

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.400 OF 2015**

Shri Shivaji Daji Neghulkar

..Applicant

Vs

Mrs. Baijnabai Alibhoy, since
deceased, and Ors

.. Respondents

Mr. Govind Solanke i/b Mr. Pratap Patil Advocate for Applicant.
Mr. Pradeep J. Thorat and Ms. Pratibha Shelke Advocate for
Respondents.

CORAM : R.G.KETKAR,J.
DATE : 14/06/2016

PC:

1. Heard Mr. Govind Solanke, learned counsel for the applicant and Mr. Pradeep Thorat, learned counsel for the respondents at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant has challenged the Judgment and order dated 11.7.2006 passed by the learned Judge, presiding over Court Room no. 38 of the Court of Small Causes at Mumbai (Bandra Branch) in Misc. Notice No. 346 of 2005 as also the Judgment and order dated 23.12.2011 passed by the Appellate Bench of the Small Causes Court in Misc. Appeal No. 413 of 2006. By these orders, the Courts below dismissed the proceedings instituted by the applicant, hereinafter referred to as

'defendant no.2' under Order IX, Rule 13 of C.P.C. for setting aside exparte decree dated 16.8.2003 passed in R.A.E. & R. Suit No. 1333 of 1986.

3. In support of this Application, Mr. Solanke submitted that defendant no.2 was not served with suit summons on 6.3.1998. The signature appearing on the suit summons is not his signature. His signature is fabricated. He does not sign in Marathi. However, the suit summons indicates that defendant has signed in Marathi. In short, he submitted that defendant no.2 did not receive the suit summons. He came to know about passing of the exparte decree only when notice of execution was served on him in the month of January, 2005. He, thereafter, contacted lawyer and collected certified copies and thereafter took out proceeding under Order IX, Rule 13 of C.P.C. for setting aside exparte decree after condoning the delay in filing the application. The Courts below, however, rejected the application on the ground that no sufficient cause is made out. He, therefore, submitted that the application requires consideration.

4. On the other hand, Mr. Thorat submitted that the plaintiff had instituted the suit in the year 1986 against Anusayabai Daji Neghulkar, since deceased, hereinafter referred to as original defendant. Original defendant accepted the service of writ of summons on 5.4.1986. During pendency of the suit, plaint was

amended and copy of the amended plaint was served on her 30.11.1995. Again notice for amending the plaint was taken out for joining defendant no.2. The said notice was also served on the defendant no.2 on 6.3.1988. He, therefore, submitted that initially original defendant was served in the year 1986 and in the year 1995 and even defendant no.2 was served in the year 1998. Despite service of the suit summons, no written statement was filed as also he did not participate in the trial Court. Mr. Thorat, therefore, submitted that no case is made out for setting aside exparte decree by setting aside the impugned orders.

5. 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 plaintiffs have instituted the suit in the year 1986. The suit was instituted against the original defendant and the suit summons was served on her on 5.4.1986. Despite that, original defendant did not file written statement. During the pendency of the suit, plaint was amended. Amended plaint was also served on the original defendant on 30.11.1995. Even then no written statement was filed. It appears that after the death of original defendant, her legal representatives were brought on record. The suit summons was served on the defendant no.2 on 6.3.1998. Perusal of the application filed by the defendant shows that no explanation,

worth the name, is given for not filing written statement after service of suit summons in the year 1986 as also after service of the amend plaint in the year 1995. The only explanation offered by him is that suit summons does not bear signature of defendant no.2. The learned trial Judge has considered this aspect and observed that defendant no.2 did not substantiate his plea that signature dated 6.3.1998 was forged and copied by somebody else. Mere allegations of forged signature are not sufficient to prove the allegations. The learned trial trial Judge further observed that in the application, defendant no.2 contended that he acquired knowledge about passing of the decree in January 2005 and did not file application within 30 days from that date. The learned trial Judge on merits as also on the ground that it is barred by limitation discharged the notice.

6. Aggrieved by that decision, defendant no.2 preferred appeal. The Appellate Bench observed that Misc.Notice was taken out on 11.7.2005 though defendant no.2 acquired knowledge about passing of the decree in January 2005. In view of Article 123 of the Limitation Act, the proceedings is barred by limitation. The Appellate Court, therefore, held that as the suit summons was served, no sufficient cause is made out for setting aside ex-parte decree. Despite service of suit summons, the defendant chose to remain absent in the proceedings.

7. After considering the submissions advanced by the learned counsel appearing for the parties, I do not find that any case is made out. The applicant was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of evidence on record, no reasonable person would have come to the conclusions arrived at by the courts below. In the light of the aforesaid discussion, I do not find that the applicant has made out any case for invocation of powers under section 115 of C.P.C. In the result, Application fails and the same is dismissed.

(R.G.KETKAR, J.)