

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

WRIT PETITION NO.8484 OF 2015

Mahesh Kantilal Shah

.. Petitioner

Versus

Jitendra Pranvallabh Chowlera and others

.. Respondents

Mr. Nitin Gangal, for the Petitioner.

Mr. S. J. Ghatage a/w Mr. C. N. Chavan, Mr. Manoj Mane, Ms. Bijal Chowlera, for the Respondents.

CORAM : R.M. SAVANT, J.

DATE : 18th DECEMBER, 2015

PC.

1. The Writ Jurisdiction of this Court is invoked against the order dated 05.08.2015 passed by the Appellate Bench of the Small Causes Court, Mumbai, by which order the Appeal filed by the Petitioner herein being Misc. Appeal No.211 of 2013 came to be dismissed and resultantly, the order dated 16.09.2013 passed by the Trial Court rejecting application being MARJI No.385 of 2011 in Execution Application No.172 of 2011 came to be confirmed.

2. The Petitioner herein is the original Defendant in RAE & R Suit No.1021/1564 of 2006. The Respondents herein are the heirs of the

original landlord. The suit in question has been filed for eviction of the Defendant from the suit premises being Shop No.15 on the first floor admeasuring 60 sq.ft. in the property situated at 3/5, Shamset Street, Zaveri Bazar, Mumbai-400 002. The eviction of the Defendant was sought on the ground of arrears of rent and non-user. There is no dispute about the fact that the summons was served on the Defendant and the Defendant having filed his written statement in the suit. The Defendant had engaged two advocates to represent him in the suit in question amongst whom was advocate Ms. Sushma Singh who was asked to keep a watch on the proceedings. In the context of the challenge raised in the present Petition, what is significant to note is that the Defendant has denied the title of the Plaintiff/landlord and had also denied that he was occupying the suit premises in respect of which the suit was filed. It was his case in the written statement that he was occupying the shop in a building which is adjoining to the Plaintiffs building. In the said suit, the Defendant filed application Exh.9 for being permitted to deposit the rent in the Trial Court and also for an order that the said rent to be kept in deposit pending the suit and not to be paid over to the Plaintiff. The said application Exh.9 was prosecuted by the advocate Ms. Sushma Singh on behalf of the Defendant. The said application came to be rejected by the Trial Court by order dated 15.02.2007. It seems that the said order was

not challenged further by the Defendant. It is after rejection of the said application Exh.9 that the issues were framed by the Trial Court. However, significantly it seems that the Defendant after rejection of the application Exh.9 was not represented in the proceedings and ultimately the suit came to be decreed by the Trial Court by judgment and order dated 21.02.2011. The Trial Court has in paragraph 10 of its judgment referred to the stand of the Defendant as taken in the written statement, wherein as indicated above, the Defendant has denied the factum of the Plaintiff being his landlord as also the fact that the Defendant is possessing a different premises which is in the building adjacent to the building of the Plaintiffs. The decree passed by the Trial Court was ex-parte in view of the fact that the Defendant was not represented before the Trial Court. After the decree was passed by the Trial Court, the Plaintiffs put the said decree in execution. The notice of the execution came to be served on the Defendant and it is thereafter that the instant application being MARJI No.385 of 2011 came to be filed by the Defendant. The said application was filed on 15.06.2011. The said application was filed invoking Order IX Rule 13 of the CPC and the ground made out was that the advocates of the Defendant had not informed him about the progress of the suit and therefore, he could not appear in the suit and therefore the suit proceeded ex-parte resulting in the decree being passed ex-parte by the Trial Court.

The said application was replied to on behalf of the Plaintiffs. In the said reply the case set out in the said application was sought to be questioned by the Plaintiffs. The various dates and the stages of the suit when the Defendant was unrepresented were mentioned in the said reply, especially in paragraphs 5 and 6 thereof. The Trial Court considered the said application being MARJI No.385 of 2011 and the reasons put forth by the Defendant for his non-appearance in the suit and also for the delay in filing the application from the date of decree did not commend acceptance to the Trial Court. The Trial Court has referred to the judgments cited on either side and has observed that the said judgments do not further the case of the Defendant in so far as the setting aside of the ex-parte decree is concerned. The Trial Court was of the view that it was necessary for the Defendant to make inquiries with his advocates especially when the Defendant had engaged two advocates and cannot lay the blame solely on the advocates for the ex-parte decree being passed. The Trial Court accordingly by its order dated 16.09.2013 has rejected the said MARJI No.385 of 2011.

3. The Defendant aggrieved by the said order dated 16.09.2013 passed by the Trial Court carried the matter by way of an Appeal before the Appellate Bench of the Small Causes Court. The Appellate Bench has by the impugned judgment and order dated 05.08.2015 dismissed the

Appeal. The Appellate Bench was of the view that the Defendant being not a rustic villager was required to take the necessary steps to see to it that he was represented before the Trial Court. The Appellate Bench has also adverted to the fact that the application Exh.9 was prosecuted on behalf of the Defendant and it is thereafter that the Defendant was unrepresented before the Trial Court. The Appellate Bench was also of the view that the Defendant was required to make inquiries with his advocates rather than blame them for the ex-parte decree being passed. The Appellate Bench has referred to the judgment of the Apex Court in Salil Datta Vs. S.T.M. and M.C. Private Ltd. [1993 Supreme Court & Full Bench Rent Cases-243. (Civil Appeal No.429 of 1993)] and held that the said judgment applies in the facts of the present case and that the judgment in Rafiq and another Vs. Munshilal & another [AIR 1981 SC 1400] case would not aid the Defendant. The Appellate Bench has thereby endorsed the view expressed by the Trial Court. The Appellate Bench has accordingly by the impugned judgment and order dated 05.08.2015 dismissed the Appeal.

4. The Learned Counsel appearing on behalf of the Petitioner Mr. Nitin Gangal would contend that in the absence of any information provided by the advocates as regards the status of the suit, the blame could not be put on the Defendant as is sought to be done by the Courts below and therefore the application for setting aside the ex-parte decree

was required to be allowed by the Courts below. It was the submission of the Learned Counsel that the Trial Court has not appreciated the fact that the Defendant is a small businessman who is not aware of the niceties of law and therefore he might have not made inquiries with the earlier advocates and also has filed the instant application belatedly in June 2011. The Learned Counsel Mr. Nitin Gangal sought to place reliance on the judgment in the matter of Ramabai Namdeo Gavand & Others Vs. Ravindra Pandharinath Ulavekar & Others reported in CDJ 2014 BHC 1967 in support of his contention.

5. Per contra, Mr. S. J. Ghatage the Learned Counsel appearing for the Respondents/original Plaintiffs seeks to support the impugned order. The Learned Counsel would contend that the conduct of the Defendant is such that it does not entitle him to the setting aside of the decree passed by the Trial Court. The Learned Counsel sought to draw this Court's attention to the averments made in the written statement and to the application Exh.9 filed by the Defendant to contend that it is probably for the said reason that the Defendant did not remain present in the Trial Court or was unrepresented before the Trial Court. The Learned Counsel would contend that though the Defendant makes a grievance against his advocates he has not taken any steps against them.

6. Having heard the Learned Counsel for the parties, I have considered the rival contentions. The question is whether the Defendant is entitled to any reliefs in the application filed by him under Order IX Rule 13 of the CPC. In the said context, it is required to be noted that there is no dispute about the fact that summons was served on the Defendant and the Defendant had filed his written statement. In the said written statement the Defendant has taken a stand, which has been referred to hereinabove which is inter-alia to the effect that the Defendant questions the Plaintiff as being his landlord as also disputes the suit premises being the same premises as occupied by him. It is also required to be noted that the Defendant had filed application Exh.9 in the suit which application was also founded on the case of the Defendant that the Plaintiffs are not landlords of the suit premises and therefore had sought the relief that he may be permitted to deposit the rent, however, the Plaintiffs should not be allowed to withdraw the same. The said application was rejected by the Trial Court by order dated 16.09.2013. It is thereafter that the issues came to be framed and it is from the said stage onwards that there is a conspicuous absence of the advocates who were appearing for the Defendant as well as the Defendant himself. The question is whether the explanation put forth by the Defendant in the MARJI No.385 of 2011 is credible and worthy of acceptance. In the said context, it is required to be

noted that the Defendant had already filed an application Exh.9 which had been rejected. The Defendant was therefore aware of the fact that the suit was pending in the Trial Court and in which suit his eviction was sought. It is further required to be noted that it is not the case of the Defendant that he made inquiries with the advocates whom he had engaged and that they refused to give him information as regards the status of the suit. It appears that the Defendant did not care to get himself represented before the Trial Court in view of the fact that the Defendant was questioning the very status of the Plaintiffs as being his landlords as also disputing that the suit premises were the same premises occupied by him. This probably may have been the reason for the Defendant to keep away from the proceedings as also not instruct his advocates. Even after the ex-parte decree was passed the Defendant did not seek the explanation of his earlier advocates nor proceeded against them. It is further required to be noted that though an ex-parte decree has passed and the Defendant got knowledge of the said decree on the notice of execution being served upon him, the Defendant did not thereafter act with reasonable despatch and filed the instant application after about three months of the decree being passed by the Trial Court. It is well settled by the judgments of the Apex Court that if the summons is served on the Defendant then the date of reckoning for the period of limitation is the date of the decree. In the

instant case, the decree is dated 21.02.2011 and the instant application is filed in June 2011. However, in the instant case, the defining aspect is that the Defendant has not cared to make inquiries with his earlier advocates. The said conduct cannot be countenanced having regard to the fact that the Defendant was faced with a eviction suit and had filed the application Exh.9 for certain reliefs. Therefore it is a case where there is gross negligence and indolence on the part of the Defendant in prosecuting the suit. The instant case therefore is not a case where by imposing costs the decree can be set aside and the suit can be directed to be proceeded on merits. The judgment in *Ramabai Gavand's case (supra)* would have no application as the facts are clearly distinguishable. In the said case the suit was dismissed for default by the Prothonotary and Senior Master for non-compliance of the order allowing the amendment of the plaint. In the said case the Plaintiffs had also addressed letters to their advocate seeking his explanation, whereas in the instant case the Defendant was served with the suit summons, had filed his written statement and had even filed an application and therefore a certain amount of care and caution was required on the part of the Defendant. However, the facts disclose that the Defendant did not bother whilst the suit was pending and only after the decree was passed has filed the instant application. In the instant case the Defendant seeks to blame his advocates however the Defendant has not

sought any explanation from his advocates nor proceeded against them. Hence, implicit in the said fact is the acceptance by the Defendant that he had not instructed his advocates after the application Exh.9 was decided. In my view, therefore, no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[R.M. SAVANT, J]