

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4108 OF 2022

ANIL GORAKHNATH WALEKAR AND OTHERS
VERSUS
SHIVAJI ASARAM WALEKAR AND ANOTHER

...
Advocate for Petitioners : Mr. Chandrakant Biradar Chandrant D.
Advocate for Respondents No. 1 and 2 : Mr. R.P. Bhumkar
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 5th APRIL, 2022

ORDER :

1. This petition takes exception to the order passed by the learned Civil Judge, Junior Division, Badnapur, on Civil Miscellaneous Application No. 2/2019, thereby allowing the said application filed under Order IX Rule read with 151 of Code of Civil Procedure, 1973 for setting aside the exparte decree passed against the respondents and deceased Asaram.

2. Regular Civil Suit No. 438/2007 was filed by the petitioners for permanent injunction in respect of the suit property

mentioned in the plaint, against the respondents and deceased Asaram in the Court of Civil Judge Senior Division, Jalna. The said suit was decreed ex parte.

3. The respondents filed Civil Miscellaneous Application No. 2/2019 for setting aside of ex parte decree. The respondents contended that suit summons of Regular Civil Suit No. 438/2007 were not served on them and deceased Asaram. Thereafter, due to establishment of Court of Civil Judge Junior Division, Badnapur, the said suit was transferred to Badnapur and was renumbered as Regular Civil Suit No. 82/2008. Even after transfer of the suit at Badnapur, no summons were issued and served to the respondents and deceased Asaram. The Respondent No. 2 got knowledge of the ex parte judgment and decree, when the petitioners filed copy of the said judgment in the proceedings filed by the Respondent No. 2 before Superintendent of Land Records, Jalna. The respondents therefore, sought setting aside of ex parte decree. The trial Court after recording the evidence has allowed the application. This order is impugned in the present petition.

4. Heard the rival submissions of learned advocate for the petitioners and learned advocate for the respondents No. 1 and 2. Perused the documents placed on record.

5. Admittedly, there is nothing on record to indicate that suit summons of Regular Civil Suit No. 438/2007 was served on the respondents. After the said suit was transferred to Badnapur Court and renumbered as Regular Civil Suit No. 82/2008, no suit summons appears to be served on the respondents or on deceased Asaram. The trial Court by order dated 17.10.2017 directed the Regular Civil Suit No. 82/2008 shall proceed *exparte* against all the defendants. Consequently, *exparte* decree is passed on 06.08.2011.

6. The trial Court recorded the evidence in Civil Miscellaneous Application No. 2/2019. The petitioners in their evidence gave vital admissions in the cross examination. They admitted that the Respondent No. 2 is residing at Aurangabad since 1992 and the respondents are not residing with Respondent No 1. The Petitioner No 1 has not filed application for issuing summons in Regular Civil Suit No. 82/2008, because there was no necessity for the same. It is

also admitted that suit summons in Regular Civil Suit No. 82/2008 were not issued on the respondents, because the respondents had knowledge of the suit. The Respondent No. 1 further admitted that during hearing of Regular Civil Suit No. 82/2008, Asaram Walekar died and the respondent No. 1 has not given information of death of Asaram to the Court.

The trial Court after considering the evidence placed on record and after hearing the parties allowed the application filed by respondents and set aside the ex parte decree.

7. There is no material on record to show that suit summons were served on the respondents in Regular Civil Suit No. 438/2007. There is nothing on record to indicate that after transfer of the suit from the Court of Civil Judge Senior Division, Jalna to Civil Judge Junior Division, Badnapur, the suit is renumbered as Regular Civil Suit No. 82/2008, suit summons were issued to the respondents. Thus, it is clear that respondents had no knowledge of pendency of suit. Taking into consideration the admissions given in the cross examination by respondent No. 1, the trial Court was right in allowing the Miscellaneous Civil Application No. 2/2019.

8. The learned advocate for the petitioners has relied upon copy of summons placed on record at Page 71, which according to him is signed by respondent-Shivaji. The summons appears to have been signed by a person by name Shivaji, however, only name 'Shivaji' is mentioned on the said summons, this cannot be said to be a proper service, therefore, it is not possible to accept the petitioners contention that the suit summons were served on defendant Shivaji.

9. The trial Court has properly appreciated the evidence on record and has rightly allowed the application filed by the respondents, by coming to a conclusion that the suit summons were not served on the respondents. No illegality or perversity is found in the impugned order. No case is made out for exercising extraordinary writ jurisdiction. The writ petition is, therefore, dismissed.

[NITIN B. SURYAWANSHI]
JUDGE