

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 539 OF 2019

Vinaya Vasant Shanbag

...Petitioner

Versus

The State Of Maharashtra
and another

...Respondents

....

Mr. Nachiket D. Jaywant a/w. Nilesh R. Pandey, Advocate for the Petitioner.

Mr. R.P. Kadam, AGP, for Respondent No.1 – State.

Mr. Akshay Pai i/b. Ranjit D. Shinde, Advocate for Respondent No.2.

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CORAM : R. G. KETKAR, J.

DATE : 26th APRIL, 2019

P.C.

1. Heard Mr. Nachiket Jaywant, learned counsel for the petitioner, Mr. R.P. Kadam, learned A.G.P. for respondent No.1-State and Mr. Akshay Pai, learned counsel for respondent No.2, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the order dated 19.12.2018 passed by the learned 2nd Jt. Civil Judge, Senior Division at Kalyan in Misc. Application No.351/2016. By that order, the learned trial Judge rejected the application made by the defendant for condonation of delay of 273 days in filing the application under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for setting aside *exparte* decree.

3. Rule. Learned counsel for the respective respondents waive service. Having regard to the narrow controversy raised in this Petition as also at the

request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing

4. In support of this petition, Mr. Jaywant invited my attention to paragraph-4 of the trial Court's judgment dated 5.1.2016 in Regular Civil Suit No.407/2014. In paragraph-4, the learned trial Judge observed thus :

“4] The defendant was served with the suit summons, additionally by way of substituted service. Suit summons was affixed on the conspicuous part of the suit premises. Even paper publication was made. However, she did not appear. Hence, suit was proceeded ex-parte against her.”

5. Mr. Jaywant submitted that basically the defendant was not served with the suit summons as observed by the learned trial Judge in paragraph-4. As there was controversy about service on the defendant, by order dated 22.1.2019, the record and proceedings of the trial Court was called for. The parties were asked to take inspection of the record before the next date of hearing.

6. With the assistance of the learned counsel appearing for the parties, I have perused the record as also the reasons given by the learned trial Judge in paragraph-5 of the impugned order. The learned trial judge extracted paragraph-4 of the trial Court's order dated 5.1.2016 and held that the defendant was served with the suit summons as well as public summons and by affixing summons on conspicuous part of the suit premises.

7. A perusal of the original record *prima facie* does not indicate that the defendant was served with the suit summons. The learned trial

Judge without examining and going through the original record rejected the application. It is, therefore, necessary to set aside the impugned order and restore the application before the trial Court for deciding it afresh. The learned trial Judge will go through the original record of the suit and find out whether the defendant was actually served with the suit summon in addition to the service by way of substituted service.

8. In view thereof, the petition is disposed of as under :

- i. The impugned order dated 19.12.2018 passed by the learned trial Judge in Misc. Application No.351/2016 is set aside. Misc. Application No.351/2016 is restored to the file of the trial Court. Registry shall forthwith transmit R & P to the trial Court.
- ii. The parties assure that they will appear before the trial Court on 10.6.2019 and for that purpose no fresh notice be issued to them.
- iii. The learned trial Judge will fix a suitable date and will dispose of the application within four weeks from fixing such date.
- iv. All contentions of the parties on merits are expressly kept open.
- v. Rule is made absolute in aforesaid terms with no order as to costs.

9. All concerned parties, including the trial Court, to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)