

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

WRIT PETITION NO. 8441 OF 2011

Mrs.Azra Akhtar Rizvi

... Petitioner

v/s

Mr.Iqbal Ahmed Sayed

... Respondent

Mr.Prashant Pandey along with Akshay Malvia for the petitioner.

Mr.Kunal Bhanage for the respondent.

CORAM: N. M. JAMDAR, J.

DATED : 24TH APRIL, 2015

ORAL JUDGMENT:

By this writ petition, the petitioner challenges the judgment and order passed by the Appellate Bench of the Small Causes Court, Mumbai, dated 20 September 2011 and confirming the order passed by the Small Causes Court, Mumbai, dated 29 April 2010 dismissing the appeal which was filed against the order passed in miscellaneous notice and against the judgment and decree passed in respect of eviction of the petitioner.

2 The respondent had filed R.A.E. Suit No.471/877 of 2008 for eviction of the petitioner on the ground of bonafide requirement. The petitioner appeared in the suit, however, did not file written

statement in time. The application for condonation of delay in filing the written statement was taken out, which was allowed on 22 September 2008, subject to payment of cost of Rs.500/-. The cost was not paid by the petitioner. Thereafter the trial proceeded and the learned Small Causes Court Judge decreed the suit on 8 October 2008.

3 Thereafter respondent filed execution proceedings. The execution proceedings were served on the petitioner on 28 August 2009. The petitioner filed a Miscellaneous Notice No.744 of 2009, to set aside the ex-parte decree. This notice was discharged by the Small Causes Court Judge by an order dated 29 April 2010. Thereafter, the petitioner filed a Miscellaneous Appeal No.195 of 2010.

4 The Appellate Bench of the Small Causes Court held that there was no error committed by the Small Causes Court in discharging the notice, and considering the conduct of the petitioner, no indulgence needed to be shown to the petitioner. The Appellate Bench found that the petitioner was negligent in prosecuting her claim and by the impugned judgment and order dated 20 September 2011 dismissed the appeal. On the same day, the petitioner sought for continuation of the stay of the decree of execution, from the Appellate Bench. The respondent objected to the continuation of stay and stated that the petitioner be directed to pay arrears to the tune of Rs.4,00,000/-. The petitioner sought

time to take instructions and thereafter filed a purshis on 21 October 2011. In view of the purshis, the application for continuation of stay was disposed of, as not pressed. Thereafter the respondent executed the decree and obtained compensation. The petitioner filed the present petition. The petition came up on board on 21 November 2011. The petition was admitted. The fact that the petitioner had lost possession was recorded and the respondent was directed not to create third party rights.

5 I have heard the learned counsel for the petitioner and learned counsel for the respondent.

6 The petitioner had engaged an advocate in the suit. There was a delay in filing the written statement, which was condoned. It appears that the cost of Rs.500/- for condoning the delay in filing the written statement was imposed, which was not paid. Thereafter the suit proceeded and decree came to be executed. The reason given by the petitioner was that the advocate had instructed her that since it is being a civil suit, it is not necessary that she should attend every date. This explanation cannot be considered as fanciful. Further more, the advocate who conducted the case of the petitioner, himself filed an affidavit and stated that it was his mistake in not depositing the costs. Both the Courts below have analyzed various provisions of law in detail, however, have lost sight of the basic equities of the case. The petitioner who has stated to be a widow, had engaged an advocate and it was not

unusual on her part to go by the advice of the advocate. The advocate's affidavit admitting his own mistake should have been given weightage. It is not that either the appeal had to be allowed in toto or it has to be dismissed completely. The Appellate Court could have balanced the equities of the matter, such as, putting the petitioner to conditions. However, instead of exploring any of the options, the Appellate Bench has taken rather hyper-technical view of the situation. Further more, as on today, the petitioner is not in possession of the premises. I am of the opinion, therefore, that interest of justice requires that an opportunity be given to the petitioner to put-forth her case on merits.

7 The learned counsel for the respondent submitted that the decree was executed because the petitioner refused to pay any arrears. He submitted that, an opportunity was given by the Appellate Bench and this Court to deposit arrears and since the petitioner did not deposit any arrears, the application for stay was withdrawn and decree was executed. He submitted that, even if any indulgence is to be extended in favour of the petitioner, the petitioner should be put to conditions. This submission made by the learned counsel for the respondent is reasonable. The petitioner should at least deposit arrears as regards the rent for the period she was admittedly in possession.

8 Though it would be in the interest of justice to grant a liberty to the petitioner to contest the suit on merits, it cannot be said that

conduct of the petitioner was completely blemishless for the purpose of putting conditions. When the petitioner sought for continuation of the interim order before the Appellate Court, the respondent had sought for a direction to deposit arrears of rent of Rs.4,00,000/-. Since there is dispute amongst the parties as regard the exact quantum of the arrears claimed, I am of the opinion that the equities can be balanced by directing the petitioner to deposit Rs.3,00,000/-. This, in my opinion, would balance the equities of the case, since I am also inclined to direct the respondent not to create third party interest till the disposal of the suit.

9 Accordingly, the writ petition is allowed. The orders passed by the Appellate Bench of the Small Causes Court in Misc. Appeal No.195 of 2010 and the order passed by the Small Causes Court, Mumbai, in Misc. Notice No.744 of 2009 and the judgment and decree in R.A.E. Suit No.471/877 of 2008 are quashed and set aside. R.A.E. Suit No.471/877 of 2009 stands restored to file. This shall however be subject to the petitioner depositing an amount of Rs.3,00,000/- in the Small Causes Court, Mumbai, within a period of four weeks from today.

10 The learned Small Causes Court, Mumbai, will make an endeavour to take up the suit for early disposal, subject of course to early time bound commitments. Till the disposal of the suit, the respondent will not create third party rights in the property,

without leave of the Small Causes Court. It will be open to the respondent to make an application to the Small Causes Court for withdrawal of the amount deposited by the petitioner. The learned Small Causes Court will consider the application on merits on such terms and conditions, which the Small Causes Court considers fit.

11 Rule made absolute in above terms. No costs.

12 It is made clear that this order does not direct the respondent to restore the possession of the suit premises at present. This would be considered by the Small Causes Court at the conclusion of the suit.

(N. M. JAMDAR, J.)