

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2663 OF 2011**

Mr. John Rodricks and Ors.

..Petitioners.

Vs

Mrs Fatmabai Dolaria and Ors

.. Respondents

Mr. Rampal S. Kohli, Advocate for Petitioners.

Mr. R.M.Haridas i/b S.N.Biradar, Advocate for Respondents no. 1 to 3.

CORAM : R.G.KETKAR,J.

DATE : 28/07/2016

PC:

1. Heard Mr. Rampal Kohli, learned counsel for the petitioners and Mr. R.M. Haridas, learned counsel for respondents no.1 to 3 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants no.1(a) and 1(b)', have challenged the judgments and orders dated 4.12.2009, 10.8.2010, 11.2.2011, at Exhibit-'N' (pages 62 to 70), at Exhibit 'S' (pages 92 to 98), at Exhibit-'X' (pages 127 to 147), respectively. By Judgment and decree dated 4.12.2009, the learned trial Judge decreed R.A.E. Suit No. 384/813 of 2008 filed by the respondents no. 1 to 3, hereinafter referred to as 'plaintiffs', and directed the defendants to hand over vacant and peaceful possession of the premises on the first floor admeasuring about 330 sq.ft comprising of one room and kitchen

with a balcony, toilet and W.C., on the first floor of Veronica House, situate at 21/A, Waroda Road, Bandra (W), Mumbai-400 050, (for short, 'suit premises') to the plaintiffs. By order dated 10.8.2010, the learned trial Judge rejected the application filed by defendant no.1(b) for himself and as power of attorney holder of the defendant no.1(a) for setting aside *ex parte* decree dated 4.12.2009. By order dated 11.2.2011, the Appellate Court dismissed Appeal No.158 of 2010 preferred by defendants no.1(a) and 1(b) against order dated 10.8.2010. It is against these orders, defendant no.1(a) and 1(b) have instituted present petition under Article 227 of the Constitution of India.

3. In support of this Petition, Mr. Kohli strenuously contended that the suit summons was not served on the defendants. The learned trial Judge, however, proceeded on the premise that the defendants were duly served and that the suit proceeded *ex parte* against the defendants as well as legal representatives of the defendant as per orders dated 2.3.2009 and 16.3.2009. He has taken me through the reasons set out in the application filed under Order IX, Rule 13 of C.P.C. He submitted that the plaintiffs have misrepresented the trial Court and secured *ex parte* decree on 4.12.2009. He further submitted that plaintiffs no.2 and 3 are Lawyers and are fully aware that if the summons are served on the defendants, they will definitely contest the matter. The

plaintiffs have closed the gate leading to the first floor and tampered with the electricity flow in order to create records. Plaintiffs no.2 and 3 being Advocates have avoided serving the proceedings upon the defendants. He also relied upon the provisions of Order V, Rule 17 of CP.C. as also Bailiffs' Manual and in particular, Chapter-I of Part-I containing general directions regarding service of processes. It, inter alia, provides that no bailiff charged with the service of a process, is entitled to call upon the party interested in the service to point out the person to be served. It is his duty to use his best efforts to effect service, and it is only when he fails, inspite of such efforts, that the Court may order the party to render help to him. He has also taken me through the description of the suit premises given in the plaint and the bailiffs' report. In particular, the description of the suit premises in the plaint is as under :-

“On or towards the North : By a lane facing boundary wall of property No.21, Waroda Road known as Shah Villa (Rebecca Villa),

On or towards the South by: Property No.16, Chapel Road, known as Miranda House at,

On or towards the East by : By a lane facing property No.19A Waroda Road, known as Ramprasad at,

On or towards the West by : Open plot known as Gregory House and the open space of property no.18 of Chapel Road.”

As far as bailiff's reports are concerned, the bailiff report dated 10.11.2008 shows that bailiff went to serve copy of the summons with plaint on the defendants on 10.11.2008 at about 3 pm but he (defendant Lawrence, since deceased) was not found and the door of the suit premises was found locked. On his inquiries with Shri Rajabali, tenant of Gloria building which is behind the suit premises, he informed to the bailiff that the defendant is not staying at the above said address since last three years and his present whereabouts are not known to him. Bailiff's report dated 12.11.2008 at 11.15 am shows that bailiff tried to serve suit summons on the defendant. Defendant was not found and he found the suit premises was locked. On his inquiries with Smt Munira, tenant of behind building, she informed the bailiff that the defendant has left the suit premises since long back and his present whereabouts are not known. Bailiff report dated 15.11.2008 also shows that bailiff went to serve a copy of the summons with plaint on the defendant at 1st floor of the suit premises on 15.11.2008 at 5.15 pm but he was not found and door of the suit premises was found locked. On making inquiries with Mr. Manish, tenant of Gloria building, he was informed that the defendant has left the suit premises since last two years.

4. Mr. Kohli compared the boundaries of the suit premises

given in the plaint as also bailiff's report and submitted that Gloria building is not adjacent to the suit premises and is not mentioned in any of the boundaries.

5. Mr. Kohli has invited my attention to affidavit dated 12/1/2008 of Arif Dolaria, plaintiff no.2 and Constituted Attorney of plaintiffs no. 1 and 3 and in particular paragraph 5 thereof. In paragraph 5, it is stated that the address of defendant Lawrence Rodrigues shown in the title is the last known address of the defendant. Despite diligent inquiries, he has not been able to find out the present whereabouts of the defendant. Mr. Kohli has also invited my attention to the following correspondence:

- (i) E-mail dated 3.7.2005 sent by Masooma Dolaria, plaintiff no.3 to Shilpa Rodrigues, wife of John Rodrigues;
- (ii) Letter dated 3.5.2008 sent by Lawrence Rodrigues to plaintiffs remitting monthly rent for April 2008, having address of suit premises.
- (iii) Money Order sent by Maria Rodrigues from 43-B, Palash Towers, Veera Desai Road, Andhri (W), Mumbai to Fatima Dolaria remitting monthly rent of July 2008;
- (iv) Letter dated 8.9.2008 sent by Lawrence Rodrigues to the plaintiffs having address of the suit premises;
- (v) Communication dated 27.5.2009 from Mario Rodrigues to Ms. Fatima Dolaria having address of the suit premises;

(vi) Order dated 14.2.2013 passed by the learned Metropolitan Magistrate, 12th Court, Bandra Mumbai below Complaint in C.C.No.81/SW/2011. By that order the learned Magistrate issued process against accused no.1 of offences under sections 465, 471 Indian Penal Code, 1860. The complaint was made on the ground that the acknowledgements in R.A.E.Suits No. 384/813 of 2008 and 383/812 of 2008 do not bear signatures of Lawrence Rodrigues and the same are forged. Relying upon these correspondence, Mr Kohli submitted that the plaintiffs were aware of the address of the defendant, namely 43-B, Palash Towers, Veera Desai Road, Andheri (W), Mumbai.

6. Mr. Kohli also relied upon Bailiffs reports dated 11.5.2009, 13.5.2009, 15.5.2009. Report dated 11.5.2009 shows that the bailiff went to serve three summons copies along with three plaint copies on defendants no.1(a) to 1(c) on the suit premises on 11.5.2009 at 5.30 pm, they were not found and door of the suit premises was found locked. On his inquiry with neighbouring tenant Panjawani, he was informed that the defendants 1(a) to 1(c) have left the suit premises since long back and their whereabouts are not known. Bailiff Report dated 13.5.2009 shows that bailiff went to serve defendants no.1(a) to 1(c) at the suit premises on 13.5.2009 at 9.10 am. Defendants no.1(a) to 1(c) were not found and outer door of the suit premises was

found locked. On his inquiry with neighbouring tenant Ms M. Manish, he was informed that these defendants have left the premises since long back and whereabouts are not known. Bailiff report dated 15.5.2009 shows that he went to serve defendants no.1(a) to 1(c) at the suit address on 15.5.2009 at 11 am. Defendants no 1(a) to 1(c) were not found there and the suit premises were found locked. On his inquiry with Ms Mary Naronha, tenant of the neighbouring building, he was informed that defendants no.1(a) to 1(c) are not staying at the suit address.

7. Mr. Kohli submitted that as basically the suit summons was not served on the defendants as also the substituted service was defective. Before ordering substituted service, the learned trial Judge did not record satisfaction. He submitted that the provisions of Order V, Rule 17 and rule 34 of chapter III of Bailiff's Manual are mandatory and failure to comply these mandatory provisions vitiates the service. In support of this proposition he relied upon decision of this Court in the case of G.S.Ramchandran vs. M.M.Rajadhyaksha, 1984(1) Bom.C.R.507 and in particular paragraph 12 thereof wherein the learned Single Judge of this Court has observed that "non-compliance with the provisions of Order V, Rule 17 of the Code and the bailiffs Manual in relation to the bailiffs report and the affidavit, which has been found by both

the Courts below in the instant case, cannot be treated as lightly as it has been done. Irreparable damage may follow from an ex parte decree passed in respect of residential accommodation in Bombay. The need to be fully conscious of the procedure to be followed and the need for fair play in this regard, should not be ignored.”

8. On the other hand, Mr. Haridas has supported the impugned orders. He has taken me through the impugned orders. In paragraphs 13,14,15, the Appellate Court has recorded that number of times the bailiffs visited the suit premises for effecting service of summons. In particular in paragraph 14, the Appellate Court noted that on 6.6.2009, the plaintiffs applied for substituted service of summons by pasting, RPAD and under certificate of posting. That application was allowed. On 15.6.2009, when the bailiff visited the suit premises at that time none of the defendants was found and the suit premises was found locked. The bailiff, therefore, pasted three summons along with three copies of plaint on the outer door of the suit premises. The summons sent on 19.6.2009 by R.P.A.D also returned by the postal authorities with remark 'unclaimed, returned to sender". The copies of the summons also appear to be sent under certificate of posting. Plaintiff no.2 also submitted before the court the affidavit of service of summons.

On 9.8.2009, the Trial Court passed the following order:

“Read affidavit of service. Perused bailiff report . It reveals that service to defendant no.1(a) to 1(c) is completed by substituted service by pasting and RPAD. Hence, it is held that service on defendants no.1(a) to 1(c) is completed.”

He further submitted that the provisions of Order V, Rule 20 has been duly complied with. He, therefore, submitted that the learned trial Judge was satisfied that the substituted service was properly effected. He submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record.

10. The moot question is whether the defendants were properly served or not? It is, therefore, necessary to consider the bailiff's reports as also the findings recorded by the Courts below in that regard. In paragraph 13, the Appellate Court has referred to the attempts made by the bailiff for effecting service on the sole defendant-Mr. Lawrence Rodrigues. It was observed that the suit was filed against the sole defendant Lawrence on 16.10.2008. The writ of summons was issued on 20.10.2008. It was tried to be served on him on 10.11.2008, 12.11.2008 and 15.11.2008. On all those occasions the summons could not be

served on defendant as he was not found at the suit premises and the suit premises was found locked. On 19.11.2008, the plaintiffs applied for substituted service of summons by pasting, registered post A.D. and under certificate of posting. The trial Court allowed that application. Accordingly the summons was sent by RPAD on 16.12.2008 but the same was returned by the postal authorities with remark 'unclaimed, returned to sender'. The summons was also sent under certificate of posting. On 10.12.2008, the bailiff served the summons by pasting its copy and copy of the plaint on the outer door of the suit premises as per order of the Court. On 2.3.2009, the trial Court passed order on the plaint to the effect that the service of summons was effected by way of substituted service and directed the suit to proceed ex parte.

11. On 23.4.2009, original defendant-Lawrence expired. On 4.5.2009 the plaintiff applied for bringing on record three sons of Lawrence, since deceased. That application was allowed and his sons were brought on record as defendants no.1(a) to 1(c). On 4.5.2009, the summons were issued to them. Bailiff visited on suit premises for service of summons on 11.5.2009, 13.5.2009 and 15.5.2009. On all these occasions, the defendants were not found and suit premises were found locked. On 6.6.2009 the plaintiff applied for substituted service of summons by pasting

R.P.A.D and under certificate of positing. That application was allowed. On 15.6.2009 the bailiff visited the suit premises. None of the defendants were found and the suit premises were found locked. The bailiff, therefore, pasted three summons along with three copies of the plaint on the outer door of the suit premises. On 19.6.2009, the suit summons sent by R.P.A.D also returned by postal authorities "unclaimed and returned to sender". The suit summons were also sent under certificate of posting. Plaintiff no.2 submitted affidavit of service of summons.

12. Mr. Kohli submitted that affidavit of service dated 1.6.2009 shows that plaintiff no.2 and Constituted Attorney of plaintiffs no.1 and 3 had accompanied the bailiff to serve the summons of the suit on the proposed defendants from 11.5.2009 at 5.30 p.m. 13.5.2009 at 9 am and 15.5.2009 at 11 am. Mr. Kohli relied upon the following provisions of Chapter-I in Part-I of the Bailiffs' Manual, which reads thus:

"No bailiff charged with the service of a process is entitled to call upon the party interested in the service to point out the person to be served. It is his duty to use his best efforts to effect service, and it is only when he fails, inspite of such efforts, that the Court may order the party to render help to him. In cases where he does not know the individual on whom the process is to be served, but such individual is pointed out to him, there should be a verification of the endorsement on the process by the person who points out the individual concerned."

He submitted that no bailiff is entitled to call upon party

interested in service of a process to point out a person to be served. I do not find any merit in this submission for the fact that even on the previous occasions the bailiff though attempted to serve personally on the deceased Lawrence, he could not effect personal service and, therefore, the plaintiffs applied for substituted service of summons as observed the Appellate Court in paragraph 13 of the impugned order.

13. I have carefully considered the bailiff's reports. In the facts and circumstances of the case, record discloses satisfaction of the trial Court about avoidance of service of suit summons in regular course by the defendant/s and necessity of effecting service on defendants 1(a) to 1(c) by way of substituted service. It is also relevant to note that thereafter the trial Court passed order on 6.9.2009 directing the suit to proceed ex parte as the defendants were found absent. On the same day, plaintiff no.2 submitted his affidavit of evidence along with documents and the suit was adjourned to 16.10.2009 for deciding admissibility of documents. On 5.11. 2009, the trial Court admitted the documents of plaintiff in evidence and the matter was adjourned for arguments of the plaintiff as no cross examination of plaintiff no.2 was conducted. On 4.12.2009, the suit came to be decreed. Thus, perusal of the above narration clearly shows that right from 10.11.2008 onwards, bailiff made several attempts to effect

service earlier on the original defendant and thereafter on his L. Rs. After satisfying itself about completion of service by way of substituted service, the learned trial Judge directed the suit to proceed *ex parte* against the defendants.

14. It is also material to note that the plaintiffs thereafter filed Misc. Application no. 56 of 2010 on 3.2.2010 for issuing show cause notice before execution be issued to the defendants. The learned trial Judge passed order directing to issue notice under Order 21, Rule 22 on all the defendants as to why decree should not be executed. This aspect is considered in detail by the Appellate Court in paragraph 15. Ultimately in paragraph 16, the Appellate Court recorded that from the events narrated above, it is manifest that summons was tried to be served on the defendants from time to time but all the efforts have been in vain. Though the intimation containing the suit summons and copy of the plaint was given on 18.12.2008, nobody turned up for collecting R.P.A.D envelop. In view of the reasons set out by the Appellate Court, I do not find that any fault can be found with the impugned orders.

15. Mr. Kohli relied upon the decision of this Court in the case of G.S. Ramchandran, (*supra*). In that case, the learned Single Judge of this Court has observed in paragraph 12 thus:

“Non-compliance with the provisions of Order V, Rule 17 of

the Code and the bailiffs Manual in relation to the bailiffs report and the affidavit, which has been found by both the Courts below in the instant case, cannot be treated as lightly as it has been done. Irreparable damage may follow from an ex parte decree passed in respect of residential accommodation in Bombay. The need to be fully conscious of the procedure to be followed and the need for fair play in this regard, should not be ignored: on the other hand, they should be fully impressed upon the process servers of the Court of Small Causes."

16. There is no dispute as what has been held by this Court in paragraph 12. The question, as noted earlier, is whether in the present case the defendants were duly served or not. The Courts below after appreciating the material on record have concurrently held that the defendants were duly served. In view thereof, I do not find that the reliance placed by Mr. Kohli on the decision of this Court advances the case of the defendants.

17. Mr. Kohli relied upon the correspondence referred in earlier part of this order to contend that the plaintiffs were aware of the address of Mario Rodrigues, viz. 43-B, Palash Towers, Veera Desai Road, Andheri (W) Mumbai. However, no attempts were made by the plaintiffs to effect service on that address. As noted earlier, original defendant Lawrence Rodrigues was tenant. Original defendant Lawrence Rodrigues had made correspondence from the suit premises. Original Defendant Lawrence Rodrigues died on 23.4.2009. Perusal of e-mail dated 3.7.2005 shows that Shilpa Rodrigues informed plaintiff no.3

Masooma Dolaria that they have shifted to Canada. Communication dated 3.5.2008 of Lawrence Rodrigues shows the address of the suit premises. Money Order sent by Mario Rodrigues remitting rent of July, 2008 undoubtedly shows his address 43-B, Palash Towers, Veera Desai Road, Andheri (W), Mumbai. It is material to note that the said Money Order was remitted on 26.8.2008, that is to say, during the life time of original defendant Lawrence Rodrigues. The communication dated 8.9.2008 of Lawrence Rodrigues also shows the address of the suit premises. On 27.5.2009 Mario Rodrigues addressed a letter to Fatima Dolaria and the address shown was that of the suit premises and not 43-B, Palash Towers, Veera Desai Road, Andheri (W), Mumbai. I, therefore, do not find any merit in this submission. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

18. At this stage Mr. Kohli orally applies for stay of this order for eight weeks from today. He assures that within two weeks from today, the petitioners and all the adult family members residing in the suit premises will give usual undertaking with advance copy to other side incorporating therein:

(i) that they are in possession of the suit premises and nobody else is in possession;

(ii) that they have neither created any third party interest nor parted with possession;

(iii) that they will hereafter neither create third party interests nor part with possession;

(iv) that they will pay arrears of rent, if any, within 2 weeks from today;

(v) that they will not apply for further extension of time;

(vi) that in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondents.

19. In view thereof, notwithstanding dismissal of the petition, subject to the petitioners filing undertaking in the aforesaid terms within two weeks from today, this order shall remain stayed for a period of eight weeks from today.

20. It is made clear that in case the undertaking is not filed and/or arrears are not paid within two weeks from today, interim order shall stand vacated without further reference to the Court. Order accordingly.

21. List the Petition for reporting compliance after three weeks.

(R.G.KETKAR, J.)