

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5516 OF 2015

Veena Valmik Fulare ... Petitioner
Vs.
Vincent Gabriel Gomes ... Respondent

Mr. G. C. Sawant for Petitioner.
Mr. Santosh T. Kanchar for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 28, 2016

P.C. :

Heard Mr. Sawant, learned Counsel for the petitioner and Mr. Kanchar, learned Counsel for the respondent at length. Mr. Kanchar assures that within one week from today, he will file appearance on behalf of the respondent.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 22.04.2015 passed by the learned Appellate Bench of Small Causes Court in Revision Application No.371 of 2014. By that order, the appellate Court allowed the Revision Application filed by the respondent, hereinafter referred to as 'plaintiff' and quashed and set aside the judgment and order dated 13.10.2014 passed by the learned Judge presiding over Court Room No.25 in Marji Application No.214 of 2013 and rejected the application filed by the petitioner under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. Respondent had instituted Suit against the petitioner, hereinafter referred to as 'defendant' namely R.A.E. & R. Suit No.1213/1961 of 2011. In that Suit, defendant was duly served with the suit summons at exhibit-7. Despite that, defendant failed to appear in the Court and the

Suit was proceeded ex-parte against her. By the judgment and decree dated 21.08.2012, the learned trial Judge decreed the Suit under Section 15 of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the defendant to hand over vacant and peaceful possession of Room No.14, Chawl No.4 situate at Vincent Garbriel Gomes Chawl, Gomes Colony, Kanjur Village, Kanjur Marge (East), Mumbai 400 042 (for short 'suit premises') within two months from the date of the decree. Defendant filed Marji Application No.214 of 2013 on or about 13.01.2014 under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree as also for condoning the delay in filing the application. By order dated 13.10.2014, the learned trial Judge allowed the application and set aside the ex-parte decree. Aggrieved by that decision, plaintiff preferred Revision Application before the appellate Court, which is allowed by the impugned order. It is against this order, defendant has instituted the present Petition.

4. In support of this Petition, Mr. Sawant strenuously contended that defendant was served with the suit summons. She is an illiterate lady. She cannot read. She was not in a position to engage Advocate because of bad economic conditions. She came to know about passing of the decree on 11.03.2013 and thereafter application was taken out on 13.01.2014. He also invited my attention to the reasons given in the Marji Application and more particularly, paragraphs 3, 8 and 16-A. He submitted that defendant's husband expired on 10.11.2005. Defendant was under impression that plaintiff had filed Suit against her husband and since 1993, plaintiff is in habit of sending notices to her husband. He, therefore, submitted that the delay in filing the application under Order IX, Rule 13 is neither intentional nor deliberate and the same may be condoned as also the ex-parte decree may be set aside.

5. On the other hand, Mr. Kanchar supported the impugned order.

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 and is rather a matter of record that defendant was duly served with the suit summons. In paragraph 7, the appellate Court recorded that the suit summons at exhibit-7 was duly served upon the defendant on 28.12.2011. Despite service, defendant did not appear in the matter. The Suit was thereafter directed to proceed ex-parte against the defendant. The ex-parte decree was passed on 21.08.2012. Plaintiff filed proceedings for execution. He also requested for issuing warrant of possession for handing over possession of the suit premises against the defendant. Instead of issuing warrant of possession, the learned trial Judge passed order below exhibit-3 dated 12.12.2012 to issue notice to the defendant under Order 21, Rule 22 of C.P.C. Bailiff tried to serve the notice issued under Order 21, Rule 22 to the defendant on 19.12.2012, 27.12.2012 and 12.01.2013. Defendant was not found at the suit premises and the suit premises was locked. Plaintiff, therefore, filed application for issuing notice under Order 21, Rule 22 to the defendant by substituted service i.e. by pasting and R.P.A.D. On 02.02.2013, when the Bailiff along with the plaintiff had been to the suit premises for effecting services, defendant was present in the suit premises. Bailiff tried to serve the notice on the defendant. She, however, declined to accept the notice of execution. Bailiff, therefore, pasted the notice of execution under Order 21, Rule 22 of C.P.C. on the suit premises on 02.02.2013. Defendant has thereafter filed the present application for setting aside ex-parte decree after condoning the delay. Thus, from the narration of above facts, it is evident that defendant was served with the suit summons as far back as on 28.12.2011. Application under Order IX, Rule 13 is filed on 13.03.2013. Article 123 of the Limitation Act prescribes period of limitation of 30 days for setting aside the ex-parte decree and the period of 30 days begins from the date

of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree. In the present case, it is not the case of the defendant that summons or notice was not duly served on her. Rather it is admitted position that defendant was served with the suit summons on 28.12.2011. The ex-parte decree was passed on 21.08.2012. The application is made on 15.03.2013. In the application under Order IX, Rule 13, defendant has contended that she acquired knowledge of the ex-parte decree on 13.03.2013 when she approached her Advocate for taking necessary steps. The said explanation cannot be accepted. The period of limitation will begin from 21.08.2012 and not from 13.03.2013.

7. As far as the other explanation that defendant is illiterate and uneducated is concerned, during her cross-examination, she admitted that her daughter Shraddha is major. She is residing with the defendant. The Appellate Court, therefore, observed in paragraph 11 that the explanation given by the defendant for condonation of delay is not satisfactory. I do not find that the appellate Court committed any error in that regard. The appellate Court rightly held that defendant had not made out sufficient cause for condoning the delay. Defendant was not in a position to demonstrate that the findings recorded by the appellate Court are perverse being based on no evidence or that on the basis of evidence on record, no reasonable person could have come to that conclusion. 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.

8. At this stage, Mr. Sawant orally applies for continuation of the ad-interim order for the period of eight weeks from today. He states that the defendant is in possession and nobody else is in possession. The

defendant has neither created third party interest nor parted with possession. She will hereafter neither create third party interest nor part with possession. He assures that within two weeks from today, defendant and all the adult family members residing with her will file usual undertaking incorporating therein that,

- i) they are in possession and nobody else is in possession of the suit premises;
- ii) they have neither created third party interest nor parted with possession of the suit premises;
- iii) they will hereafter neither create third party interest nor part with possession of the suit premises;
- iv) they will pay up-to-date arrears of rent to the plaintiff within two weeks from today;
- v) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will vacate and handover vacant and peaceful possession of the suit room to the plaintiff;

9. Subject to the defendant and all the adult family members residing in the suit premises filing undertaking in the aforesaid terms within two weeks from today after giving advance copy to the other side, this order shall remain stayed for a period of eight weeks from today. It is made clear that in case the defendant does not file undertaking within two weeks from today, the ad-interim order shall stand vacated without further reference to the Court.

10. List the Application for 'reporting compliance' after three weeks.

(R. G. KETKAR, J.)