

Kulsum Khan and another Vs. Pinakin Bhailal Amin and another	...	Petitioners Respondents
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Mr. Kunal Bhanage for Petitioners.
Mr.Vivek Walawalkar a/w. Mr.S.R.Ingale i/b. Mr.Prajot Jaggi for Respondents.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 17, 2016

Heard Mr. Bhanage, learned Counsel for petitioners and Mr. Walawalkar, learned Counsel for respondents at length. Rule. Mr. Walawalkar waives for respondents. Having regard to the controversy raised in the Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants' have challenged the judgment and order dated 24.03.2015 passed by the learned Judge presiding over Court Room No.17 of the Court of Small Causes, Mumbai in Marji Application No.659 of 2014 as also the judgment and order dated 22.08.2016 passed by the Appellate Bench of the Small Causes Court in Miscellaneous Appeal No.152 of 2015. By these orders, the Courts below dismissed the application made by the defendants under Order 9, Rule 13 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for setting aside the ex-parte decree dated 14.06.2014 passed by the learned trial Judge in R.A.E.& R.Suit No.829/1327 of 2012.

3. Respondents, hereinafter referred to as 'plaintiffs', instituted Suit

against the defendants for recovery of possession of room No.33 in Amin House, 15, Goa Street, Fort, Mumbai 400 001 (for short 'suit premises') inter alia invoking grounds under Sections 15, 16(1)(e) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). On 30.07.2012, summons was issued by the Small Causes Court. On 30.08.2012, Mrs. S. P. Kardak, Bailiff visited the suit premises at about 5.30 p.m. and submitted report to the effect that defendant No.1 (Kusum Khan, mother of defendant No.2 Khawaja Khan) was not found. On her inquiries with defendant No.2 Khawaja, he informed her that defendant No.1 is at Mira Road and there is no fixed time for her return. He showed willingness to accept the service. He willingly accepted the service / notice on behalf of his mother i.e. defendant No.1 and she obtained acknowledgment on the original notice.

4. Despite service, defendants did not appear before the trial Court. By judgment and order dated 11.06.2014, the learned trial Judge decreed the Suit on all the grounds. Defendants thereafter filed application under Order 9, Rule 13 of C.P.C. on 10.11.2014. This was opposed by the plaintiffs. After hearing both sides, the Courts below dismissed the application. It is against these orders, defendants have instituted the present Petition.

5. In support of this Petition, Mr. Bhanage strenuously contended that defendant No.1 was not duly served. He submitted that in paragraph 4, the learned trial Judge observed that the suit summons were sent to the defendants by registered post. Both the defendants were duly served. However, they did not turn up. He submitted that the learned trial Judge, while passing the ex-parte decree, did not even go through the Bailiff's report and observed that the suit summons were sent to the defendants by registered post. The learned trial Judge did not consider

whether defendant No.1 was served through defendant No.2 or not.

6. He submitted that basically, defendants came with two-fold contentions for setting aside ex-parte decree. In the first place, it is the case of the defendants that defendant No.1 is not duly served. Secondly, plaintiffs had instituted another Suit being R.A.E.&R. Suit No.1329 of 2012 against defendant No.1 Mohd. Shafi Munshi and defendant No.2 Khawaja Khan. Defendant No.1 therein is a grandfather of defendant No.2. He submitted that settlement talks were going on between the plaintiffs and other tenants. Defendant No.1 was also called upon by the plaintiff for settlement. It was agreed between the parties that upon payment of arrears of rent to the plaintiff, plaintiff will transfer the rent receipt of another room No.35 which is the subject matter of R.A.E.&R. Suit No.1239 of 2012 for the premium to be accepted by the plaintiffs from the defendants. Accordingly, the said Suit in respect of Room No.35 was settled upon payment of arrears and transfer fees. In other words, he submitted that defendants were under bonafide impression that even plaintiffs will settle the dispute in respect of the suit premises namely, room No.33 and because of this, defendants did not participate in the present Suit and this constitutes a sufficient cause.

7. Mr. Bhanage invited my attention to Order 5, Rule 15 of C.P.C. He submitted that while dismissing the application under Order 9, Rule 13, the Courts below did not record satisfaction about service of suit summons on defendant No.1. Assuming for the sake of arguments, defendants were duly served with the the suit summons, Courts below also did not record any finding as regards whether defendants have made out sufficient cause for not participating in the trial. The Courts below only recorded a finding on the question whether defendant No.1 was duly served or not. He, therefore, submitted that Petition requires

consideration.

8. On the other hand, Mr. Walawalkar invited my attention to paragraph 25 of the appellate Court judgment and in particular item No.6 in respect of Rojnama dated 07.09.2012 recording presence of defendant No.1. He also invited my attention to Marji application filed by defendants wherein no grievance was made about Bailiff's report. That apart, even the application under Order 9, Rule 13 is jointly filed by defendants No.1 and 2. He submitted that it is not in dispute that defendants No.1 and 2 are staying together in the suit premises. In other words, he submitted that defendant No.2 accepted the service on behalf of the defendant No.1, and therefore, the Courts below rightly came to the conclusion that defendant No.1 was duly served.

9. As far as the other ground namely, whether defendants have made out sufficient cause for not appearing in the trial Court despite service is concerned, he invited my attention to paragraph 61 of the appellate Court's order to contend that defendants did not adduce any evidence substantiating the said plea. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Suit instituted by the plaintiffs is decreed ex-parte. Defendants took out application under Order 9, Rule 13 of C.P.C. for setting aside ex-parte decree. Order 9, Rule 13 of C.P.C. so far as is material for deciding controversy raised herein, reads thus,

“13. Setting aside decree ex parte against defendants. - In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons

was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.”

11. Perusal of the above extracted provision shows that ex-parte decree can be set aside by the Court if the defendant satisfies the Court that - a) the summons was not duly served; or b) he was prevented by the sufficient cause from appearing when the Suit was called on for hearing.

12. It is the case of the defendants that defendant No.1 was not duly served with the suit summons. As observed earlier, on 30.08.2012, Bailiff has served suit summons on defendant No.1. The report reads thus,

“ Served a copy of this notice alongwith copy of plaint on within named def.no.2 at Room No.33, Amin House, 15, Goa Street, Fort, M-01 on 30/08/12 at 5.30 pm & obtained his ackn. on original notice as above.

But said def. no.1 was not found at the above said address, date & time. So, on my inquiries with her son Mr. Khawaja Khan i.e. def no.2, he informed me that said defendant No.1 is at Mira Rd, & no fixed time for her retn. But he shows his willingness to accept the said service.

So, he willingly accepted the said service (notice) on behalf of his mother i.e. D.no.1 & obtained his acknowledgment on original notice.”

13. The Bailiff had submitted a report after affirming the said report before the Senior Bailiff on 31.08.2012. Perusal of the report clearly shows that Bailiff went to serve the suit summons upon defendants No.1 and 2 on 30.08.2012 at 5.30 p.m. At that time, defendant No.1 was not found at the suit premises. Upon her inquiries with defendant No.2, he informed her (Bailiff) that defendant No.1 is at Mira Road and there is no fixed time for her return. He showed his willingness to accept the said service. As defendant No.2 willingly accepted service on behalf of

his mother - defendant No.1 and obtained acknowledgment on the original notice, the Bailiff effected service on defendant No.1 through defendant No.2.

14. In view of Order 5, Rule 15 of C.P.C., it has to be held that defendant No.1 is duly served through defendant No.2. Perusal of Rojnama of 07.09.2012, which is reproduced by the appellate Court in paragraph 25 records presence of defendant No.1 and in her presence, Suit was adjourned to 01.10.2012. Perusal of the application under Order 9, Rule 13, and in particular paragraph 14 shows that defendant No.2, after receipt of writ of summons, contacted Advocate. She had immediately taken inspection of the Suit on 08.11.2014 and applied for certified copies of entire proceedings as plaintiffs did not serve upon the defendants any proceedings of the Suit. Thus, the application under Order 9, Rule 13 is taken out by the defendants after taking inspection of the entire record of the Suit. Perusal of the application does not even remotely indicate any grievance made by the defendants as regards Bailiff's report dated 30.08.2012. It also does not remotely indicate any grievance made about Rojnama dated 07.09.2012. That apart, admittedly, defendants No.1 and 2 are residing in the suit premises. Even the application under Order 9, Rule 13 is jointly made by defendants No.1 and 2. In view thereof, it has to be held that defendant No.1 was duly served with the suit summons through defendant No.2. It's a valid service as per Order 5, Rule 15 of C.P.C. It is not the case of the defendant No.2 that he was not served with the suit summons. In other words, there is hardly any ground for doubting the correctness of the Bailiff's report. Mr. Bhanage submitted that the Courts below did not record satisfaction about the service on defendant No.1. I do not find any merit in this submissions, for the reasons recorded earlier. In view thereof, it has to be held that defendants were duly served with the

suit summons.

15. The next question is whether defendants have made out any sufficient cause that prevented them from appearing in the trial Court. Perusal of the impugned orders does not show that the Courts below have considered this aspect. The learned trial Judge has framed issues, which are to the following effect:

<u>POINTS</u>	<u>FINDINGS</u>
1 Whether the present application is filed within the period of limitation?	In the negative.
2 Whether defendants / judgment debtors shows that, suit summons was not duly served on defendant No.1?	In the negative.
3 Are defendants entitled for the reliefs as claimed?	In the negative.
4 What order?	As per final order.

16. Perusal of the above issues shows that the learned trial Judge did not even frame issue as to whether defendants have made out any sufficient cause that prevented them from appearing in the Suit. Perusal of the points framed by the appellate Court, and in particular point No.2, shows that the appellate Court framed point as to “whether both the defendants are prevented due to sufficient cause from appearing in the suit when the suit was called on for hearing”. The discussion shows that the appellate Court mainly concentrated on the question as to whether defendant No.1 was duly served or not. Perusal of paragraph 61 also shows that the appellate Court observed that defendant No.1 was aware of filing of the Suit against her. The appellate Court also noted that parties did not adduce any evidence to substantiate their case. Perusal of the order of the appellate Court does not indicate that the appellate court recorded any finding on the second ground namely, whether defendants were prevented by any sufficient cause from appearing when the Suit

was called for hearing. Perusal of paragraphs 10 to 13 of Marji Application shows that defendants have pleaded cause that prevented them from appearing in the trial Court.

17. In view thereof, the impugned orders cannot be sustained and the same are liable to be quashed and set aside thereby restoring the Marji Application for deciding the same afresh. It will be open to the parties to lead evidence in support of their case, if they so desire. Parties agree that they will appear before the learned trial Judge on 15.11.2016 and for that purpose, no fresh notice be issued to them. Hence, the following order:

a. the impugned orders dated 24.03.2015 and 22.08.2016 are quashed and set aside;

b. Marji Application No.659 of 2014 is restored to the file of the trial Judge;

c. Parties are permitted to adduce evidence in support of their cases, if they are so advised. The said exercise shall be completed within three months from the date of appearance of the parties;

d. Parties will appear before the learned trial Judge on 15.11.2016 and for that purpose, no fresh notice be issued to them. Parties will extend full co-operation for recording of evidence and will not seek undue adjournments;

e. The learned trial Judge is requested to decide the application within 3 months from completion of the recording of evidence;

f. All contentions of the parties, except the contention of defendants that defendant No.1 was not served, are expressly kept open;

g. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)