

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2306 OF 2020

Tejas Bhagwat Chabukswar and Anr. ... Petitioners
Versus
Mrs. Ambubai Nagnath Mode and Ors. ... Respondents

— —
Mr. Anil Anturkar, Senior Advocate i/by Mr. Shubham H. Misar for the
Petitioners.
None for the Respondents.
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CORAM : SHARMILA U. DESHMUKH, J.

DATE : June 26, 2023.

P. C. :

1. Heard. None appears for the Respondents.
2. Vide order dated 29th June, 2022, this Court had issued notice for final disposal and by way of interim relief the proceedings in R.C.S. No.602 of 2011 were stayed. Office noting shows that the Respondent Nos.1 to 4 was duly served and, as such, the petition is taken up for hearing.
3. The challenge is to the order dated 17th April, 2019 rejecting the petitioners' application seeking to set aside the order of exparte hearing passed against the Petitioners. For sake of

convenience parties are referred as per their status before the Trial Court.

4. The facts of the case are that the Petitioners' paternal aunt had instituted proceedings bearing R.C.S.No.602 of 2011 against the Defendant no.1-grandmother, Defendant No.2-father, Defendant No.3-mother and the Petitioners-Defendant Nos.4 and 5 seeking partition and separate possession of the suit properties. The service was effected upon the Defendants Nos.1 to 3 and written statement came to be filed by the Defendant No.2 and Defendant no.3. The service could not be effected upon the Petitioners and to that effect there is a Bailiff's report, which is annexed at page 32 of the petition, which records that the Petitioner no.1-original Defendant no.4 was residing at Sangali for the purpose of his education and the Petitioner no.2-Defendant no.5 was residing at Nigeria.

5. The Bailiff's report made it clear that the service could not be effected upon the Petitioners, as they were not residing at the address given in the cause title. Subsequently, on 7th March, 2012, an application was moved by the plaintiff seeking permission to complete the service upon defendant Nos.4 and 5 through the Defendant No.2 their father. On the same day, by an endorsement on

the said application, the Defendant No.2 accepted the service.

6. Upon learning of the suit proceedings, on 12th February, 2019, an application came to be moved by the Petitioners seeking to set aside the order of ex parte hearing passed on 28th March, 2012. It is the precise contention of the Petitioners in the said application that there was collusion between the plaintiff and the defendant nos.1 and 2. The said application was opposed by the original plaintiff and the evidence came to be led between the parties. After the evidence was led the order impugned was passed rejecting the said application.

7. Mr. Anturkar, learned Senior Counsel appearing for the Petitioners has pointed out the cause title of the plaint which shows that the Defendant no.3 and Defendant nos.4 and 5 were residing at the address i.e. r/o.15B, Mulchi Housing Society, Sidheshwar Nagar, Near Bharati Vidyapeeth, Solapur, whereas the Defendant no.2-father was residing at post Vangi, Tal. South Solapur, District Solapur. It is thus, evident that the defendant nos.3 to 5 were not residing with the defendant no.2. He would further point out the written statement filed by the defendant no.2-father, which clearly supports the case of the plaintiff, whereas the written statement of the defendant no.3, opposes to grant of relief of partition and separate possession. He

would further submit that considering the position that the defendant nos.4 and 5, the Petitioners herein, were not residing with the defendant no.2-father, it was not open for the plaintiff to effect service upon the defendant nos.4 and 5 through the defendant no.2. He would further submit that the provisions of Order 5 Rule 15 of the Code of Civil Procedure, 1908, which have been relied upon by the trial Court while rejecting the application will be applicable only in event, the adult male member of the defendant is residing with him.

8. There is considerable force in the submissions made by the learned Senior Counsel Mr.Anturkar. A perusal of the provisions of Order 5 Rule 15 of the CPC, provides that when the defendant cannot for any reason be personally served and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

9. Trial Court ought to have considered the fact that the cause title of the plaint itself indicates that the defendant no.2 is not residing with the defendant nos.4 and 5, and as such, the provisions of Order 5 Rule 15 are clearly inapplicable to the facts of the present case. It was also expected of the Trial Court to take into consideration

the fact that the written statement filed by the defendant no.2-father and the defendant no.3-mother appears to be a variance inasmuch as father has accepted the claim of the plaintiff, whereas the mother has opposed the relief of partition. The evidence on record clearly establishes that the Defendant no.2-father was not in contact with the Defendant no.5 and the specific admission was given that he had met the Defendant no.5 almost 8 to 10 years back.

10. Considering the evidence which has come on record, the service which was effected upon the defendant nos.4 and 5 through the defendant no.2 could not be said to be the proper service within meaning of Order 5 Rule 15 of CPC.

11. In light of the above, the impugned order dated 17th April, 2019 is clearly unsustainable and is hereby quashed and set aside. As a result, the application of the Petitioners' below Exh.84 seeking to quash and set aside the order of exparte hearing stands allowed.

12. Writ Petition stands allowed in the above terms.

(Sharmila U. Deshmukh, J.)