

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

WRIT PETITION NO.6482 OF 2016

Mr. Sahilesh Balchandra Patil & Ors.

.. Petitioners

Vs

Smt. Sunita Ramnath Mahtre & Ors.

.. Respondents

Mr. Reshant Shah i/b. M/s. Lex Conseiller for the Petitioners.

Mr. Hira Gummala for the Respondent Nos. 1 to 3.

***CORAM : N.M.Jamdar, J.
Tuesday, 29 November 2016.***

P.C. :

. The Petitioners have challenged the concurrent judgment and orders passed by the Small Causes Court, Bandra dated 17 December 2014 and the Appellate Bench of Small Causes Court dated 6 May 2016, whereby the application taken out by the applicant under Order 9 Rule 13 of Code of Civil Procedure for setting aside the ex-parte decree has been rejected.

2. The Respondent-landlord instituted R.A.E. Suit No.236/466 of 2007 for eviction of the original tenant i.e. Balchandra Patil. The suit was filed on the basis that the suit premises have not been used for a period of six months prior to the institution of suit without any sufficient cause and that the tenant has sublet the suit premises to one M/s. Rayyan Network Marketing Pvt. Ltd., when

the premises were let out only for residential purposes. The suit summons was issued. The bailiff submitted a report that attempt was made to serve the original tenant on 26 June 2007, 29 June 2007 and 7 July 2007 and the premises were locked and the whereabouts were not known. The learned Small Causes Judge permitted substituted service. Thereupon the notice was pasted and also a notice was issued in the news paper i.e. Free Press General. Thereof, by judgment and order dated 2 March 2009 the suit was decreed. Execution proceedings were initiated and the Respondents took the possession of the property. An application was taken out by the original-tenant for setting aside the ex-parte decree on the ground that the suit summons was not validly served. This application was rejected by the learned Small Causes Court Judge by order dated 17 December 2014 and the order was confirmed by the Appellate Bench on 6 May 2016.

3. Heard the learned counsel for the parties. The original-tenant has passed away during the hearing of the appeal and the cause is being prosecuted by his son and daughters.

4. The learned counsel for the Petitioners firstly submitted that the landlord was fully aware of the whereabouts of the original tenant and suppressing these facts, an application was taken out for substituting service, which is not in compliance with Order 5 of the Code of Civil Procedure. He relied on the decision of the learned Single Judge of Gauhati High Court in the case of *Shila Nath Malik*

& Ors V/s. Balabhadra Sutradhar & Ors reported in AIR 1992 GAUHATI 121. The learned counsel for the Respondent-landlord on the other hand submitted that the case of the Petitioners is replete with contradictions and no knowledge can be imputed to Respondent-landlord.

5. The contention of the learned counsel for the Petitioners cannot be accepted. This letter itself indicates that it is in response to letter of the original-tenant which is undated. There is no written communication by the original-tenant to the Respondent-landlord putting the landlord to notice that currently the original tenant is residing with its son or daughter and correspondence should be made to him there. This is relevant as parties seem to be have exchanged correspondence earlier. The only allegation i.e. made that the Respondent aware that the tenant was residing with the son.

6. The ground on which suit is filed cannot be lost sight of. It is a clear assertion that there was non-user of premises therefore the original tenant was not found at the premises. As far as the Respondent-landlord is concerned, the suit summons had to be issued to the suit premises. It was for the Petitioner either be present in the suit premises to collect the same. The learned counsel for the Respondent has rightly pointed out that the contradictory case put up by the Original-tenant. On one hand it is held it is contended that the original tenant was frequently going to his son's premises were near

by, and on the other hand it is submitted that he was seriously ill during this period and staying at his daughter's place. If the original tenant was frequently visiting the suit premises and he was staying close, it is impossible that he will notice the suit summons pasted in the year 2007. Other case put up is that the original tenant was unwell and he was residing with his daughter in another town i.e. at Palghar. How the landlord will be aware of this position is not explained. Therefore both the Courts have appreciated this position and have come to the conclusion that as far as Respondent-landlord is concerned the Respondent-landlord issued the suit summons which was admittedly had to be served on the suit premises and the premises were locked. There is no communication from the original tenant informing the landlord, that the temporary address is of his son's address. If the original tenant was frequently visiting the premises as stated then he would aware of pasting of suit summons which was done in the year 2007 itself. As far as the knowledge of the Respondent-landlord is concerned, learned counsel for the Petitioner heavily relied on the letter dated 17 January 2007 issued to the original-tenant by the Respondent-landlord at an address of his son of the original-tenant. According to the learned counsel for the Petitioner this letter clearly shows that the Respondent landlord knew the whereabouts of the original tenant. The learned counsel for the Respondent pointed out that by this order the Respondent had merely replied to a letter issued by the Original-tenant to the landlord on the same address from where it was issued.

7. Both the Courts have entered concurrent findings regarding the validity of the suit summons. As far as the procedure adopted by the Respondent-landlord is concerned, after the suit was instituted suit summons has been issued, the bailiff attempted to serve the summons for at least three occasions when the premises were found locked. Thereafter an application for substituting service is made which is granted by the Court pursuant to which notice has been pasted on the suit premises and also a public notice is issued. Therefore no fault can be found with the procedure adopted with the Respondent-landlord.

8. In these circumstances, there is neither any error of jurisdiction nor any failure of justice. The original tenant is now no more and his son and daughter are residing elsewhere. In the circumstances, no interference is warranted in power of superintendence of this Court. The Writ Petition is rejected.

(N.M.Jamdar, J.)