

CNR No. MHSCA2003472-2017

Presented on : 20/12/2017

Registered on : 09/01/2018

Decided on : 28/11/2018

Period required for disposal

00 Years, 10 Months, 19 Days

IN THE COURT OF SMALL CAUSES AT MUMBAI

MERJI APPLICATION NO.8 OF 2018

IN

L. E. & C. SUIT NO.129 OF 2012

1.Mr. Muthu Daniel Muthuswamy	]
Age : 51 yrs, Occ : Service	]
80/Madha Koil Street, Muthuswamy	]
Colony, Selvapuram Coimbatore – 26,	]
Tamil Nadu.	]
2. Mrs. Manomani George	]
Age : 46 yrs, Occ : Housewife	]
9/20, Blossom CHS, Marol Military Road,	]
Andheri East, Mumbai – 400 059.	]
3. Mrs. Regina Selvaraj	]
Age : 40 yrs, Occ : Service,	]
Room No.11A, Kattawadi Back Chawl,	]
Dharavi, Mumbai – 400 017.	]

4. Miss. Kalaimagal Selvaraj]
 Age : 17 yrs, Occ : Student,]
 Room No.11A, Kattawadi Back Chawl,]
 Dharavi, Mumbai – 400 017]
 Through her natural guardian]
 Mrs. Regina Selvaraj, Residing at]
 Room No.11A, Kattawadi Back Chawl,]
 Dharavi, Mumbai – 400 017.]...Plaintiffs

Versus

Mrs. Mehmooda w/o. Abdul Rehman @ Mumtaz]
 Age : 51 yrs, Occ : Housewife,]
 Flat No.505, 5th floor, Dharavi Parani CHS,]
 407, Paulwadi, Dharavi Cross Road, Dharavi,]
 Mumbai – 400 017.]...Defendant

M. M. Shetty, Ld. Advocate for Plaintiffs.
 Shri Surendra Yadav, Ld. Advocate for Defendant.

Coram : Smt. S. S. Pakhale, Judge
 Court Room No.20
 I/c. Judge, C.R.No.25
 Date : 28/11/2018

ORAL JUDGMENT

1. The present application is being filed by the son and CA of the defendant for setting aside exparte decree dated 10.08.16 passed in LE & C Suit No. 129 of 2012.

2. In short the case of the applicant is as under:

The applicant is the tenant of the suit premises. She was not aware that an eviction suit was filed against her. She has contended that the suit summons of the said suit was not served upon her. Therefore, this application is been filed by the C.A. of the defendant who is also her son to set aside the said exparte decree passed against her. In the application the applicant has given the details as to how the suit premises was being transferred in the name of Abdul Rehman Ibrahim Rawther who was her husband. The applicant has expressed that, she and her family member were not aware about the pendency of suit which was decreed exparte. In this context it is further submitted that Plaintiffs have filed the suit for possession of the suit premises viz.: Flat no.: 505, 5 th Floor, Dharavi Parani CHS, 407, Paulwadi, Dharavi Cross Road, Dharavi, Mumbai - 400 017 on the ground that defendant and her husband were put in possession of the suit premises by Late Mr. Daniel Muthuswamy gratuitously without any term as to compensation and on other various grounds mentioned in the Plaint.

3. It is further submitted that from the certified copies which she has obtained on 4/ 12/2017 she came to know that the suit was filed on 11/5/2012 and the defendant was not served with Writ of Summons and copy of Plaint either through bailiff or by any other mode. The plaintiff by obtaining false bailiff report of service by pasting, obtained ex-parte decree on 10/8/2016. The defendant alongwith her son and daughter are permanently residing in the suit premises. She is newer being served with the suit summons through pasting. The defendant does not know Hindi, Marathi and English except Tamil language. She has not received summons through bailiff nor by Registered Post and therefore there is no

mention about the explanation of his visit by the bailiff to her. She has not received any intimation from the Post Office. She further contends that neither her son nor daughter had ever met or talk to any court person.

4. It is further contended that from 2012 the matter was adjourned from time to time. The Hon'ble Court kept the matter for Ex-parte hearing on 10/10/2013. The ex-parte decree was passed on 10/8/2016 against the defendant. After the service of execution application of the above suit on 8/11/2017, she for the first time came to know about the exparte decree. As the suit summons was not served upon her by any mode of service, therefore the exparte decree is liable to be set aside. It is therefore prayed that pending the hearing and final disposal of the notice, Execution of the Decree dt. 10/8/2016 be stayed and the exparte decree dt. 10/8/2016 passed by Court Room No. 25 be set aside by condoning the delay caused in making the application. It is further prayed to give an opportunity to the defendant to file her Written statement and contest the suit on merit.

5. The present application is strongly contested by the the Constituted Attorney of the Plaintiff no. 1 and 2 by filing his reply at Exh.5. It is contended by the plaintiff that the application made by the Constituted Attorney of the Defendant to set aside the decree is not maintainable and bad in law more particularly without the sworn statement of the Defendant herself. The application is barred by the law of limitation. Therefore, according to the plaintiff no case is made out for setting aside the decree. So also the application is not maintainable and is liable to be dismissed with costs.

6. The plaintiff has further denied that Sheikh Mohdin the son and CA of the Defendant was residing in the suit premises prior to 2000.

All the contentions of the defendant with regard to transferred of the suit premises in the name of Abdul Rehman by the Plaintiff no. 1 's father are denied by the plaintiff. According to the plaintiff though the defendant has relied upon an affidavit in her application for transfer of the electricity connection to her name but it is a false claim on the basis of forged and fabricated document.

7. All the contentions of the defendant with regard to the letter dated 19.05.2000 said to be written by the Plaintiff no. 1's father to the secretary /chairman of Dharavi Parani CHS Ltd stating that the possession of the suit premises was given to Abdul Rehman are being denied by the plaintiff. It is denied that the CA of the Defendant became aware on 4.12.2017 about the passing of the exparte decree. All the contentions of the defendant that the suit summons were not served to her by any mode is denied by him. The plaintiff has specifically denies that the Defendant does not know any language except Tamil or that she had not received summons through Bailiffs or by post. It is the contention of the plaintiff that the Bailiffs reports will falsify the contentions of CA of defendant that he or his sister did not ever talk to the Bailiff. All the other contentions of the defendant are being denied by the plaintiff. According to the plaintiff, the defendant was duly served with the suit summons through pasting. Therefore, all her allegation with this regard are false and incorrect. Hence with these contentions, it is prayed to reject the application.

8. From the rival contentions of the parties following points arise for my determination for which I have recorded my findings for reasons to follow :

<u>S.N.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1	Whether the ex-parte decree passed in LE & C Suit No. 129 of 2012 is liable to be set aside by condoning the delay ?	Yes
2	What order ?	As per final order.

REASONS

AS TO POINT NO.1 AND 2

9. Heard Id Advocate for the parties. Gone through the entire record of L.E.& C Suit No.129 of 2012. Heard Id. Advocate for the parties.

10. Through this application the defendant has sought to set aside the exparte decree dated 10.08.2012 passed in LE & C Suit No.129 of 2012. Admittedly the suit summons in the said suit is shown to be served upon the defendant through pasting. Whereas, the main contention of the defendant in this application is that, she is not being duly served by any mode of service. She has also gives the details as to how the suit premises was transferred in the name of her husband to show as to how the restoration of the suit is important for her. In this context, it is submitted by the defendant that the father of the Plaintiff no. 1, Late Mr. Daniel Muthuswamy was good friend of her deceased husband. She further submits that Mr. Daniel Muthuswamy expired on 28/9/2002 and his wife Irudaya Marie Daniel, also expired on 20/9/2010. The said suit premises was originally in the name of Mrs. Arabia Zakaria widow of late P. M. Zakaria which was allotted to her by Maharashtra Housing and Department Area Board. All these contentions of the defendant are denied

by the plaintiff. He has also resisted the defendant's claim of being lawful occupant of the suit premises. In the present application the defendant has given the details of the events which according to her are important to decide the present application as she claims to be lawful occupant of the suit premises being the heir of the lawful transferee.

11. To claim her right over the suit premises the applicant has further stated that the said suit premises was transferred in the name of Abdul Rehman son of Ibrahim Rawthe by Affidavit dt. 19/5/2000. In the said Affidavit the plaintiff no. 1's father, Late Mr. Daniel Muthuswamy has declared that due to his personal difficulties, he has handed over the peaceful and physical possession of the suit premises and gave consent to transfer it in the name of Abdul Rehman Ibrahim Rawther and he has also relinquished all his rights and interest in respect of the suit premises. Therefore, he and his family members had no objection for transfer of the suit premises in the name of Defendant's husband.

12. To substantiate this contention, the defendant has annexed at Exh. "B" the copy of the Affidavit dt. 19/05/2000. The plaintiff has not only denied the said affidavit to be a genuine document but has also disputed the genuineness of the affidavit of the defendant for transfer of the electric connection of the suit premises in her name. The plaintiff contends that though the defendant has relied upon an affidavit in her application for transfer of the electricity connection to her name but it is a false claim. According to the plaintiff this affidavit would show that the documents have been fabricated by the defendant for claiming rights in the suit premises. Plaintiff contends that, there are no properly stamped or registered document transferring right, title or interest of the suit premises in the name of defendant's husband. This statement is made by the

plaintiff on the basis of Exh.X which is a copy of affidavit which along with other documents is said to be obtained by Mrs. Irudaya Mary Daniel the deceased wife of Daniel Muthuswamy under RTI.

13. To prove her claim over the suit premises, the defendant has further submitted that the plaintiff no.1's father had written a letter dt. 19/5/2000 to the secretary/ chairman Dharavai Parani CHS Ltd. stating that the possession of the suit premises has been given to Mr. Abdul Rehman Ibrahim Rawther. According to the defendant, plaintiff's father also expressed his no objection to transfer the suit premises in favour of Mr. Abdul Rehman Ibrahim Rawther. The defendant has produce on record at Exh. C the copy of the said letter dt. 19/5/2000 which is said to be signed by Plaintiff no. 1's father i.e Mr. Daniel Muthuswamy. This document is also been disputed by the plaintiff. All the contentions of the defendant with regard to Plaintiff no. 1's father to had written letter dated 19.05.2000 to the secretary /chairman of Dharavi Parani CHS Ltd stating that the possession of the suit premises was given to Abdul Rehman are been denied by the plaintiff. It is his contention that the letter dated 19.05.2000 is false and fabricated and therefore the statements made therein are false and of no consequence.

14. It is the case of the plaintiff that till today the suit premises stands in the name of Daniel Muthuswamy in the records of the society. So also it is contended by the plaintiff that the defendant herself through her advocate had made contradictory and false statements in her earlier notices and correspondence to various authorities. The plaintiff has produce at Exh. Y the copy of the notice of her advocate which is said to be obtained by him among other documents under RTI. In the said notice of the defendant's advocate it is clearly stated that all documents are

missing except the letter to society. It was also stated in the said letter that the husband of the Defendant was missing since 09.07.2001. These contentions of the plaintiff can be ascertained from Exh.Y and also for not being denied by the defendant. From the above contentions of the parties, one can gathered that there are serious contraventions between the parties with regard to the suit premises, not only on the basis of licensee but also on the basis of title. Therefore, one can conclude that a contested suit is the best opportunity to the parties to finally decide whether or not the husband of the defendant was the gratuitous licensee of the suit premises.

15. Ld. Advocate for the plaintiff argued that as the said suit was ex-parte therefore when the plaintiffs applied for execution of warrant of possession on 05/07/2017 being Execution Application No. 205/2017, the Hon'ble Court was pleased to order to issue the notice to the defendant. At Exhibit "D" the plaintiff has produced the copy of the Execution Application. It is further argued that though the suit is decreed exparte but the defendant was given an opportunity to appear and contest the suit which she failed though was duly served with suit summons. From the above discussion, one can gather that the suit premises is in the use and occupation of the defendant as such she is resisting the decree. From the above discussion it can be also be gathered that the defendant is also resisting the said decree on the ground that her husband was the lawful transferee of the suit premises therefore according to her she has right to hold the same. But to decide whether the decree is liable to be set aside it is only necessary to see whether or not the suit summons were duly served upon the defendant.

16. The defendant has contended that after coming to know about the execution proceeding she for the first time obtained the certified copies

of the Complaint, Ex-parte decree, Summons, bailiff's report, oral judgment, etc. It is her contention that the bailiff of the court had never visited the suit premises neither summons was pasted on the door of the suit premises nor the Registered packets of summons was sent at the address of the suit premises nor same was refused. Defendant contends that the contents of bailiff report that Miss Rashida and Sheikh Mohiddin were informed about the suit and they have refused to take the summons is false and obtained by fraud. Defendant further contends that the bailiff has not taken the signature of the neighborer as a witnesses before whom he has pasted the Summons and Complaint. The fact that no signature of any neighborer was obtained while pasting the summons on the outer door of the suit premises is not been denied by the plaintiff. But according to the plaintiff the suit summons were pasted in the presence of the daughter of the defendant named Rashida. This is reflected from the copy of the bailiffs report which is produced along with Exh.6.

17. Defendant further contends that, due to old age and ill health she stays at home only and she does not go anywhere. Therefore, according to the defendant without pasting of Summons, the bailiff report is obtained by the Plaintiff to show that the defendant is served by pasting. She further contends that the Writ of Summons was not served upon the defendant either personally or by any mode of service. The Bailiff has never pasted the summons on the door of the suit premises. Neither she nor her children were aware of the suit proceedings. All the said contentions of the defendant are denied by the plaintiff. The plaintiff contends that the defendant as well as her children were aware about the suit proceeding as the defendant is duly served by pasting. To substantiate this contention the Ld. Advocate for the plaintiff drew my attention to all

the report written by the bailiff at the time of every attempt which he made towards service of summons.

18. In the present application the applicant has sought to set aside the ex-parte decree on the ground that defendant was not been served with the suit summons. The defendant has produced on record along with exh. 6 the certified copy of the bailiff report in LE & C Suit No.129 of 2012. As the defendant has disputed the bailiff report, it is necessary to go through it, carefully. From the report dated 11.07.2012, 16.07.2012 and 19.07.2012 it reveal that, the bailiff had attempted to make the service but could not make the same due to non availability of the defendant. From the report dated 11.07.2012 it can be seen that the son of the defendant i.e. Shri Shaikh Mohidin is shown to be found in the suit premises but failed to accept the summons on behalf of the defendant. From the bailiff report dated 16.07.2012 it can be seen that the daughter of the defendant namely Rashida is shown to be found in the suit premises but she did not accept the summons on behalf of her mother. From the report dated 19.07.2012 it can be gathered that both the above named son and daughter are shown to be present in the suit premises but they decline to accept the summon on behalf of their mother. Thus, it can be said that the suit premises was never locked when the bailiff had made an attempt to serve the summons on the defendant.

19. As per the bailiff report, the service could not be effected due to non availability of the defendant on the given address i.e. the suit premises. Defendant has not denied the said Mohidin and Rashida to be her son and daughter respectively. Therefore it is hard to believe that she had no knowledge about the pendency of the present suit. But, it is specifically laid down in Order 5 Rule 15 of CPC that the summons to be

effected on the defendant personally or on the adult member of her family if he willingly accept the same. However, from the reports mentioned above, it can be gathered that son and the daughter of the defendant has not accepted the summons on her behalf. Therefore, it can not be concluded that the defendant gained knowledge about the pendency of the suit from her son and daughter.

20. It is argued on behalf of the plaintiff that as the son and daughter of the defendant were present when the plaintiff made attempt to serve the suit summons on the defendant therefore, defendant had knowledge of the pendency of the suit. So also if there is any irregularity in service of summons it would not help the defendant. To support this preposition, the Ld. Advocate for the plaintiff has relied upon the decision of the Hon'ble Bombay High Court in the case of ***Gaspar G. Furtado Vs. Filomena wd/o. Antonio Mariano Cota & Ors., 2000(2) Mh.L.J. 87***, wherein it is held that,

“The grounds which are contemplated for setting aside exparte decree are the court should be satisfied that the summons were not duly served or that there was sufficient cause for failure to appear when the suit was called for hearing. Second proviso to O.IX, R.13, however provides that no such exparte decree shall be set aside merely on the ground of irregularity of service of summons, if the court is satisfied that the defendant knew, or but for his willful conduct would have known of the date of hearing in sufficient time to appear and answer plaintiff's claim”.

21. In the present case the summons were not served upon the adult members of the family of the defendant as they specifically refused to accept the summons. Therefore, to decide the present application it is necessary to see whether the summons were duly served by other modes. As noted above the suit summons are served on the defendant by pasting. In case of ***Gaspar G. Furtado (cited supra)***, it is laid down that

irregularity in service of summons can be ignored if it is found that the defendant has knowledge about the pendency of suit. In all the bailiff reports mentioned above, it is specifically mentioned that the bailiff came to know from the children of the defendant that the defendant has been going out for work. In all the report the same reason is mentioned by the bailiff. Thus, it appears that the bailiff has not made proper inquiry about the whereabouts of the defendant.

22. To substantiate his argument that the summons were not served upon the defendant in proper way, the Ld Advocate for the defendant relied upon the case of ***G. S. Ramchandran V./s. M. M. Rajadhyaksha, 1984 Mh L.J. 247***, wherein it is observed that,

'Non- compliance with the provisions of O.5 R.17 of the code and the bailiff manual in relation to the bailiff report and the affidavit, which has been found by both the court below in the instant case, cannot be treated as lightly as it has been done. Irreparable damage may follow from an Ex parte decree passed in respect of residential accommodation in Bombay. The need to be fully conscious of the procedure to be followed and the need for fair play in this regard should not be followed ignored; on the other hand, they should be fully impressed upon the process servers of the court of Small Causes.

23. The Ld Advocate for the defendant has also relied upon the following case law to support his case (1) *R. M. T. S. S Dhanasekaran V/s. State Bank of India, AIR 1977 Mad 252*; (2) *Durant Refrigeration Private Limited V/s. Northern Radio and Refrigeration Company Private Limited, 1992-LAWS (DLH)9 – 59* and (3) *Hindustan Carrier Corporation V/s. Vijay Prasad, 2002-LAWS (DLH)1-140*.

24. Admittedly the suit summons are not served personally upon the defendant. The defendant has disputed all the reports of the bailiff. In this context the report dated 20/04/2013 is important which is the report of substitute service by pasting. In this report the bailiff has shown the

presence of the daughter of the defendant in the suit premises but he has not specified whether he has obtained her signature on the summons as it's witness. For the sake of argument if it is assumed that the defendant's daughter refused to sign as witness yet the bailiff ought to have obtained the signature of the neighborer to show that it was affixed in his presence or at least the bailiff should have stated whether the said Rashida has signed or refused to sign on the report. But no such attempt is made by the bailiff. It is also not mentioned in the report that the daughter of the defendant has signed or has refused to sign as witness for the said pasting of the summons. Therefore, it cannot be concluded that the defendant was duly served by pasting. It is to be noted that every time the bailiff went to serve the summons on the defendant she was not present at the suit premises. Therefore, there is a possibility that, she is not made aware by her children that the bailiff of the court had come to their house to serve her with suit summons. The most important thing to be noted is that, though the suit summons were ordered to be served upon the defendant by substitute service also by RPAD but from the record of the said suit one cannot find out that the summons are served to the defendant by RPAD. The RPAD envelopes are shown to be returned to the court but there is no specific reason as to why the same is returned. Thus, in the light of above discussion it can be said that the suit summons are not duly served upon the defendant. However, unless the delay is condoned the said decree cannot be set aside.

25. The exparte decree against the defendant is passed on 10.08.2016. The notice in execution petition was served upon the defendant on 08.11.2017. In the above discussion this court has held that the defendant was not aware about the pendency of the said suit.

Therefore, it can be believed that the defendant was also not aware about the passing of exparte decree till the notice of the Execution Petition was served upon her i.e. on 18.11.2017. This application for setting aside exparte decree was filed on 27.01.18. Therefore, though there is delay in filing the present application but the defendant has explained the delay. Therefor in my view the delay needs to be set aside and in the interest of justice the exparte decree also needs to be set aside to enable the defendant to contest the same. Therefore, I answer point no. 1 in the affirmative and to answer point no.2, I proceed to pass following order.

ORDER

Application is partly allowed as under;

- 1) Ex-parte Decree in L.E. & C. Suit No.129 of 2012 dt 10/08/2016, is hereby set aside by condoning the delay caused in making present application subject to costs of Rs.10,000/-(Rs. Ten Thousand only) to be paid to the plaintiffs by the defendant within Three weeks from date of this order.
- 2) After payment of costs, the L.E. & C. Suit No.129 of 2012, be restored and notice be issued to the parties.

Sd/-
(S. S. Pakhale)
Judge, C. R. No.20
I/c. Judge, C.R.No.25

Dt.28/11/2018

Dictated on : 28/11/2018
Prepared on : 15/12/2018
Checked & signed on : 21/12/2018

Sd/-
(S. S. Pakhale)
Judge, C. R. No.20
I/c. Judge C.R.No.25