

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO.656 OF 2016 WITH
WITH CIVIL APPLICATION NO.13000 OF 2016

Sau. Sakharbai w/o Ramrao Gaikwad ...APPELLANT

VERSUS

Damodhar s/o Rambhau Kakade ...RESPONDENT

.....
Shri A.S. Bajaj, Advocate for appellant
Shri Mobin Shaikh, Advocate holding for
Shri V.R. Dhorde, Advocate for respondent
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CORAM: A.M. DHAVALÉ, J.

DATED : 30th October, 2018.

ORAL ORDER :

1. Heard learned counsel for the parties.
2. The matter is taken for final hearing at admission stage and following substantial question of law is framed :

"Whether the learned first appellate Court erred in not verifying whether the defendant was duly served or not in Regular Civil Suit No.66/2002 before rejecting the averments for condonation of delay?"

3. The learned Advocates have taken me through the relevant record. It shows that, the present appellant is original defendant. The present respondent Damodar had filed Regular Civil Suit No.66/2002 for redemption of mortgage and for recovery of possession. The said suit proceeded ex parte against the present appellant. The learned trial Judge held that the defendant was duly served with the suit summons Exhibit 8, but she did not appear in the suit. The suit was decreed by judgment dated 2.2.2006. The appellant challenged the said judgment by way of First Appeal. As there was delay, Misc. Civil Application No.185/2008 was filed for condonation of delay of 930 days. In the said application, it was specific contention of the defendant/ appellant that he was not served with the summons. It seems that, the defendant/ appellant had examined herself and one Radhakisan while the plaintiff/ Damodhar had examined himself. The learned first appellate Court held that, besides the bare version, the defendant has not placed on record any cogent evidence to show that she did not receive the suit summons.

4. If the defendant was not duly served, she cannot lead any evidence except making a statement that she was not served. The learned first appellate Court should not have given the reason that besides the bare words the applicant has not

given cogent reasons as the negative burden cannot be discharged besides making a statement on oath. It was necessary in these circumstances for the first appellate Court to call for the record and see the summons alongwith the endorsement thereon and to verify whether the same was served on the defendant or not. If necessary, the bailiff should have been examined.

5. If the defendant was not served, Article 123 will come into picture and the period of limitation will start from the date of knowledge and in that case, the delay of 930 days will not be in question. The delay will have to be calculated from the date of knowledge which is claimed to be 19.11.2007, which he got in review petition arising out of another dispute between the same parties. The learned first appellate Court, apart from verification of the service, ought to have considered whether after the receipt of knowledge, whether the appeal has been filed within time or not.

6. The judgment and decree must conform to the principles of natural justice. If no opportunity of hearing is given, then the judgment and decree will have to be set aside and fresh opportunity of hearing will have to be given. In this regard, I rely on **Swadeshi Cotton Mills Vs. Union of India [(1981) 2 SCR**

533 : (AIR 1981 SC 818)], in which Chinnappa Reddy, J., in his dissenting judgment summarized the position in law on this point as follows :

“The principles of natural justice have taken deep root in the judicial conscience of our people, nurtured by Binapani (AIR 1967 SC 1269), Kraipak (AIR 1970 SC 150), Mohinder Singh Gill (AIR 1970 SC 851), Maneka Gandhi (AIR 1978 SC 597) etc. They are now considered so fundamental as to be 'implicit in the concept of ordered liberty' and, therefore, implicit in every decision making function, call it judicial, quasi-judicial or administrative. Where authority functions under a statute and the statute provides for the observance of the principles of natural justice in a particular manner, natural justice will have to be observed in that manner and in no other. No wider right than that provided by statute can be claimed nor can the right be narrowed. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice. The implication of natural justice be presumptive it may be excluded by express words of statute or by necessary intendment.”

7. Considering the facts, I hold that the learned first appellate Court erred in overlooking the issue of due service or absence thereof on the defendant. Mere delay cannot be

considered from the date of judgment when there is a plea that the defendant was not served with the summons. In the light of these facts, the impugned judgment cannot be sustained and deserves to be set aside. The matter deserves to be remanded to the first appellate Court with directions.

8. Hence, the Second Appeal is partly allowed. The order dated 1.4.2016 in Misc. Civil Application No.185/2008, passed by learned Ad hoc District Judge-3, Ahmednagar is hereby set aside. The matter is remanded to the first appellate Court with directions to give fresh opportunity to the parties to lead evidence and the appellate Court shall consider specifically whether there is proper evidence to show due service of summons on the defendant in Regular Civil Suit No.66/2002 or not. The first appellate Court is further directed to consider that if there is no due service of summons, when the appellant got knowledge and whether the First Appeal was filed within limitation from the date of knowledge.

9. It is clarified that the observations made herein are only for the purpose of deciding this Appeal and the first appellate Court should not get influenced by the observations made herein. Considering the long pendency, it is directed that the first appellate Court shall decide the appeal within a period of

three months from the date of receipt of record and uploading of this order.

10. The parties are directed to appear before the first appellate Court on 15th November 2018 and there will be no necessity to issue separate notice.

11. Court Fees paid on the appeal memo be refunded to the appellant as per Section 15 of the Maharashtra Court Fees Act.

12. In view of disposal of the Second Appeal, Civil Application No.13000/2016 stands disposed of.

(A.M. DHAVALÉ)
JUDGE

fmp/