

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2496 OF 2017**

**Vasudeo Mahadeo Pawar
Vs.
Bharat Chamber Trust & Ors**

**..Petitioner

..Respondents**

**Mr. Hasmit Trivedi i/b Vrinda Daga for the Petitioner
Mr. S. P. Srivastava for the Respondents**

**CORAM : R. M. SAVANT, J.
DATE : 27th APRIL, 2017**

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 20-12-2016 passed by the Appellate Bench of the Small Causes Court by which order the Misc Appeal No.287 of 2015 came to be dismissed and resultantly the order passed in the MARJI Application No.699 of 2013 came to be confirmed.

2 The Petitioner herein was the original Defendant in RAE & R Suit No.1613/2354 of 2006 filed by the Respondent No.1 trust seeking eviction of the Petitioner / Defendant on the ground of nuisance and arrears of rent. The said Suit was instituted on 15-9-2006. The summons in the said Suit were sought to be served on the Defendant in the suit premises which is a hair cutting saloon on five occasions i.e. 23-11-2006, 9-4-2007, 8-6-2007, 30-6-2007 and 21-7-2007. On all the five occasions, the Defendant was not found

in the suit premises but his employee one Sunder R. Jadhav was found and was informed by the bailiff of the purpose of his visit. Thereafter the Plaintiffs obtained an order for substituted serve by way of pasting which was granted by the Trial Court and accordingly the Suit Summons were pasted on the outer door of the suit premises. In spite of the said service of the Suit Summons effected on the Petitioner/Defendant, the Petitioner/Defendant did not appear in the said Suit. An order to proceed ex parte was passed on 8-1-2008. The Plaintiffs it seems filed his affidavit of evidence on 16-2-2009 and ultimately the Suit came to be decreed ex parte on 12-6-2009.

3 The Petitioner filed an application under Order IX Rule 13 being MARJI Application No.699 of 2013 for setting aside the ex parte decree. Since there was a delay of more than 4 years in filing the application, in the said application itself the Petitioner/Defendant cited the reasons for the said delay. It was the case of the Petitioner that he was unwell during the contemporaneous time as passing of the ex parte decree in the Suit and that he became aware of the decree only in August 2013 through his neighbouring shop keepers. It was further his case that thereafter some time was lost in obtaining the certified copy etc., which has resulted in the said delay.

4 The said MARJI Application was opposed to on behalf of the Plaintiffs – landlords i.e. the Respondents herein. The case of the Defendant in

the said MARJI Application was sought to be questioned on the ground inspite of 5 attempts made by the bailiff to serve the Suit Summons by visiting the suit premises wherein his employee Sunder Jadhav was found, the Defendant had not taken care to take cognizance of the Suit Summons and appeared in the Suit. The Respondents i.e. the original Plaintiffs therefore sought rejection of the said MARJI Application.

4 In support of his case as urged in the MARJI Application, the Defendant relied upon certain documents which were the medical case papers in respect of the treatment he had undergone during the contemporaneous time. However, the medical papers were relating for the period 6-5-2006 to 7-10-2013. The Trial Court did not deem it appropriate to give credence to the medical papers, as according to the Trial Court, the medical papers were contradictory as one of the documents it was mentioned that the Petitioner/Defendant was suffering from low back ache and in another document it is mentioned that the Defendant's ECG has been taken. The Trial Court therefore came to a conclusion that the case of the Defendant based on the said medical papers could not be accepted. The Trial Court also found that inspite of the certified copy being furnished to the Petitioner/Defendant, the Petitioner / Defendant had not proceeded with reasonable dispatch even in respect of the filing of the MARJI Application which was filed after 23 days. The Trial Court accordingly by its order dated 8-6-2015 rejected the said application.

5 The Defendant aggrieved by the said order dated 8-6-2015 carried the matter in Appeal by filing Misc Appeal No.287 of 2015. The Lower Appellate Court on reconsideration of the material on record did not find any reason to interfere with the order passed by the Trial Court rejecting the said MARJI Application and accordingly dismissed the Appeal by impugned judgment and order dated 20-12-2016. As indicated above, it is the said order dated 20-12-2016 which is taken exception to by way of the above Petition.

6 The Learned Counsel appearing on behalf of the Petitioner Mr. Trivedi would seek to reiterate the case of the Petitioner as urged before the courts below. The Learned Counsel would contend that on account of the Petitioner suffering a heart attack in the year 2009 that the Petitioner could not participate in the proceedings resulting in the decree being passed exparte. The Learned Counsel would contend that the Petitioner original Defendant acquired knowledge of the decree only in August 2013 and it is thereafter that the Petitioner / Defendant has with reasonable despatch filed the said MARJI Application for setting aside the exparte decree.

7 Per contra, the Learned Counsel Mr. Srivastav appearing for the Respondents – landlords would support the impugned order. The Learned Counsel would contend that inspite of the five attempts made to serve the Suit

Summons on the Petitioner/ Defendant in the suit premises where in an employee of the Petitioner/Defendant Sunder Jadhav was present and inspite of pasting of the Suit summons on the outer door of the suit premises, the Petitioner/Defendants did not choose to participate in the proceedings. The Learned Counsel would also submit that the medical papers as such do not justify the said huge delay of about 4 years in filing the MARJI Application.

8 Having heard the Learned Counsel for the parties I have considered the rival contentions of the parties. The issue that arises is whether the discretion can be exercised in favor of the Petitioner/Defendant. As indicated above the Suit in question was filed on 15-9-2006 and as many as five attempts were made to serve the Suit Summons in the said Suit on the Defendant from November 2006 to July 2007. On all the five occasions though Defendant was not found in the suit premises his employee Sunder Jadhav was very much present. Hence it would have to be presumed that the said employee must have informed the Defendant of the bailiffs visit to the suit premises on the said 5 occasions. That apart, the Suit Summons were pasted on the outer door of the suit premises that should have been enough notice to the Defendant of the Suit being filed by the Respondents on the grounds mentioned therein. However, inspite of the same, the Defendant did not choose to remain present before the Trial Court.

9 In so far as the case of the Defendant based on the medical papers is concerned, in my view, the medical papers did not further the case of the Defendant in the matter of seeking condonation of the said huge delay of 4 years in filing the MARJI Application. The courts below have not given credence to the said medical papers as according to them the said medical papers in fact are contradictory to the case of the Defendant, as in some of the papers it is shown that the Defendant is suffering from low back ache wherein in some documents it is shown that an ECG of the Defendant has been taken. Even assuming that the Defendant had suffered from a heart attack in the year 2009 and was hospitalised, the medical papers do not show that he was suffering from any debilitating ailment from 2009 to 2013, when he filed the said MARJI Application. In my view, the courts below were right in refusing to exercise discretion in favour of the Petitioner / Defendant having regard to the fact that 5 attempts were made by the bailiff to serve the Petitioner/Defendant on which occasions the employee of the Defendant Sunder Jadhav was very much present in the suit premises as also considering the fact that Suit Summons were pasted on the outer door of the suit premises. In my view, the conduct of the Defendant to say the least is utterly careless and indolent. A Writ Court obviously cannot exercise discretion in favour of such a litigant. In that view of the matter no case for interference in the Writ Jurisdiction of this Court is made out, the Writ Petition is accordingly dismissed.

10 At this stage, the Learned Counsel for the Petitioner Mr. Trivedi on instructions of the Petitioner who is personally present in Court seeks time to vacate the suit premises. In the facts and circumstances of the case, the Petitioner is granted time up to 31-12-2017 to vacate the premises on the usual undertaking to be filed in this Court within two weeks from date. If the undertaking is not filed as directed by this Court, then the Plaintiffs / Respondents herein would be free to proceed with the execution in accordance with law.

[R.M.SAVANT, J]