impugned judgment and order passed by the Learned Civil Judge requires any interference. The impugned order discloses that both the issues were decided against the Defendant. In so far as non-user is concerned, the Lower Appellate Court has reiterated the finding of the Trial Court on the said issue and accordingly confirmed the decree passed on the said ground. It seems that in the Appeal a submission was sought to be raised on behalf of the Defendant that the summons were not served, as a consequence of which the Lower Appellate Court considered the material on record and recorded a finding that the summons were in fact served upon the Defendant. The Lower Appellate Court accordingly has by the impugned judgment and order dismissed the Appeal and confirmed the decree passed by the Trial Court.

4. The Learned Counsel appearing for the Applicants Shri. D. S. Mhaispurkar was at pains to demonstrate before this Court that in fact the summons were not served upon the Defendant. In support of which submission the Learned Counsel sought to draw this Court's attention to the Roznama and Bailiff's report. As indicated above, it was the submission

of Shri. D. S. Mhaispurkar that the Bailiff's report is not in terms of what is mandated by Order V Rule 18 and 19 of the CPC.

5. Per contra, the Learned Counsel Shri. A. S. Khandeparkar appearing for the Respondents/original Plaintiffs would support the impugned order. The Learned Counsel would contend that in the absence of any ground raised, the Appellate Court had proceeded to consider the findings recorded by the Trial Court in respect of the ground of non-user and therefore in the revisionary jurisdiction of this Court the Applicant for the first time cannot raise the ground of non-service of the suit summons.

6. In my view, it is not possible to accept the contentions of Shri. D. S. Mhaispurkar the Learned Counsel for the Applicants. As indicated above, in the earlier part of this order neither in the Memo of Appeal is there any averment relating to the non-service of the suit summons nor there is any ground raised in the grounds of Appeal assailing the decree on the ground that the suit summons were not served. In the absence of any ground raised, the Appellate Court has proceeded to consider the finding recorded by the Trial Court in so far as the ground of non-user is concerned. If the Defendant i.e. the Petitioner herein was to raise the ground of non-service of summons before the Lower Appellate Court, the Lower Appellate Court in the said event obviously would have gone into

the said aspect and framed an issue and recorded a finding thereon. It is only because the submission was raised at the Bar based on the said ground of non-user, the Lower Appellate Court has made observations in respect thereof in paragraph 10 of the impugned order. It seems that the Defendant proceeded on the basis that the summons were served, as the Defendant did not choose to file an application under Order IX Rule 13 nor raised any ground in the grounds of Appeal. The challenge raised in the above Civil Revision Application on the ground of non-service of summons can therefore be said to be after thought. In that view of the matter, no case for interference in the revisionary jurisdiction of this Court is made out. The Civil Revision Application is accordingly dismissed.

[R.M. SAVANT, J]