

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

CIVIL REVISION APPLICATION NO. 242 OF 2016

Shri Inamulla

..Applicant

Vs

1.Shri Kedarnath Majadev Tiwari
and Anr.

.. Respondents

Mr. K.K.Pandey, Advocate for Applicant.

CORAM : R.G.KETKAR,J.
DATE : 04/10/2016

PC:

1. Heard Mr. K.K.Pandey, learned counsel for the applicant at length.
2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as 'defendant no.2', has challenged the Judgment and order dated 26.10.2010 passed by the learned Judge presiding over Court Room No.35 of the Court of Small Causes at Mumbai (Bandra Branch) in Misc. Notice No.167 of 2005 taken out in R.A.E.& R. Suit No. 268/701 of 1995 as also the Judgment and order dated 2.11.2012 passed by the Appellate Bench of the Small Causes Court in Misc. Appeal No. 6 of 2011 as also the Judgment and order dated 6.10.2015 passed by the Appellate Bench of the Small Causes Court in Review Application No. 3 of

2013. By these orders, the application made by defendant no.2 under Order IX, Rule 13 of C.P.C. for setting aside exparte decree dated 17.2.2003 was dismissed by the Courts below.

3. In support of this Application, Mr.Pande strenuously contended that respondent no.1-original plaintiff, had instituted suit against respondent no.2, hereinafter referred to as 'defendant no.1' and applicant-defendant no.2 describing applicant/ defendant no.2 by name Inamulla. He submitted that correct name of defendant no.2 is Animullah and not Inamulla as disclosed in the cause-title of the plaint. Due to incorrect name of defendant no.2 in the cause title of the plaint, it cannot be said that defendant no.2 was duly served with the suit summons. He has invited my attention to :

- (a) Affidavit dated 24.2.2014 made by defendant no.2 in C.R.A. No.1115 of 2012 in the name of Animullah Abdullah Chaudhari. It was verified by defendant no.2 by name Animullah Abdullah Chaudhari;
- (b) Motor Driving licence standing the name of Animullah Chaudhari and having address of the suit premises;
- (c) Registration Certificate of establishment in Form D under the Bombay Shops and Establishment Act, 1948 in the name of Animullah Chaudhari;
- (d) Pan Card issued by Income Tax Department in the name of

Animullah Chaudhari;

(e) Identity Card issued by Election Commission of India in the name of Animullah Chaudhari at the suit address.

(f) Ration Card in the name of Animullah Chaudhari;

(g) Order dated 25.2.2013 passed by this Court in C.R.A No.1115 of 2012 permitting defendant no.2 to file Review Application in the Appellate Court seeking review of the order dated 2.11.2012.

4. Mr.Pandey submitted that in pursuance of the liberty granted by this Court, defendant no.2 filed Review Application No. 3 of 2013 seeking review of order dated 2.11.2012 passed in Misc. Appeal No. 6 of 2011 which was dismissed on 6.10.2015. He submitted that exparte decree is liable to be set aside as the suit summons was not served on defendant no.2 whose correct name is Animullah Chaudhari.

5. I have considered the submissions advanced by Mr. Pandey. I have also perused the material on record. The short question is whether defendant no.2 can be said to be duly served with the suit summons. While answering this question in affirmative, the learned trial Judge has referred to the decision in S.H.Salaskar Vs Ms. M. Chatterji, 2003(1) ALL MR 150. In that case, in identical circumstances it was held that mistake in the name of defendant is of no consequence. In the case of S.H.Salaskar (supra), the

suit was instituted against “Morrie Chatterji” instead of “Moni Chatterji”. In that case, suit summons was returned with endorsement as “refused. I am not the L.R of Mr. Morrie Chatterji.” Pursuant to the directions given by the Rent Court, the summons through R.P.A.D. As well as under Certificate of Posting was sent to the respondent no.1 at her Jabalpur address. The summons sent by R.P.A.D. Was, however, returned with endorsement dated 18.11.1983 as “refused. The undersigned is not the wife of Shri Morrie Chatterji” . In paragraph 6, it was observed that “if the respondent no.1 was so conscious about the mistake or irregularity in the name of the envelopes sent through Court but she took no efforts to get the mistake corrected or explained, It would obviously be a case to draw legal presumption about her knowledge of proceedings and of further acquiescence into that mistake”. In the present case, the courts below have categorically recorded finding that defendant no.2 accepted writ of summons in the name of Inamullah as also treated and accepted himself as Inamullah.

6. In the present case, material on record discloses that defendant no.2 not only accepted writ of summons in the name of Inamulla but at several stages in the proceedings treated and accepted himself as Inamulla. I have also perused Exh.9, viz. affidavit dated 15.3.2011 made by defendant no.2. It is in the

name of Inamulla Abdullah Chaudhari as also verified by Inamulla Abdullah Chaudhari. It is, however, true that it is signed as Animullah. In view of decision of S.H.Salaskar as also findings recorded categorically by the Courts below to the effect that defendant no.2 accepted writ of summons in the name of Inamullah as also treated and accepted himself as Inamullah, I do not find that the Courts below have committed any error in dismissing the application.

7. Apart from above, Order IX, Rule 13 reads thus:

“13. Setting aside decree ex parte against defendant.- 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:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be sent aside as against all or any of the other defendant also:

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation : Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall

lie under this rule of setting aside the ex parte decree.”

8. Perusal of the second proviso to Order IX, Rule 13 lays down that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. Hence, no case is made out for invocation of powers under section 115 of C.P.C. In view thereof, Application fails and the same is dismissed.

(R.G.ketkar,J.)