

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7571 OF 2016

Smt. Jayanti Mahabal Shetty And Ors ...Petitioners

Versus

Shri. Prafulla Mukund Kharote ...Respondent

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Ms. Vinaya S. Shetye, Advocate for the Petitioners.

Mr. Neel G. Helekar, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 14th SEPTEMBER, 2016

P.C.

1. Heard Ms. Vinaya Shetye, learned Counsel for the petitioners and Mr. Neel Helekar, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged judgment and order dated 17.10.2014 passed by the learned Judge, presiding over Court Room No.21 in Marji Application No.468/2014 as also judgment and order dated 6.2.2016 passed by Appellate Bench of the Court of Small Causes at Bombay in (Misc.) Appeal No.493/2014. By these orders, the Courts below rejected the application made by the petitioners, hereinafter referred to as the 'defendants', under Order IX Rule 13 of Code of Civil Procedure, 1908 (for

short, 'C.P.C.') for setting aside *exparte* decree dated 10.5.2013 passed by the learned trial Judge in R.A.E. Suit No.171/1142 of 2012.

3. In support of this Petition, Ms.Shetye strenuously contended that the suit summons was not duly served on the defendants. She has taken me through the bailiffs reports [1] dated 8.8.2012 and 13.8.2012 at Exhibit-7, [2] dated 29.8.2012 and [3] dated 25.9.2012. She submitted that the respondent filed application dated 7.9.2012 praying for serving the defendants by substituted service by pasting the notice on outer door of the suit premises and copy of the plaint to be sent by R.P.A.D. upon the defendants. On 12.9.2012, the learned trial Judge directed issuance of the summons to the defendants under Order V Rule 20 of C.P.C. and by R.P.A.D. on payment of process fees. She submitted that however neither the plaintiff nor the Court ordered issuance of public notice by way of substituted service. She also invited my attention to three packets bearing endorsement 'closed' dated 20.9.2012 and 'intimation posted' dated 21.9.2012. In short, she submitted that the defendants are not served by the suit summons even by substituted service under Order V Rule 20 of CPC.

4. Ms. Shetye invited my attention to paragraph-4 of the affidavit of examination-in-chief of the plaintiff under Order XVIII Rule 4 of C.P.C. In paragraph-4, the plaintiffs

alleged that the defendants have acquired suitable alternate accommodation somewhere else in Mulund shifted their residence. She submitted that the plaintiff was thus aware of the address of the defendants and despite that did not make any attempt to serve the suit summons on the defendants address in Mulund.

5. Ms. Shetye has invited my attention to the application made by the defendants under Order IX Rule 13 of C.P.C. as also application for condoning the delay in filing application under Order IX Rule 13 of C.P.C. She submitted that the building where the suit premises is situate is in a dilapidated condition. Even Municipal Corporation of Greater Mumbai [for short, 'Corporation'] had issued notice for repairs but the plaintiffs did not carry out repairs in the suit premises. Even other tenants have issued notice calling upon the plaintiffs to carry out the repairs. As the plaintiffs did not carry out repairs of the building, the defendants had no alternative but to obtain premises on leave and licence basis. She submitted that the Courts below were not justified in rejecting the application for condonation of delay on the ground that no sufficient case is made out. She submitted that the defendants acquired knowledge about passing of exparte decree on 13.5.2014 and the application under Order IX Rule 13 of C.P.C. was filed on 8.8.2014. Thus there is delay of about 85 days caused in filing the application. The Courts below

should have adopted liberal approach while condoning the delay.

6. Ms.Shetye submitted that because of the dilapidated condition of the building, the defendants have shifted elsewhere. It is also not possible to accept this submission as no material is produced on record calling upon the plaintiff to carry out repairs. In fact in paragraph-11 of the reply the plaintiff has asserted that he is staying along with his family in the building where the suit premises is situate. He has also annexed report dated 22.5.2013 submitted by System Structural Consultants Pvt. Ltd. to the effect that the building is out of danger and the structure is safe for the purpose for which it is intended. For all these reasons, she submitted that the petition requires consideration.

7. On the other hand, Mr. Helekar supported the impugned orders. He submitted that the bailiff had visited the suit premises on 8.8.2012, 13.8.2012 and 29.8.2012. On all these dates, after making enquiries, the bailiff found that the defendants are not residing in the suit premises. The plaintiff, therefore, filed application at Exhibit-9 for effecting service on the defendants by way of substituted service. After satisfying itself, the trial Court directed issuance of summons to the defendants under Order V Rule 20 and by R.P.A.D. Accordingly on 25.9.2012, bailiff

submitted report of affixing summons. He further submitted that despite service, the defendants did not particulate in the trial and exparte decree was passed on 10.5.2013. He submitted that even before executing decree, the bailiff had submitted reports dated 4.4.2014, 10.4.2014 and 25.4.2014. That time also, the defendants were not found in the suit premises. Ultimately warrant of possession was executed and possession was taken on 5.4.2014. On 13.5.2014, the lock was broken open and the defendants filed application under Order IX Rule 13 on 8.8.2014. He submitted that as per Article 123 of the Limitation Act, the time will start running from passing of the decree. The delay is of 456 days and not 85 days.

8. As far as the contention raised by the defendants that the suit premises is in dilapidated condition, he invited my attention to the report dated 22.5.2013 made by System Structural Consultants Private Limited as also reply dated 15.9.2014 filed by the plaintiff. In paragraph-10, the plaintiff relied upon the structural report as also contended that the plaintiff is residing along with his family in the building where the suit premises is situate. For all these reasons, he submitted that no case is made out for invoking powers under Article 227 of the Constitution of India more so when the decree is executed.

9. I have considered the rival submissions advanced

by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the defendants have instituted proceedings under Order IX Rule 13 of C.P.C. on 8.8.2014 principally on the ground that the suit summons was not served on them. It is, therefore, necessary to find out whether the suit summons was duly served on the defendants or not.

10. It is not in dispute that the plaintiff has instituted suit against the defendants on the ground of non-user as contemplated by Section 16[1][n] of the Act and reasonable and bonafide requirement as contemplated by Section 16[1][g] of the Maharashtra Rent Control Act, 1999 [for short, 'Act']. Perusal of the record shows that on 8.8.2012, Mr.M.S. Ilhe, bailiff made report. In that report it is specifically noted that he visited the suit premises on 8.8.2012 at about 10:00 a.m.. The defendants were not found and the door of the suit premises was found locked. He made enquiries with Ravinath Motwani, occupant of room No.10. He informed that the defendants have left the suit premises since 2 to 3 years and their present address is not known. Mr. Ilhe had also made affidavit to that effect.

11. Again on 13.8.2012, Mr. M.S. Ilhe, bailiff, submitted report. In that report it is stated that on 13.8.2012 at about 9:00 a.m. he visited the suit premises. The defendants were not found and the door of the suit

premises was found locked. On his enquiry with neighbouring lady of room No.11 [subsequently it has come on record that she was Ms.Railkar], she refused to give her name. She, however, informed him that the suit premises are locked since three years and present address of the defendants is not known to her.

12. On 29.8.2012, another bailiff M.R. Choudhari, visited the suit premises at about 5:20 p.m.. The defendants were not found and the suit premises were found locked. He made enquiries with Ms Railkar, resident of room No.11 and informed that the defendants have left the suit premises since last 2 to 3 years and their present whereabouts are not known to her. He also made affidavit dated 30.8.2012.

13. The plaintiff thereafter filed application dated 7.9.2012 setting out therein that the bailiff tried to serve the defendants on 8.8.2012, 13.8.2012 and 29.8.2012. Despite three attempts, the defendants were not found in the suit premises. The last known address of the defendants is mentioned in the cause title of the plaint. The defendants are deliberately avoiding writ of summons. He, therefore, prayed that the defendants may be allowed to be served with substituted service by pasting notice upon the outer door of the suit premises and copy of the plaint be allowed to be sent by RPAD. On 12.9.2012, the learned trial

Judge passed following order :

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ORDER

Perused the application and record.

Heard Ld. Advocate for Plaintiff. It seems from the report of Bailiff that summons cannot be served as Defendant No. 1 to 3 were not found on given address. Therefore, it appears that said summons cannot be served in ordinary way to Defendants as they were not found after using due diligence. Hence, issue summons to Defendants under Order V Rule 20 of C.P.C. and by R.P.A.D. on P.F. as prayed.”

14. Perusal of above order shows that the learned trial Judge recorded satisfaction that the summons cannot be served in ordinary way the defendants as they were not found. The learned trial Judge, therefore, ordered issuance of summons under Order V Rule 20 of C.P.C. and by R.P.A.D. Accordingly on 25.9.2012, M.R. Choudhari, bailiff, visited the suit premises at 10:10 a.m. and made report. In the report it is stated that the defendants were not found at the suit premises and the suit premises was found locked. He made enquiries with Mr. Railkar, resident of room No.11 and was informed that the defendants have left the premises since last 2 to 3 years and present whereabouts are not known to him. As per order of the Court, he affixed three copies of summons along with three copies of plaint on the outer door at the suit premises in presence of Mr.

Railkar. He has also affixed three copies of summons along with three copies of summons along with three copies of plaint on the notice board in the Court. Said report is also affirmed by Mr. M.R. Choudhari. While passing exparte decree, the learned trial Judge has observed in paragraph-5 that the defendants were duly served with the suit summons. They did not appear and hence the suit proceeded exparte. The suit was decreed on 10.5.2013.

15. In the application under Order IX Rule 13 of CPC, the defendants have asserted that they acquired knowledge about passing of exparte decree on 13.5.2014 and the application under Order IX Rule 13 was made on 8.8.2014. The question is whether the suit summons was duly served on the defendants or not. It is also material to note that even before executing decree, the bailiff had made reports dated 4.4.2014 and 10.4.2014. In the report dated 4.4.2014, it is stated that the bailiff M.R. Choudhari visited the suit premises on 4.4.2014 at about 10:40 a.m.. The suit premises was found locked and the defendants were not found present. He made enquiries with Ms.Nirmala Railkar and Ms. Deepika Motiwale [residents of room Nos.11 and 10]. They informed that the suit premises was always locked and the defendants are not staying at the suit premises. Defendant No.2 seldomly visits the suit premises.

16. In the report dated 10.4.2014, bailiff M.R.

Choudhari stated that he reached the suit premises on 10.4.2014 at about 5:05 p.m. The suit premises was found locked. Defendants No.1 to 3 were not found. He made enquiries with Milind Railkar (resident of room No.11), Ms.Shobha Pradhan [resident of room No.8] and Ms.Mrunalini Panshikar (resident of room No.7). They informed him that the suit premises was always locked and defendants No.1 to 3 are not staying at above said suit premises since long back and their present whereabouts are not known. In the aforesaid circumstances, the writ of warrant could not be executed and returned.

17. The bailiff M.R. Choudhari also submitted report dated 25.4.2014 stating therein that he reached the suit premises on 25.4.2014 between 12:30 and 1:15 p.m.. Suit premises was found locked and the defendants were not present. He made enquiries with Mr. Railkar (resident of room No.11), Ms. Mamta Nitin Parab (resident of room No.6) and Mr.Shashikant Waman Kadam (resident of room No.3). He explained the purpose of visit and contents of writ of warrant of possession. On enquiries, he was informed that the suit premises is locked since 7 to 8 years. The defendants never attended the suit premises. As per order of the Court he broke open the lock of the suit premises with the help of keymaker who was appointed by the plaintiff.

18. In the application for condonation of delay as also in an application under Order IX Rule 13, the defendants have not disputed various bailiffs report. They have also not disputed that Ms.Shobha Pradhan (room No.8), Mr. Railkar (room No.11) and Ms.Panshikar (room No.7) are their neighbours. The defendants have also not made out any case of bias of these neighbours.

19. From narration of the above facts, it is abundantly clear that on three occasions, the bailiff tried the suit summons personally on the defendants. As they were not available, the plaintiff filed application at Exhibit-9 on 7.9.2012 and on the basis of order dated 12.9.2012, again bailiff attempted to serve the defendants. In the facts and circumstances of the present case, I am satisfied that the defendants were duly served with the suit summons. If that be so, the question is what is the limitation for filing application under Order IX Rule 13. Article 123 of Limitation Act reads thus :

	Description of application	Period of limitation	Time from which period begins to run
123.	To set aside a decree passed ex-parte or to rehear an appeal decree or heard ex-prate. <i>Explanation.- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be</i>	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

	<i>deemed to be due service.</i>		
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20. I have already held that the suit summons was duly served on the defendants and also by substituted service. The period of limitation will be 30 days from passing of the decree i.e. 10.5.2013. Application is admittedly made on 8.8.2014. Thus the delay is not 85 days, but, is more than 450 days. The Courts below have found that the defendants have not made out sufficient cause for condoning the delay. I do not find that the Courts below committed any error in that regard. Ms. Shetye submitted that paragraph-4 of the affidavit of examination-in-chief of the plaintiff shows that he was aware of acquisition of alternate accommodation by the defendants in Mulund. However, no attempts were made by him to serve the defendants. Relevant portion of that deposition reads thus :

“I say that the Defendants have acquired suitable alternative accommodation some where else in Mulund and shifted their residence and is not using the room for a continuous period of more than six months prior to filing of the suit.”

21. Perusal of said deposition clearly shows that no postal address was mentioned by the plaintiff. The defendants did not come with the case that they have intimated their address of Mulund or any other place to the

plaintiff. In view thereof, it cannot be stated that the plaintiffs were aware of the defendants address at Mulund. In view thereof, no case is made out for invocation of power under Article 227 of the Constitution of India more so when the decree is already executed. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)