

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 208 OF 2015

Mr. Ukesh Ratilal Pitadia
and another

...Applicants

Versus

Mr. Narendra Abheraj Baltoda
and others

...Respondents

....

Mr. Sachin S. Punde, Advocate for the Applicants (appointed by Legal Aid).
Ms. Vidhi Thaker a/w. Kunal Bhanage, Advocate for Respondent No.3.

....

CORAM : R. G. KETKAR, J.

DATE : 07th JANUARY, 2019

P.C.

1. Heard Mr.Sachin Punde, learned counsel for the applicants and Ms. Vidhi Thaker, learned counsel for respondent No.3, at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants have challenged the judgment and decree dated 9.4.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai in 2b(iv) Appeal No.435/2010. By that order, the Appellate Bench allowed the appeal preferred by respondent No.2 Subhash Ratanchand Baldota and set aside the judgment and decree dated 20.8.2010 passed by the learned trial Judge, Court Room NO.20 of the Court of Small Causes at Mumbai in Misc. Application No.419/2009. The Appellate Bench dismissed that Misc.

Notice. The relevant and material facts, giving rise to filing of the present C.R.A., briefly stated, are as under.

3. It appears that S/Shri A.H. Baldota and R.H. Baldota instituted R.A.E. Suit No.2592/1991 against Narbheram Jina (for short, 'original defendant') for recovery of possession of room No.21/24, Baldota House, Laxmi Narayan Lane, Matunga, Mumbai-9 (for short, 'suit premises'). Initially, original defendant did not file the written statement till 3.6.2003. The suit was, therefore, ordered to proceed exparte against the original defendant. Subsequently, original defendant filed written statement and denied the plaintiff's claim. During pendency of the suit, original defendant died and his widow Damyantiben Narbheram Jina was brought on record.

4. After filing of the written statement and during the lifetime of the original defendant, issues were framed. After framing of the issues, original defendant expired and Damyantiben was brought on record. Though she was served with the suit summons on 3.6.2003, she did not file written statement. The learned trial Judge directed the suit to proceed exparte. The plaintiff examined PW-1 Amrutlal Parekh. He deposed that the defendant carried out construction of a loft and thus made additions and alterations of permanent nature in the suit premises. He also caused waste to the suit premises and acted contrary to the

provisions of the Transfer of Property Act, 1882. The evidence of PW-1 was not challenged. The learned trial Judge decreed the suit on 1.3.2004. It appears that on 16.9.2004, the decree was obstructed. Obstructionist Notice being Obstructionist Notice No.78/2004 was, therefore, taken out on 12.10.2004. The Obstructionist Notice was dismissed for want of prosecution on 19.9.2005 as the decree holder did not pay process-fee. The decree holder thereafter took out application on 11.12.2008 for reissuing warrant of possession. On 19.12.2008, the decree came to be executed.

5. On 16.6.2009, application under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') was taken out by Ratilal Pithadia, husband of applicant No.1 and brother of applicant No.2. Said application was affirmed by Harsha Ukesh Pithadia, wife of applicant No.1. On behalf of the plaintiff affidavit-in-reply was filed opposing the application. After considering the material on record, the learned trial Judge allowed the application and set aside the exparte decree dated 1.3.2004 and directed the plaintiff to restore the possession of the suit premises to the defendant within two months period. The plaintiffs were also directed to bring on record the name of the applicants as party defendants being legal heir and representatives of the deceased defendant.

6. Aggrieved by this decision, respondent No.1 Narendra Abheraj Baldota and respondent No.2 Subhash Ratanchand Baldota preferred appeal. It appears that respondent No.1 Narendra Abheraj Baldota was deleted in the appeal. As indicated earlier, by the impugned order, the Appellate Court allowed the appeal. It is against this order, the applicants have instituted present C.R.A..

7. In support of this C.R.A., Mr. Punde strenuously contended that the Appellate Court committed serious error in reversing the trial Court's well reasoned order. He submitted that exparte decree was passed on 1.3.2004. Though in paragraph-6 of the application, it is contended that they were informed by the Bailiff on 16.9.2004 about passing of exparte decree, they were bonafide defending Obstructionist Notice taken out by the plaintiffs. He submitted that the Obstructionist Notice was dismissed in default on 19.9.2005 for non-payment of process fees. Instead of restoration of that proceeding, the plaintiffs took out application on 11.12.2008 for re-issuing warrant of possession. This was totally malafide action on the part of the plaintiffs inasmuch the decree was obstructed in the year 2004 itself. He further submitted that the decree was executed on 19.12.2008 and the possession of the suit premises was taken from Mr. Ukesh R. Pithadia who is suffering from mental disease, namely, parancid schizophrenia (mental disorder). He

submitted that in paragraph-9 of that application, the applicants have made out a sufficient cause for condoning the delay. The learned trial Judge accepted the reasons given by the applicants for condoning the delay. However, the Appellate Court committed serious error in holding that the application under Order IX Rule 13 of C.P.C. is hopelessly barred by limitation.

8. Mr. Punde further submitted that the applicants are residing in the suit premises right from 1969. He has invited my attention to paragraph-4 of the application where in support of their contention, the applicants have produced voluminous documentary evidence on record. The applicants further claimed that as they are continuously residing in the suit premises along with the defendant at the time of his death, as such they became tenant under the provisions of the Rent Act. Appellate Court was, therefore, not justified in allowing the appeal. He submitted that the applicants have satisfied the requirements laid down under Order IX Rule 13 of C.P.C. He, therefore, submitted that the application requires consideration.

9. On the other hand, Ms. Thaker supported the impugned order. She submitted that in the first place, though the applicants claimed that they are residing in the suit premises since 1969, they have not mentioned the relationship with the original defendant either in the

application under Order IX Rule 13 of C.P.C. or even in the present C.R.A. under Section 115 of C.P.C. Secondly, in paragraph-6 the applicants admitted that they acquired knowledge of passing of exparte decree on 16.9.2004. However, application under Order IX Rule 13 is taken out on 16.6.2009. Thirdly, original defendant was duly served with the suit summons. He had filed written statement. Pending suit, original defendant expired. His wife Damayantiben was brought on record. She submitted that the learned trial Judge while passing the decree observed that though Damayantiben was served with the writ of summons on 3.6.2003, she did not participate in the trial. She, therefore, submitted that as original defendant and his widow were duly served with the writ of summons, 30 days period prescribed under Article 123 of the Limitation Act, 1963 will begin from 1.3.2004 being the date of the decree. In any case, as per the case of the applicants they acquired knowledge of passing of exparte decree on 16.9.2004 and the period will begin from that date. Present application is filed on 16.6.2009 which is hopelessly barred by limitation. She further submitted that this is to be appreciated in the backdrop of the fact that on 19.12.2008 the applicants were dispossessed from the suit premises and still present application is made out on 16.6.2009. She submitted that the appellate Court rightly held that no sufficient cause is made out

for condoning the delay. She, therefore, submitted that no case is made out for interfering with the impugned order.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the decree was passed on 1.3.2004. It is also not in dispute that original defendant was duly served with the writ of summons. He had also filed the written statement. The learned trial Judge had framed the issues on the basis of pleadings. After framing of the issues, original defendant expired. His widow Damyantiben was brought on record. She also served with the writ of summons on 3.6.2003. Damyantiben, despite service, did not file written statement and participate in the proceedings. The evidence adduced by PW-1 was not challenged by Damyantiben. It is in this context material to note the claim of the applicants that they are residing in the suit premises right from 1969. Appellate Court has considered this aspect in paragraph-17 of the impugned order. Appellate Court observed that the appellants ought to have taken out application for impleadment in the suit. If the applicants claim to be residing in the suit premises, they cannot say that they were unaware of the proceedings. In view thereof, I do not find that the appellate Court committed any error in reaching to this conclusion.

11. A perusal of explanation given by the applicants in paragraph-9 shows that the applicants have not explained what prevented them from filing application under Order IX Rule 13 of C.P.C. at least from acquiring knowledge on 16.9.2004 about passing of exparte decree. Not only that even the decree was executed on 19.12.2008 and the application is made on 16.6.2009. In view thereof, the Appellate Court rightly held that the applicants have not made out a sufficient cause for condoning the delay in filing application under Order IX Rule 13 of C.P.C.

12. Article 123 of Limitation Act reads thus :

**THIRD DIVISION—APPLICATIONS
PART I – APPLICATIONS IN SPECIFIED CASES**

Description of application		Period of limitation	Time from which period begins to run
123.	To set aside a decree passed ex parte or to re-hear an appeal decreed or heard ex parte. Explanation. -- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

13. A perusal of above provision shows that the period of 30 days will begin from the date of passing of the decree or where the summons or notice was not duly served, when the applicants had knowledge of the

decree. In the instant case, original defendant and Damyantiben were duly served and the limitation will begin from the date of the decree, namely, 1.3.2004. Even accepting the case of the applicants that they acquired knowledge of passing of decree on 16.9.2004, the application ought to have been filed within 30 days from 16.9.2004. As against this, the application is filed on 16.6.2009. It is also material to note that on 19.12.2008 decree was executed and possession was taken. Even thereafter also the applicants did not promptly file application for setting aside exparte decree.

14. Mr. Punde submitted that as the plaintiffs had filed the Obstructionist Notice on 12.10.2004, the applicants were prosecuting that proceeding bonafide. I do not find any merit in this submission for more than one reason. In the first place, the obstructionist proceedings were dismissed for want of prosecution on 19.9.2005. Secondly, the time spent by the applicants in prosecuting obstructionist proceedings will not come to their rescue as basically they have to apply for setting aside exparte decree. Admittedly, the applicants acquired knowledge at least on 16.9.2004. Nothing prevented them from filing application under Order IX Rule 13 of C.P.C. for setting aside exparte decree. As mentioned earlier, the plaintiffs took out obstructionist notice for removal of the obstruction. That will not enable the applicants to claim

that while prosecuting that proceedings exparte decree be set aside. In short, the applicants ought to have filed application under Order IX Rule 13 of C.P.C. immediately after at least acquiring knowledge on 16.9.2004.

15. In view thereof, I do not find that the appellate Court committed any error in passing the impugned order. Hence, C.R.A. fails and the same is dismissed. Order accordingly,

16. At this stage, the Court records appreciation of able assistance rendered by Mr. Punde who was appointed through Legal Aid.

(R. G. KETKAR, J.)

Deshmane (PS)