

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9643 OF 2016

Sadanand Gajanan Batwalkar (deleted since
decd) through LRs ... Petitioners
Vs.
Waman Sitaram Waradkar ... Respondent

Mr. Ahmed Saeed Uraizee a/w. Mr. M. V. Singh for Petitioners.
Mr. Sureshchandra R. Jaiswal for Respondent.

CORAM : R. G. KETKAR, J.
DATE : MARCH 26, 2018

P.C. :

Heard Mr. Uraizee, learned Counsel for the petitioners and
Mr. Jaiswal, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and order dated 20.12.2014 passed by the learned Judge, Court Room No.20, Court of Small Cause, Mumbai in Marji Application No.205 of 2013 in R.A.E.Suit No.1429 of 2010 as also the judgment and order dated 29.06.2016 passed by the Appellate Bench of the Small Causes Court at Mumbai in Appeal No.32 of 2015. By these orders, the Courts below dismissed the application taken out by the defendants under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for setting aside ex-parte decree dated 06.08.2012 passed in R.A.E. Suit No.1429 of 2010.

3. In support of this Petition, Mr. Uraizee has invited my attention to the Bailiff's reports dated (i) 15.09.2010 at exhibit-3A, (ii) 25.10.2010 at exhibit-3B, (iii) 30.10.2010 at exhibit-3C and (iv) 25.02.2011 about

pastings a copy of summons on the outer of the suit premises and sending another copy of summons by R.P.A.D. He has also invited my attention to application made by the defendants under Order IX, Rule 13 and in particular paragraphs 5 and 6 thereof. In paragraph 5, defendants dealt with Bailiff's report dated 25.10.2010. In that report, Bailiff V. V. Pawar had set out that he made enquiries with Shobha Redkar, tenant of room No.16. Mr. Uraizee submitted that Shobha Redkar died on 17.03.2005. He, therefore, submitted that Bailiff's report dated 25.10.2010 requires to be discarded.

4. In so far as the other Bailiff reports dated 15.09.2010 and 30.10.2010 are concerned, they are false and defendants denied the contents thereof in *toto*.

5. As far as the substituted service is concerned, Mr. Uraizee invited my attention to order dated 14.02.2011 passed by the learned trial Judge below exhibit-9. The learned trial Judge allowed application exhibit-9 by passing following order:

“Perused Bailiff's report.

Substituted service as prayed is allowed.

Sd/-”

6. Mr. Uraizee relied upon the decision of the Apex Court in *Neerja Realtors Pvt. Ltd. Vs. Janglu*, (2018) 2 SCC 649 to contend that there was breach of Order V, Rule 17 of C.P.C. The learned trial Judge, while permitting substituted service, did not record satisfaction that the defendant was avoiding service of summons or summons could not be served in ordinary manner for any other reason. The learned Judge passed a cryptic order while permitting substituted service. He, therefore, submitted that as basically the suit summons was not served on the defendant, the ex-parte decree is liable to be set aside.

7. On the other hand, Mr. Jaiswal supported the impugned orders. He submitted that in so far as Bailiff's reports dated 15.09.2010, 30.10.2010 and 25.02.2011 are concerned, in application under Order IX, Rule 13, defendants have not even dealt with those reports. In other words, he submitted that defendants dealt with report dated 25.10.2010 where Bailiff recorded that he made enquiry with Shobha Redkar, tenant of room No.16. She expired on 17.03.2005.

8. As far as the order below exhibit-9 is concerned, the learned trial Judge recorded that he had perused the Bailiff's reports and thereafter permitted substituted service. Even the substituted service was effected by the Bailiff by pasting copy of summons on the outer of the suit premises and had also sent another copy of summons to the defendant by R.P.A.D. R.P.A.D. was also pasted. Apart from that, he submitted that in September 2016, respondent has taken possession of the suit premises.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The short question that arises in the present proceedings is whether defendant was duly served with the suit summons and consequently is entitled to get the ex-parte decree dated 06.08.2012 set aside.

10. A perusal of Bailiff's report dated 15.09.2010 shows that he made enquiries with Ms Pratibha Murlidhar Bhagat, tenant of room No.14. He was informed that defendant's whereabouts are not known. The said report is verified before the Head Bailiff. On 30.10.2010, Bailiff visited the suit premises at about 11.20 a.m. and he did not find the defendant. He made enquiries with Ms Pratibha Bhagat, tenant of room No.14. He

was informed that whereabouts of defendant are not known. Defendant has not disputed that Bhagat is tenant of room No.14. It is no doubt true that Bailiff's report dated 25.10.2010 records that he made enquiries with Shobha Redkar, tenant of room No.16 and that she expired in the year 2005. In view thereof, one has to discard the Bailiff's report dated 25.10.2010. Even if this report is discarded, a perusal of application under Order IX, Rule 13 shows that it is totally silent in respect of reports dated 15.09.2010 and 30.10.2010. It is material to note here that one of the grounds for eviction of the defendants is non-user of the suit premises without sufficient cause for a period of 6 months immediately preceding date of institution of the Suit as contemplated by Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

11. Mr. Uraizee relied upon the decision of the Apex Court in **Neerja Realtors Pvt. Ltd.** (*supra*) to contend that while permitting substituted service, the learned trial Judge did not record satisfaction that defendant was avoiding service of suit summons and that he passed a cryptic order. In that case, the application under Order IX, Rule 13 was made for setting aside ex-parte decree in a Suit for specific performance. In the present case, as noted earlier, one of the grounds for eviction is under Section 16(1)(n) of the Act. Defendant has not disputed that Bhagats are tenants in respect of room No.14. He has also not shown that there is any animosity between Bhagats and defendant. Bhagats had no reason to disclose to Bailiff that defendant's whereabouts are not known.

12. In so far as the submission based upon the order of the learned trial Judge permitting substituted service is concerned, a perusal of that order shows that after perusing the application which had set out the Bailiff's reports dated 15.09.2010, 25.10.2010 and 30.10.2010 when defendant was not found, the prayer was made for directing the Bailiff to

paste copy of the summons on the door of the suit premises and to send another copy of summons by R.P.A.D. After perusing the Bailiff's reports, the learned trial Judge permitted substituted service. In view thereof, it cannot be said that the learned trial Judge was not satisfied about defendant avoiding the service of suit summons. That apart, a perusal of the substituted service report also shows that Bailiff had pasted copy of the summons on the door of the suit premises and had sent another copy of the summons by R.P.A.D. and the R.P.A.D. note was also pasted. In view thereof, reliance placed by Mr. Uraizee on **Neerja Realtors Pvt. Ltd.** (*supra*) does not advance the case of the defendants.

13. After appreciating the material on record, the Courts below have concurrently held that defendant has not made out a case for setting aside ex-parte decree. It cannot be said that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Merely because on the basis of evidence, other view is possible that itself is no ground for taking a different view. It also cannot be said that no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. More so, plaintiff has already executed the decree and obtained possession. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. R & P shall be transmitted forthwith to the trial Court.

14. At this stage, Mr. Uraizee prays for stay of this order. As the plaintiff has already executed the decree and obtained possession, oral application is rejected.

(R. G. KETKAR, J.)