

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2986 OF 2009

Mahesh Vasudeo Bhatt and others ... Petitioners
Vs.
Roozbeh Mundegar Aga and others ... Respondents

WITH

CIVIL APPLICATION NO.2030 OF 2013

IN

WRIT PETITION NO.2986 OF 2009

Roozbeh Mundegar Aga ... Applicant
Vs.
Mahesh Vasudeo Bhatt and others ... Respondents

Ms Manjiri Parasnis a/w. Ms Priya Shetty for Petitioners in Petition and for Respondents in C.A.

Mr. V. Y. Sanglikar for Respondent No.1 in Petition and for Applicant in C.A.

CORAM : R. G. KETKAR, J.

DATE : FEBRUARY 22, 2019

ORAL JUDGMENT :

Heard Ms Parasnis, learned Counsel for the petitioners and Mr.Sanglikar, learned Counsel for the respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 27.09.2006 passed by the learned trial Judge in Miscellaneous Notice No.8 of 2006 as also the judgment and order dated 16.01.2009 passed by the Appellate Bench of the Small Causes Court in Appeal No.638 of 2006. By these orders, the Courts below dismissed the interim notice taken out by the petitioners for condoning the delay in filing the proceedings for setting aside the ex-parte decree dated 17.01.2005 as also for setting aside ex-parte decree thereby restoring the Suit to its original position. The parties shall hereinafter be referred to as per their status in the trial Court. The relevant and material facts giving rise to filing of the present

Petition, briefly stated, are as under:

3. Respondent No.1-plaintiff, Roozbeh Mundegar Aga instituted R.A.E. & R. Suit No.58/85 of 2004 against the defendant No.1 - Mahesh Vasudeo Bhatt, defendant No.2 - Umesh Vasudeo Bhatt, defendant No.3 - Shashidhar Vasudeo Bhatt, defendant No.4 - Ranjana M. Rao and defendant No.5 - Ashok Dharmayya Gurrapu for recovery of possession of room No.32-B on the 2nd floor of Bakhtawar Building (Irani Chawl) situate at Sayani Road, Gokhale Road (South), Bombay 400 025 (for short 'suit premises'). The plaintiff claimed possession invoking grounds under Sections 15, 16(1)(e) and 16(1)(b) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). The learned trial Judge decreed the Suit under Sections 15 and 16(1)(e) of the Act on 17.01.2005. In paragraph 4, the learned trial Judge observed that the Writ of Summons was served on the defendant by substituted service by Registered Post A.D., Under Certificate of Posting. The Writ of Summons was also published in the daily newspaper "Free Press Journal". Defendants neither appeared nor filed written statement and the Suit proceeded ex-parte.

4. The plaintiff took out Miscellaneous Notice No.517 of 2005 on 20.09.2005 for execution of the eviction decree. On 03.10.2005, defendant No.5 - Ashok Dharmayya Gurrapu was personally served with the said notice at the suit premises. Defendant No.5 attended the said notice on 21.10.2005, 18.11.2005, 25.11.2005 and 02.12.2005. It appears that on 18.11.2005, plaintiff filed application for substituted service. Defendant No.5 was called upon to furnish the addresses of the defendants No.1 to 4. Defendant No.5 stated that defendants No.1 to 4 had left the suit premises and that they were staying at their native place. He was not having their addresses. Accordingly, the application was allowed. The plaintiff was directed to serve defendants No.1 to 4 by

R.P.A.D. On 10.01.2006, defendant No.5 took out application for setting aside the ex-parte decree as also for condoning the delay in filing the proceedings. By the impugned orders, the Courts below have dismissed the application. It is against these orders, defendants have instituted the present proceedings.

5. In support of this Petition, Ms Parasnis strenuously contended that the findings recorded by the Appellate Court in paragraph 25 to the effect that defendant No.5 did not produce original Power of Attorney is totally perverse. Defendant No.5 had produced the original Power of Attorney as also photocopy of the Power of Attorney before the trial Court. She further submitted that defendant No.5 was Power of Attorney of defendants No.1 to 4. The service effected on wife of defendant No.5 cannot be treated as a valid service on defendants No.1 to 4. She further submitted that the learned trial Judge was not justified in ordering substituted service on defendants No.1 to 4. Lastly, she submitted that the Courts below were not justified in holding that no sufficient cause was made out for condoning the delay. In particular, she invited my attention to paragraph 3 of Miscellaneous Notice No.8 of 2006 to contend that for the reasons set out therein, the Courts below ought to have condoned the delay and set aside the ex-parte decree.

6. On the other hand, Mr.Sanglikar supported the impugned orders. He submitted that on 09.02.2004, defendant No.5 was personally served. Defendants No.1 to 4 were not residing in the suit premises. The Bailiff thereafter attempted to serve defendants No.1 to 4 on 20.02.2004 and 01.03.2004. On both the occasions, defendants No.1 to 4 were not found in the suit premises. The plaintiff, therefore, filed application for effecting substituted service on 09.03.2004. In the application, the plaintiff had set out the attempts made by the Bailiff for serving defendants No.1 to 4. Only upon satisfaction, the learned trial Judge

directed service on defendants No.1 to 4 by way of substituted service. The learned trial Judge directed that defendants No.1 to 4 be served by pasting, R.P.A.D. and U.C.P. at the suit premises and also by publication in the newspaper. Accordingly, on 23.03.2004, Bailiff went to the suit premises for the purpose of pasting the Writ of Summons. At that time, Ms Riya, wife of defendant No.5 was present. She informed the Bailiff that defendants No.1 to 4 had left the suit premises. The Bailiff pasted the notice at the suit premises, which was the last known address of defendants No.1 to 4, in the presence of Ms Riya, wife of defendant No.5. He, therefore, submitted that defendants No.1 to 4 were duly served by Writ of Summons by R.P.A.D., U.C.P. and by publication as per the orders and directions given by the trial Court. He further submitted that neither defendant No.5 nor his wife gave addresses of defendants No.1 to 4 to the Bailiffs.

7. Mr. Sanglikar further submitted that on 09.02.2004, defendant No.5 was personally served. On 24.02.2004, defendant No.5 appeared before the Registrar of the Small Causes Court and the presence of the defendant No.5 is recorded in the Rojnama. He has taken me through the reply filed by the plaintiff opposing the Miscellaneous Notice of the defendants and submitted that the Courts below, after appreciating the evidence on record, have concurrently held that no sufficient cause is made out for condoning the delay as also for setting aside ex-parte decree. He, therefore, submitted that no case is made out for interfering with the impugned orders.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The plaintiff has instituted Suit against the defendants for recovery of possession of the suit premises. On 15.01.2004, the Writ of Summons was issued to the defendants. On 09.02.2004, Bailiff

personally served defendant No.5. Report dated 09.02.2004, on solemn affirmation of the Bailiff, is to the following effect:

“Served for defendant No.5 and unserved for defendants No.1 to 4

Served a copy of this summons along with copy of plaint on the within named defendant No.5 at room No.32-B, 2nd floor, Bakhtawar Building (Irani Chawl), Sayani Road, Gokhale Road (South), Mumbai 25 on 9th February 2004 at about 9.25 a.m. and obtained his signature as above.

And defendants No.1 to 4 were not found and at above same address on same day and time, I made inquiries with defendant No.5. I was informed that said defendants No.1 to 4 have left the premises since long back. Hence, I came back. I was accompanied by the plaintiff.

sd/-
Bailiff
9/2/04”

9. Defendants No.1 to 4 were not found at the time of service. Defendant No.5 informed the Bailiff that defendants No.1 to 4 had left the premises since long back. On 20.02.2004, Bailiff again tried to serve defendants No.1 to 4. Wife of defendant No.5 was present. She informed Bailiff that defendants No.1 to 4 had left the premises since long back and their whereabouts are not known. The Bailiff's report dated 20.02.2004 on solemn affirmation reads thus,

“Unserved for defendants No.1 to 4

Again I went in search of defendants No.1 to 4 at room No.32-B, 2nd floor, Bakhtawar Building (Irani Chawl), Sayani Road, Gokhale Road (South), Mumbai 25 on 20th February 2004 at about 12.30 p.m. but said defendants No.1 to 4 were not found. On making inquiries with Mrs. Gurrapu, wife of the defendant No.5 I was informed that said defendants No.1 to 4 they have left the premises since long back and whereabouts are not known. Hence, I came back. I was accompanied by the plaintiff.

sd/-
Bailiff
20/2/04”

10. On 01.03.2004, again Bailiff tried to serve defendants No.1 to 4. Wife of defendant No.5 was present. She informed the Bailiff that defendants No.1 to 4 had left the premises since long back and their whereabouts are not known. The report dated 01.03.2004 of Bailiff, on solemn affirmation, reads thus,

“Unserved for defendants No.1 to 4

I went in search of defendants No.1 to 4 at room No.32-B, 2nd floor, Bakhtawar Building (Irani Chawl), Sayani Road, Gokhale Road (South), Mumbai 25 on 1st March 2004 at about 06.00 p.m. but said defendants No.1 to 4 were not found. On making inquiries with Mrs. Riya Gurrapu, wife of the defendant No.5, I was informed that said defendants No.1 to 4 they have left the premises since long back and whereabouts are not known. Hence, I came back. I was accompanied by the plaintiff.

sd/-
Bailiff
1/3/04”

11. The plaintiff, therefore, took out application exhibit-6 on 09.03.2004 for substituted service on defendants No.1 to 4 setting out therein the attempts made for effecting service on defendants No.1 to 4. The learned trial Judge directed that the defendants No.1 to 4 be served by pasting, R.P.A.D. and U.C.P. at the suit premises and simultaneously by publishing the same in the newspaper (Mid Day). The said order was modified in pursuance of application dated 13.09.2004 made by the plaintiff and by order dated 13.09.2004, plaintiff was permitted to publish Summons in daily newspaper 'Free Press Journal' instead of 'Mid Day'. Accordingly, notice was published in the edition of 07.10.2004 of Free Press Journal.

12. With the assistance of the learned Counsel appearing for the parties, I have also perused the original record. A perusal of the original record shows that the Power of Attorney dated 15.04.2003 was given by defendants No.1 to 4 in favour of defendant No.5. One of the recitals of

the Power of Attorney recorded that due to unavoidable circumstances, defendants No.1 to 4 had decided to leave the suit premises for good permanently, and as such, it was necessary for them to appoint a fit and proper person as their Attorney in connection with the suit premises. Defendants No.1 to 4 appointed defendant No5 as their Attorney inter alia conferring powers on him -

- a. to use and occupy the suit premises along with his family;
- b. to get the tenancy / occupancy rights of the suit premises transferred / regularized in his name;
- c. to pay the necessary rent, fees, maintenance and other charges and outgoing expenses of the suit premises;
- d. to appear before and represent before the concerned landlords of the suit premises, B.M.C. in connection with the transfer of tenancy, rent bill of the suit premises;
- e. to give oral and / or documentary evidence in respect of the suit premises to the concerned authorities as and when required;
- f. to appear before and represent before all the authorities concerned in Mumbai for all the matters touching the suit premises;
- g. to appoint any advocate, lawyer, solicitor on their behalf and to sign necessary Vakalatnama and to pay their legal fees as and when required;
- h. to execute and make all necessary documents, applications or papers, affidavit, indemnity bond, undertaking, declaration and all other documents and to put his signature thereof;
- i. to institute, commence, carry on or defend any suits, petitions or appeals, cases or proceedings concerning anything in which their appearance is necessary as the Attorney may deem fit and necessary;
- j. to take all such steps as may be required and expedient for the purpose of the suit premises.

13. Ms Parasnis submitted that in paragraph 25, the Apex Court wrongly recorded a finding that defendant No.5 did not produce original Power of Attorney. For the time being, I proceed on the premise that defendant No.5 produced original Power of Attorney. As indicated earlier, defendants No.1 to 4 gave Power of Attorney to the defendant No.5 in respect of the suit premises. Thus, when defendant No.5 was personally served on 09.02.2004, service was deemed to have been effected on defendant No.1 to 4 in the eyes of law. Defendant No.5 was fully aware of filing of the Suit by the plaintiff. It is material to note that on 21.04.2004, defendant No.5 was present before the Registrar's Court and Rojnama recorded his presence. On 20.10.2004, the matter was before the Registrar's Court when the following order was passed as recorded in the Rojnama:

“Plaintiff and Advocate present. Defendant No.5 absent. W.S. not filed. Defendants No.1 to 4 pasted, R.P. returned, Defendants No.1 to 4 publication published the service of summons to Defendants No.1 to 4 in Free Press Journal Newspaper on 07.10.2004, on page 6. Filed, Adjourned to 5.11.2004 for W.S.”

14. On 05.11.2004, defendants were absent and no W.S. was filed. On 07.12.2004, the learned trial Judge passed the following order:

“When called out, only Plaintiff and Advocate present. Defendant No.5 personally served long back. Defendants No.1 to 4 served with substituted service of pasting, R.P.A.D., U.P.C. and public notice. All Defendants remained absent till today.

Order Suit to proceed ex-parte against all the Defendants to 21.12.2004.”

15. The learned trial Judge directed the Suit to proceed ex-parte against the defendants and matter was adjourned to 21.12.2004. On 21.12.2004, plaintiff filed affidavit of evidence along with the documents. Defendants did not participate. On 17.01.2005, the learned trial Judge decreed the Suit.

16. On 20.09.2005, plaintiff took out notice before execution namely, Miscellaneous Notice No.517 of 2005. Defendant No.5 was personally served with the said notice on 03.10.2005 at the suit premises. Defendant No.5 attended Miscellaneous Notice on 21.10.2005, 18.11.2005, 25.11.2005 and 02.12.2005. On 10.01.2006, defendant No.5 took out present proceedings for condonation of delay in filing the proceedings under Order IX, Rule 13 of the Code of Civil Procedure, 1908 as also for setting aside the ex-parte. The plaintiff filed detailed reply dated 25.01.2006 opposing the said notice.

17. While rejecting the application, the learned trial Judge observed in paragraph 10 that defendant No.5 was in the suit premises when Bailiff went to serve the Writ of Summons. Defendant No.5 also claims to be the Power of Attorney Holder of defendants No.1 to 4. In view thereof, service on defendant No.5 was proper and legal. In my opinion, once defendant No.5 has come with the case that he was Power of Attorney of defendants No.1 to 4 on the basis of Power of Attorney dated 15.04.2003, the service effected on defendant No.5 was deemed to be service on defendants No.1 to 4 in the eyes of law. Though defendant No.5 was personally served and he appeared before the Registrar on 21.04.2004, he thereafter did not participate in the trial Court. The learned trial Judge was, therefore, right in holding that no sufficient cause was made out for condoning the delay as also for setting aside the ex-parte decree. It is also material to note that defendant No.5 claims that defendants No.1 to 4 are his relatives. Neither defendant No.5 nor his wife gave addresses of defendants No.1 to 4 for effecting service on them.

18. In so far as the Appellate Court is concerned, the Appellate Court considered the submissions of defendants as regards sufficient cause for

setting aside the ex-parte decree as also for condoning the delay, namely,

- a. defendant No.5 was suffering from Typhoid;
- b. defendant met with an accident on 15.12.2005 and he was bedridden for almost 4 months;

19. The Appellate Court noted in paragraph 35 that defendant No.5 attended the said notice on different dates. The Appellate Court noted that defendant No.5 was suffering from Typhoid from 20.09.2005 till four months. After perusing the certificate dated 19.12.2005, the Appellate Court observed that defendant No.5 has sustained blunt trauma to right knee and leg and he was advised to take rest for one month. Defendant No.5 was not advised complete bed rest as claimed by him. In fact defendant No.5 attended Miscellaneous Notice on different dates which itself falsified his case that he was advised complete bed rest. After re-appreciating the evidence on record, the Appellate court affirmed the findings recorded by the trial Court.

20. Ms Parasnis submitted that in paragraph 25, the Appellate Court held that application filed by the defendant No.5 is not maintainable as he did not produce the original Power of Attorney. She further submitted that wife of the defendant No.5 was not Power of Attorney of defendants No.1 to 4, and therefore, service on wife of defendant No.5 cannot be treated as a valid service on defendants No.1 to 4. She further submitted that without recording satisfaction, the learned trial Judge directed effecting service on defendants No.1 to 4 by substituted service and lastly, that the Courts below were not justified in holding that no sufficient cause was made out for condoning the delay as also for setting aside the ex-parte decree.

21. I do not find merit in any of these submissions for the reasons

recorded earlier. Hence, Petition fails and the same is dismissed. Rule is discharged with no order as to costs.

22. In view of the disposal of the Petition, Civil Application No.2030 of 2013 for fixing Writ Petition for final hearing does not survive and the same is disposed of as such.

23. Registry to transmit the R.&P. forthwith to the concerned Court.

(R. G. KETKAR, J.)

Minal Parab