

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8499 OF 2015

Chandrakant J Desai : Petitioner.
Versus
Nalin Dayabhai Kumar and ors. : Respondents.

Mr. A H Khatri i/by Khatri Legal Venture for the Petitioner.
Mr. K A Shah a/w Mr. G A Sawant for the Respondent No.1.

CORAM : R. M. SAVANT, J.
DATE : 26th November 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 16/06/2015 passed by the Appellate Bench of the Small Causes Court, Mumbai by which order the Appeal filed by the Petitioner – original Defendant No.4 being Misc. Appeal No.261 of 2014 came to be dismissed and resultantly the order dated 29/03/2014 passed by the Trial Court rejecting the application filed by the Petitioner being being Marji Application No.783 of 2012 came to be confirmed.

2 The Petitioner herein is the original Defendant No.4 to the suit in question being R.A.E. Suit No.1143/1795 of 2005 filed by the Respondent No.1 herein who is the original Plaintiff. To the said suit were arrayed the Defendant Nos.1 to 9. In so far as the Defendant Nos.1 and 2 are concerned, they are the original tenants of one large premises. The said Defendant Nos.1 and 2

created sub-tenancy in favour of the Defendant Nos.4 to 6 and the Defendant Nos. 7 to 9 in respect of portions out of the larger premises. In so far as the Defendant Nos.4 to 6 are concerned, it seems that they are conducting photo copying centre in the premises in respect of which sub-tenancy is created in their favour. In so far as the Defendant Nos.7 to 9 are concerned, they are conducting a hair cutting saloon.

3 The instant proceedings involve only the Defendant No.4 who, as indicated above, had filed an application under Order IX Rule 13 of the Code of Civil Procedure. The suit in question came to be filed on the ground of illegal sub-letting and a decree was sought on the said basis. The suit summons came to be served on the Defendants including the Defendant No.4. The Defendant No.4 filed his written statement through his advocate one Ms. Yogini Gurav. However, the Defendant Nos. 4 to 6 thereafter did not participate in the proceedings whereas the Defendant Nos. 1 and 2 who are the head tenants filed their written statement and participated in the proceedings. The issues were framed in the said suit, the suit proceeded to trial. The Defendant Nos.1 and 2 and the Defendant Nos.7 to 9 led their evidence whereas the Defendant Nos.4 to 6 did not.

4 The Trial Court decreed the suit against the Defendant Nos.1 to 6 and dismissed the suit against the Defendant Nos. 7 to 9. The Plaintiff did not

proceed further against the Defendant Nos.7 to 9 and has accepted the decree. The Defendant No.4 on getting wind of the decree that was passed in the suit in question filed an application invoking Order IX Rule 13 of the Code of the Civil Procedure for setting aside what he terms as an ex parte decree. It was the case of the Defendant No.4 in the said application being Marji Application No.783 of 2012 that after the vakalatnama and written statement being filed by his advocate, his advocate had informed him that it was not necessary for him to remain present and that she would inform him the date on which he was required to remain present in the Trial Court. It was the case of the Defendant No.4 that his advocate did not inform him of the developments in the suit. It was also the case of the Defendant No.4 that he was unwell and that he was hospitalized from 18/02/2011 to 28/02/2011 and that he had suffered from an intertrochanteric fracture of the left femur i.e. the hip bone in the month of October 2011 on account of which his movements were restricted and therefore he could not attend the Court resulting in the ex-parte decree being passed. The Defendant No.4 therefore sought to justify his absence in the suit on the said ground.

5 The said application was replied to on behalf of the original Plaintiff. The Plaintiff denied the case of the Defendant No.4 as was sought to be put up in the said Marji Application. The Plaintiff stated in his reply that the Defendant No.4 is unnecessarily blaming the previous advocate without

initiating any proceedings against the said advocate for the alleged professional misconduct of the said advocate. The further objection was on the ground that the Defendants have a commonality of interest and therefore the case of the Defendant No.4 could not be accepted.

6 The Trial Court considered the said application, and as indicated above, by its order dated 29/03/2014 rejected the same. The Trial Court tested the case of the Defendant No.4 for his absence from the suit. The Trial Court adverted to the fact that after filing of the written statement on 25/04/2006, neither the Defendant No.4 nor his advocate have remained present in the Court. The case of the Defendant No.4 as set out in the said Marji Application did not commend acceptance to the Trial Court. The Trial Court was of the view that though it was the case of the Defendant No.4 that he was hospitalized between the period from 18/02/2011 to 28/02/2011, it has been falsely stated in the application that the Defendant No.4 has suffered a fracture in October 2011. The Trial Court also observed that since the Defendant No.4 has filed his written statement, his case would not come within the ambit of Order IX Rule 13 of the Code. The Trial Court was of the view that the Defendant No.4 in view of the fact that the decree was passed on 05/09/2012 has sought to come up with a case that fracture has occurred in October 2011 so as to be in closed proximity with it though the fracture as can be seen from the documents was actually suffered by him in October 2011. As

indicated above, the Trial Court has accordingly by its order dated 29/03/2014 rejected the said Marji Application No.783 of 2012.

7 The Defendant No.4 aggrieved by the said order dated 29/03/2014 carried the matter in Appeal before the Appellate Bench of the Small Causes Court, Mumbai. The Appellate Bench went threadbare into the case of the Defendant No.4. The Appellate Bench has referred to the medical papers on which reliance was placed on behalf of the Defendant No.4. On such consideration, the Appellate Bench has come to a conclusion that the case of the Defendant No.4 that he suffered a fracture in October 2011 was not bonafide because as in fact the Defendant No.4 was hospitalized between 18/02/2011 and 28/02/2011 for a fracture and that he was discharged on 28/02/2011 and was therefore fit from then onwards. Hence the case of the Defendant No.4 that he was not in a position to move about could not be accepted. The Appellate Bench has therefore questioned the bonafides of the Defendant No.4 and has observed that there is a lack of honesty and sincerity on the part of the Defendant No.4. The Appellate Bench has also adverted to the fact that since the decree is also passed against the Defendant Nos. 1 and 2 it would lead to a situation where a decree passed against the Defendants who have contested the suit would have to be set aside if the application is allowed in the instant case. The Appellate Bench has accordingly by its impugned order dated 16/06/2015 has dismissed the Appeal.

8 The learned counsel for the parties sought to reiterate the case of the parties before the Courts below. It is the contention of the learned counsel appearing on behalf of the Petitioner Shri Kantawala that the case for exercise of jurisdiction under Order IX Rule 13 of the Code is made out. In support of the said contention he sought to place reliance on the judgment of the Apex Court reported in **AIR 2000 SC 1221** in the matter of **C.P. Srivastava v/s. R K Raizada and others** as also the judgment of the Apex Court in the case of **Bank of India v/s. M/s. Mehta Brothers and ors** in **Civil Appeal No.2982 of 2001**.

9 On the other hand the learned counsel appearing on behalf of the Respondent No.1 Shri K A Shah would justify the rejection of the application and its confirmation by the the Appellate Bench of the Small Causes Court. It was the submission of the learned counsel for the Respondent No.1 that the case of the Defendant No.4 has been rejected on the ground that the same is lacking in bonafides.

10 Having heard the learned counsel for the parties, in my view, there is no merit in the above Petition. It is required to be noted that the Defendant No.4 has filed his written statement on 25/04/2006, thereafter both the Defendant No.4 and his advocate have remained absent through out the trial.

The Defendant No.4, as indicated above, is running a photo copying centre in the heart of Mumbai and is therefore a businessman who is carrying out business in Mumbai. What prevented the Defendant No.4 from seeking information from his advocate about the stage or developments in the suit therefore begs an answer. There is absolutely no material on record to indicate that the attempts made by the Defendant No.4 to obtain information from his Advocate which was not forthcoming from the Advocate. Such a conduct cannot be expected of a litigant who is faced with a suit for his eviction. In so far as the case of the Defendant No.4 that he was unable to move on account of fracture which he suffered in October 2011 is concerned, the Courts below have rightly rejected the said case as the medical papers ex-facie disclose that the Defendant No.4 was hospitalized between 18/02/2011 and 28/02/2011 when he was discharged. The said date of October 2011, as rightly held by both the Courts below, has been given by the Defendant No.4 to get into close proximity with the date of the decree so as to somehow justify his absence in the suit. It is well settled that if there is a lack of bonafides on the part of a litigant, that would be relevant consideration whilst exercising discretion more so in a case where setting aside of an ex-parte decree passed in a suit is sought.

11 In so far as the judgment in *Bank of India's* case (supra) is concerned, though the said case concerned Order IX Rule 13 of the Code of

Civil Procedure, however, in the said case the justification given for the absence of the Defendants was not questioned but the issue was whether the decree could be set aside against the Defendants who had contested the suit and got the suit dismissed. The Apex Court held that the decree being divisible it is only the decree passed in the said case against the Defendant No.6 who had filed the application was required to be set aside. Such are not the facts in the instant case, as in the instant case the justification given for the delay by the Defendant No.4 is being questioned on behalf of the Plaintiffs. In view thereof the Courts below have gone into the said aspect and found that the justification given for the delay by the Defendant No.4 is not acceptable. In so far as the judgment in *G.P. Srivastava's* case is concerned, the facts in the said case stand apart from the facts in the instant case, as in the said case there was a death in the family of the counsel for the Defendant and that the Defendant was also not in town on account of his employment and sickness. The judgments (supra) have therefore no application in the facts and circumstances of the case. In my view the orders passed by both the Courts below do not suffer from any error of jurisdiction or any other illegality or infirmity for this Court to interfere in its writ jurisdiction. The above Writ Petition is accordingly dismissed.

11 At this stage, the learned counsel appearing on behalf of the Petitioner Shri Khatri seeks stay to the execution proceedings for a period of 8

weeks from date. In my view the interest of justice would be served if the Respondent No.1 i.e. the Plaintiff is directed not to take possession for a period of 8 weeks from date rather than staying the execution proceedings.

[R.M.SAVANT, J]