IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6531 OF 2014

Sunil Dwarkanath Amrute and Anr. ..Petitioners.

Vs

Sunita Vivek Deshpande and Ors .. Respondents

Mr. A.A.Garge i/b Kashyap Bhalerao, Advocate for Petitioners.
Mr. Manmohan A Dudhane , Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 15/06/2016

PC:

1. Heard Mr. A.A.Garge, learned counsel for the petitioners and Mr.Manmohan Dudhane, learned counsel for the respondents at length.

2. Rule. Mr.Dudhane waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up finally.

3. By this Petition under Article 227 of the Constitution of India, the original plaintiffs have challenged the Judgment and order dated 20.2.2014 passed by the learned Jt. Civil Judge, Jr. Dn., Kalyan below Exhibit-1 in M.A.No.188 of 2010. By that order, the learned trial Judge allowed the application filed by the respondents under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') for setting aside exparte

decree dated 6.4.2010 passed in R.C.S. No.564 of 2009.

4. Mr. Garge submitted that in paragraph 16 the learned trial Judge recorded that the suit summons in R.C.S.No.564 of 2009 were served on the respondents on the suit address along with paper publication. The case of the respondents is that the petitioners were aware of their current address. The learned trial Judge observed that after considering the case of the respondents, the onus had shifted on the petitioners herein to prove that they were not aware about the current address of the respondents. The petitioners did not enter into witness-box nor led any evidence to prove this fact. The learned trial Judge further observed that no evidence is brought before the Court to show that the newspaper in which the summons were published, is a popular and widely circulated newspaper. The summons under Order V, Rule 20 were issued in 'Dainik Kokan Sakal' newspaper. Mr. Garge submitted that the learned trial Judge committed serious error in paragraph 16 in observing that it was also admitted fact that respondents herein did not reside on the suit address. In paragraph 17, the learned trial Judge observed that the respondents' witness and in the pleadings, they have claimed that the petitioners herein were aware of their current address. Considering this defence, the onus is shifted on the petitioners to prove that they were not aware of the

current address of the petitioners. The learned trial Judge further observed that the petitioners herein did not enter into witness box nor lead any evidence to prove the said fact. The learned trial Judge further observed that the summons was not duly served on the respondents. Mr. Garge submitted that the impugned order suffers from several errors of law apparent on the face of the record and deserves to be set aside. He further states that the petitioners have executed decree and have obtained possession. He invited my attention to the possession receipt dated 19.8.2010 to substantiate that the petitioners have obtained possession.

5. On the other hand, Mr. Dudhane supported the impugned orders. He submitted that on 9.7.2008 respondents gave notice through Advocate Deepali Pednekar to petitioner no.1. From this notice, it is evident that the petitioners were aware of current address of the respondents. However, the suit summons was not issued at the current address of the respondents and was served on the suit address along with the paper publication. He further submitted that basically the petitioners did not make out a case for issuing notice under Order V, Rule 20 of C.P.C. It is in that context the learned trial Judge rightly observed that the petitioners were aware of the current address of the respondents. The onus was shifted on the petitioners to prove that they were

not aware about current address of the respondents. The petitioner also did not enter into witness box and did not establish the said fact. He, therefore,submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the exparte decree was passed against the respondent on 6.4.2010. Mr Dudhane relied upon notice dated 9.7.2010 served on their behalf through advocate to petitioner no.1. Perusal of this notice does not indicate that the respondents have mentioned their address where they are currently residing. In paragraph 16, the learned trial Judge observed that “it is also admitted fact that the applicants (respondents herein) did not reside on the suit address”. During the course of hearing, query was made to Mr Dudhane to show where the petitioners-plaintiffs have admitted that the respondents are not residing on the suit address. He was not in a position to point out any so-called admission of the petitioners. In paragraph 17, the learned trial Judge observed that the respondents' witness and from their pleadings they have claimed that the petitioners were aware of the current address of the respondents. It is not possible to accept this submission as

the said finding is not prima facie supported by any material. The petitioners had taken steps to serve the respondents and thereafter the suit summons was served on the last known address. As the respondents have not established that their current address was known to the petitioners-plaintiffs, the learned trial Judge was not justified in allowing the application on that premise. Hence, the impugned order cannot be sustained and the same is liable to be set aside, thereby restoring Misc. Application No.118 of 2010.Hence the following order.

7. Impugned order is set aside. Misc. Application No. 118 of 2010 is restored to file. The learned trial Judge will decide the application as expeditiously as possible and preferably within six months from production of the authenticated copy of this order. All contentions of the parties on merits are expressly kept open. The learned trial Judge will decide the application uninfluenced by the observations made in this order. Rule is made absolute in above terms with no order as to costs.

(R.G.KETKAR, J.)