

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11395 OF 2015**

1 Mediwal Nagendra Dastgir	)	
since deceased through his legal	)	
heirs and representatives	)	
 1a Sugamma wd/o Nagendra Dastgir	)	
1b Anand a/o Nagendra Dastgir	)	
1c Sharanappa S/o Nagendra Dastgir	)	
 2 Mediwal Sasashiv Naganna	)	
 3 Mediwal Krishna Ramanna	)	
 4 Mediwal Dashrath Ramanna	)	
 5 Mediwal Laxmi Sadashiv	)	
 6 Mediwal Nagamma Krishna	)	
 7 Mediwal Sugamma Nagendra	)	
 8 Mediwal Ashamma Ramanna	) (deleted)	
 9 Mediwal Padmavati Dashrath	)	
 All of them adult, inhabitant of	)	
Bombay residing in a hut at Kshtriya	)	
Nivas Compound 25 Sitladevi Temple	)	
road, off Lt. Dilip Gupte Marg,	)	
Mahim Bombay 400 014	)	..Petitioners

Versus

1 Kshtriya Dnyati Sabha	)
a trust registered under the Bombay	)
Public Trust Act,	)
having office at Kshtriya Nivas 229,	)
Dr. Rajaram Mohan Roy Road,	)
Girgaum Mumbai 400 004	)

2 Atul M Vaudeo)
3 Shashilumar S Pote)
4 Suresh G. Mohandas)
5 Sunil A Rajpurkar)
6 Milind S Mukadam)
7 Sandeep A Mastakar)
8 Ulhas R. Dhebri)
9 Vaibhav A Rajpurkar)
10 Nareshchandr V Rele)
11 Dilip M. Mastakar)
12 Vinod M Mastakar)
13 Rajesh D Rajpurkar)
14 Amod C. Rele)
15 Darshan S Satghar)
16 Rajesh M Bhiwandkar)
17 Dattapal C. Neroy)
All of them adult, Inhabitant)
Of Mumbai, residing at Kshatria Dnyati)
Nivas, Sitladevi Temple Road, Mahim)
Mumbai 400 016)

..Respondents

Mr. P. J. Thorat for the Petitioner
Mr. V. R. Tripathi for the Respondents

CORAM : R. M. SAVANT, J.
DATE : 8th JANUARY, 2016

ORAL JUDGMENT

1 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court is invoked against the order dated 12-10-2015 passed by the Appellate Bench of the Small Causes Court, by which order, the Appeal filed by the Petitioners came to be dismissed and resultantly the order dated 25-2-2014 passed by the Learned Judge of the Small Causes Court rejecting the application under Order IX Rule 13 of the Civil Procedure Code came to be confirmed.

3 The Petitioners herein are the original Defendants and the Respondents herein are the original Plaintiffs in RAE Suit No.3590 of 1990. The said Suit was filed by the Respondents for eviction of the Petitioners from the suit premises.

4 It is not necessary to dilate further on the proceedings of the Suit. Suffice it would be to state that the parties led evidence. However, after the evidence was led on behalf of the parties, the Suit came to be dismissed for non prosecution on 9-2-2005. The Suit thereafter came to be restored in the year 2011, after the Appellate Bench of the Small Causes Court passed an

order restoring the Suit in an Appeal being Misc Appeal No.514 of 2008 filed by the Plaintiffs against the order dated 4-2-2006 rejecting the application being Misc Application No.176 of 2005 for restoration. It seems that after the restoration of the Suit, the amendment to include the new trustees came to be filed on behalf of the Plaintiff trust. In the said application, a notice came to be issued and it is in the course of the service being effected of the said notice that it was revealed that the Defendant No.1 had expired on 18-11-2011. An application therefore came to be filed for bringing the heirs of the Defendant No.1 on record being Defendant Nos.1a to 1c. The said application came to be allowed on 5-5-2012. The cause title of the Suit accordingly came to be amended so as to array the Defendant Nos.1a to 1c as party Defendants to the Suit. On the said Defendant Nos.1 a to 1c being made parties to the Suit, fresh summons came to be issued to the said Defendants. In so far as the Defendant No.1a is concerned, it is an undisputed position that the Defendant No.1a who is the mother of the Defendant No.1b and 1c has been served. It is in respect of the Defendant No.1b and 1c that a contentious issue has arisen as to whether the said Defendants have in fact being served. The court proceeded on the basis that the newly added Defendants have been served and though served are not appearing and therefore decreed the Suit by judgment and order dated 20-12-2012 and accordingly passed the decree of eviction. The Trial Court considered the evidence which was already on record prior to the Suit being dismissed for non prosecution.

5 The Petitioners herein i.e. the Defendants to the Suit amongst whom are the heirs of the Defendant No.1 filed an application under Order IX Rule 13 of the Civil Procedure Code for setting aside the decree being Marji Application No.809 of 2013 on the ground that the decree passed was an exparte decree as the Defendant No.1b and 1c were not served with the suit summons. The said application came to be replied to on behalf of the Respondents herein i.e. the original Plaintiffs and the reply was interalia to the effect that though the Defendant Nos.1a to 1c were served, they had not chosen to remain present. It was their case that the Trial Court has taken into consideration the evidence on record. It was therefore the case of the Respondents i.e. original Plaintiffs that the decree passed cannot be said to be an exparte decree so as to enable the Applicants to invoke Order IX Rule 13 of the Civil Procedure Code. The Trial Court considered the said Marji Application No.809 of 2013 and by its order dated 25-2-2014 rejected the same. The Trial Court was of the view that the decree passed is referable to Explanation to Order XVII Rule 2 as the Trial Court has passed the judgment and decree considering the entire evidence of the Plaintiffs and the Defendants and therefore the application under Order IX Rule 13 would not lie. This the Trial Court held on the basis that the Defendants including the original Defendant No.1 had filed his Written Statement and had also led evidence prior to the Suit being dismissed for non prosecution but had failed to appear on the day to

which the hearing was adjourned.. This was the gist of the reasoning of the Trial Court whilst rejecting the said Marji Application. The Trial Court distinguished the judgments cited on behalf of the Defendants in support of their case.

6 The Petitioners / Defendants aggrieved by the order dated 25-2-2014 passed by the Trial Court rejecting the application under Order IX Rule 13 carried the matter by way of an Appeal being Appeal No.130 of 2014. The Appellate Bench of the Small Causes Court as indicated above has by the impugned order dated 12-10-2015 dismissed the Appeal. The Appellate Bench of the Small Causes Court as the reading of its order discloses has confirmed the finding of the Trial Court in so far as the decree being passed under Explanation to Order XVII Rule 2 is concerned. However, the Appellate Bench of the Small Causes Court ventured to consider the issue as to whether the Defendants were served in view of the fact that the application was founded on the fact that the Defendant Nos.1b and 1c were not served. The Appellate Bench of the Small Causes Court has in paragraph 28 recorded that no notice was served on Defendant No.1b and 1c, but has not specifically recorded whether the Defendant Nos.1b and 1c were served. The Appellate Bench of the Small Causes Court has in respect of the said aspect observed that though the Defendants were served by notices on three occasions, they did not choose to appear and therefore the Trial Court allowed the application and permitted the

Plaintiffs to bring the names of the trustees and the heirs of the Defendant No.2 on record. Hence the Appellate Bench of the Small Causes Court was referring to the notices issued to the Defendant No.1a to 1c in respect of the application for bringing the new trustees of the Plaintiffs on record the application to bring the heirs of the Defendant No.1 on record and the application for restoration of the Suit but was not referring to the suit summons which were required to be served on the Defendant Nos.1a to 1c after they were brought on record as the heirs of the Defendant No.1. The Appellate Bench of the Small Causes Court however went on to observe that since the Defendant No.1a was served and she being the mother of the Defendant No.1b and 1c and since they are all close relatives being family members, they are expected to have knowledge of the proceedings and therefore the ground made out by the Defendants for setting aside of the decree for it being an ex parte decree, could not be accepted. The Appellate Bench of the Small Causes Court accordingly dismissed the Appeal by the impugned order dated 12-10-2015.

7 The Learned Counsel appearing for the Petitioners Mr. Thorat would by relying upon the judgment of the Apex Court in the matter of **Naresh Chandra Agarwal Vs. Bank of Baroda & Ors.**¹ would contend where an LR of deceased Defendant is brought on record, the service of notice on such heir is not a mere irregularity but should be a reality and that the court is bound to

¹ (2001) 3 Supreme Court Cases 163

give a definite finding thereon. It is the submission of Mr. Thorat that the Defendant No.1b and 1c were required to be served with the suit summons and having not been so served the decree passed against them is an exparte decree. The Learned counsel seeks to place reliance on the bailiffs report dated March 2012 in support of his contention that the Defendant Nos.1b and 1c were not served with the suit summons.

8 Per contra the Learned Counsel Mr. Tripathi appearing on behalf of the Respondents would contend that the roznama of the Suit discloses that all the heirs of the Defendant No.1 have been served. The Learned Counsel draws this court's attention to the roznama dated 22-9-2012 and 1-10-2012. The roznama dated 22-9-2012 makes a reference to Exhibit 55 which is amended summons in respect of the Defendant No.1a and 1c. The bailiff's name S. J. Khodakhan appears. Thereafter in the roznama dated 1-10-2012, it is recorded that the Advocate Plaintiffs present and the Defendant Nos.1a to 1c are served adjourned for Written Statement of the Defendants. The Learned Counsel also draws this Courts attention to the roznama dated 11-12-2012 which records that the Advocate of both sides are present. It is therefore the contention of Mr. Tripathi that the heirs of the Defendant No.1 were served and therefore the decree passed cannot be said to be an exparte decree.

9 Having heard the Learned Counsel for the parties, I have

considered the rival contentions. As indicated above the application has been filed by the Defendants under Order IX Rule 13 of the Civil Procedure Code and the foundation of the application is that the Defendant No.1b and 1c were not served. The Trial Court as indicated above has gone into the said aspect but has not recorded a specific finding whether the Defendant No.1b and 1c were served. The findings of the Appellate Bench of the Small Causes Court on the said aspect has been adverted to hereinabove in the instant order. The Appellate Bench of the Small Causes Court has also not specifically recorded a finding as regards the service on the Defendant Nos.1b and 1c. The Appellate Bench of the Small Causes Court has held against the Defendants on the ground that the Defendant No.1a being the mother of the Defendant No.1b and 1c, the same would suffice and therefore the contention of the Defendants that they are prejudiced on account of service not being effected on Defendant Nos.1b and 1c, could not be accepted. Though Mr. Tripathi was at pains to point out that the Defendant Nos.1b and 1c even if were to appear in the Suit could not have taken a stand different than the stand taken by their father i.e. the Defendant No.1 and therefore no prejudice as such is caused on account of the non service of the summons on the Defendant Nos.1b and 1c. It is not possible to accept the contention of Mr. Tripathi, the said contention would be on the merits of the matter when the court would be concerned with the issue as to whether the decree is required to be set aside. The courts below have proceeded on the basis that evidence was led by the parties and therefore have

overlooked the fact as to whether the Defendant nos.1b and 1c were served with the suit summons after they were joined as party Defendants. The question that is therefore to be dealt with by this court is whether the decree in question is an ex parte decree on account of the fact that the Defendant Nos.1b and 1c were not served. On this aspect both the courts below are not very clear. Since Mr. Tripathi has now for the perusal of this Court produced the roznama dated 22-9-2012 and 1-10-2012 which records that Defendant Nos.1a to 1c are served and since Mr. Thorat relies upon the bailiff's report which states that the Defendant Nos.1b and 1c are not served. Since the said aspect is the defining aspect in so far as the present matter is concerned, in my view to resolve the said controversy, it is necessary that the impugned order dated 12-10-2015 passed by the Appellate Bench of the Small Causes Court is set aside and the matter is relegated back to the Appellate Bench of the Small Causes Court for a denovo consideration of the Appeal.

10 On remand, the Appellate Bench of the Small Causes Court to decide the Appeal in terms of the observations made hereinabove and within the time frame that would be stipulated by this Court. The parties to appear before the Appellate Bench of the Small Causes Court on 21-1-2016. The Appellate Bench of the Small Causes Court to decide the Appeal latest by 31-3-2016. The Appellate Bench of the Small Causes Court would take into account the bailiff's report as well as the roznama of the Suit in question in so far as

the aspect of service on Defendant Nos.1b and 1c is concerned. Needless to state that the Appeal would be decided on its own merits and in accordance with law.

10 The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs.

[R.M.SAVANT, J]