

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5824 OF 2015

MRS. SAKINA ABBAS SHELIA
AND ORS

...Petitioners

Versus

MRS. AMTUBAI IBRAHIM NIMUCHWALA
AND ANR

...Respondents

....

Mr. Deepak Chitnis i/b. M/s. Deepak Chitnis-Chiparikar & Co.
for the Petitioners.

Mr. Ahmed Saeed Uraizee a/w. Mandesh Kumar Vijay Singh, for
Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 2nd FEBRUARY, 2016

P.C.

1. Heard Mr. Deepak Chitnis, learned Counsel for the petitioners and Mr. Ahmed Uraizee, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs', have challenged the judgment and order dated 16.2.2015 passed by learned Judge, presiding over Court Room No.23 of the Court of Small Causes Court at Mumbai below Exhibit-1 in Marji

Application No.741/2014 in R.A.E. Suit No.37/56 of 2013. By that order, learned trial Judge allowed the application made by the respondents, hereinafter referred to as 'defendants' under Order 9 Rule 13 of Code of Civil Procedure, 1908 (for short, 'CPC') and set aside exparte decree dated 30.7.2014 passed in R.A.E. Suit NO.37/56 of 2013 passed by learned trial Judge and restored the Suit to its original number.

3. Mr. Chitnis strenuously contended that the defendants are not residing in the suit premises. The plaintiffs instituted the suit against the defendants on three grounds, namely, (i) bonafide requirement, (ii) non-user and (iii) arrears of rent. He submitted that the suit was instituted on 26.12.2012. The bailiff had visited the suit premises on 11.1.2013, 15.1.2013 and 16.1.2013. As the premises were found locked, applications at Exhibits-13 and 14 were made on 17.1.2013 for leave to serve defendant Nos.1 and 2 by substituted service under Order 5 Rule 20 of CPC for affixing/pasting application Exh.9 for injunction on the last known address of the defendant Nos.1 and 2 and affixing/pasting the written statement of defendant Nos.1 and 2 on the last known address.

4. By order dated 17.1.2013 learned trial Judge allowed the applications and in pursuance thereof the defendants were served by way of substituted service. In short, he submitted that despite service of summons, defendant Nos.1 and 2 remained absent. Learned trial Judge therefore passed ex parte decree. Defendant Nos.1 and 2 applied under Order IX Rule 13 for setting aside ex parte decree passed against them. By the impugned order, learned trial Judge has allowed the application and set aside the ex parte decree. He submitted that learned trial Judge is not justified in setting aside the ex parte decree on that ground.

5. On the other hand Mr. Uraizee supported the impugned order. He relied upon the decision of this Court in the case of **Shri Lal Mohammed Mestry vs. Shri Abdul Sakur Abdul Gafoor & Anr., 2002 (4) ALL MR 420.**

6. I have considered the rival submissions of learned Counsel for the parties. I have perused the material on record.

7. In the case of **Lal Mohammed Mestry (supra)**, this Court while dealing with the substituted service under Order V

Rule 20 of CPC observed that the application for substituted service cannot be allowed as a matter of course and in casual manner. The record must disclose the satisfaction of the Court about avoidance of service of summons in regular course by the defendant and necessity for allowing such substituted service of summons. It is also to be borne in mind that service of summons is not an idle formality. It has to be an effective service so that the persons against whom proceeding are initiated get sufficient and fair opportunity to defend their rights.

8. In the present case, the plaintiffs made applications at Exhibits-13 and 14 on 17.1.2013. On these applications, learned trial Judge passed the following order :

“ Q
Allowed as prayed.
Sd/- Judge 17.1.2013”

9. By applying the tests laid down in the case of **Lal Mohammed Mestry (supra)** it has to be held that the learned trial Judge allowed the applications Exhibits-13 and 14 in a most casual manner. Learned trial Judge did not record satisfaction about avoidance of service of summons in regular

course by the defendants as also necessity for allowing such substituted service of summons. In view thereof, I do not find that learned trial Judge committed any error in passing the impugned order. Hence, the petition fails and the same is dismissed. The petitioners are at liberty to take out appropriate proceedings for deciding the suit in a time bound manner. If such application is taken out, the learned trial Judge will pass appropriate orders thereon. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)