

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1014 OF 2011

WITH

WRIT PETITION NO.1015 OF 2011

WITH

WRIT PETITION NO.1016 OF 2011

WITH

WRIT PETITION NO.1017 OF 2011

Gulambhai Valibhai Raje ... Petitioner

Vs.

Suresh Kalyanji Bhagat (decd) though LRs

Jaya Suresh Bhagat and others ... Respondents

Mr. Manoj A. Patil for Petitioner in all the Petitions.

Mr. Sachin Pawar for Respondents No.3 and 4 in all the Petitions.

CORAM : R. G. KETKAR, J.

DATE : SEPTEMBER 22, 2016

P.C. :

Heard Mr. Patil, learned Counsel for petitioner and Mr. Pawar, learned Counsel for respondents No.3 and 4 in all the Petitions at length.

2. By these Petitions under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant', has challenged - (i) the judgment and decree dated 27.02.2003 passed by the learned Judge, presiding over Court Room No.8 of the Court of Small Causes at Mumbai in R.A.E. Suit No.480/857 of 2002 as also (ii) the judgment and decree dated 30.10.2010 passed by the Appellate Bench of the Small Causes Court in Appeal No.712 of 2007. By these orders, the Courts below decreed the Suit instituted by original plaintiff and directed the defendants to deliver vacant and peaceful possession of Shop No.1 known as "Hotel Cafe Aaram" situate at plot No.212, Vinod Mahal, Worli Market, Worli, Mumbai 400 018 (for short 'suit premises') to the plaintiff. Defendants have also challenged the judgment and order dated

29.01.2011 passed by the learned trial Judge in Miscellaneous Application No.959 of 2010. By that order, the learned trial Judge allowed the application filed by Vinod Kalyanji Bhagat and Tanuja Bhagat filed under Section 152 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') and deleted the direction given by the Courts below to the defendants to handover vacant and peaceful possession of the suit premises.

3. By order dated 27.02.2003, the learned trial Judge decreed the Suit ex-parte after observing that all the defendants were served with the writ of summons. Defendant No.3 remained absent. Defendants No.1 and 2 engaged Counsel to file written statement on record, but failed to file written statement. In short, defendants did not participate in the trial, despite service of writ of summons. Plaintiff filed affidavit of evidence as also produced documents. While decreeing the Suit, the learned trial Judge observed that plaintiff's evidence remained unchallenged as the defendants chose not to contest the Suit. After considering the documents on record including the Court Commissioner's report, the learned trial Judge decreed the Suit ex-parte.

4. Defendants took out Miscellaneous Notice No.247 of 2004 under Order 9, Rule 13 of C.P.C. for setting aside the ex-parte decree. The notice was dismissed on 06.07.2004 by the trial Court. Aggrieved by that order, defendants preferred appeal, which was dismissed on 16.03.2006. Aggrieved by these decisions, defendants instituted four Petitions in this Court. All the Petitions were disposed of as not pressed on 25.01.2007. The order passed by this Court reads thus,

“ Mr.M.P.Vashi for the petitioners.

CORAM: D.B.BHOSALE, J.
DATED: 25TH JANUARY, 2007

P.C.:

. Heard learned counsel for the petitioners.

2. Mr.Vashi, learned counsel for the petitioners in all the four petitions submits that he has instructions not to press the writ petitions and seeks liberty to challenge the judgment and decree dated 27th February, 2003 in the appeals before the appropriate court. The writ petitions are disposed of as not pressed with liberty as prayed for. The petitioners to file appeals within four weeks from today. If the appeals are filed, same may be considered on merits in accordance with law. All contentions are kept open. The writ petitions are disposed of.”

5. In pursuance of the liberty granted by this Court, defendants preferred substantive appeals under Section 96 of C.P.C. The appeals preferred by the defendants were dismissed on 30.10.2010. After the appeals were disposed of, application under Section 152, as noted earlier, was made out for deleting the direction to handover possession. That application was allowed. It is against the trial Court's and appellate Court's judgment and decree as also order passed in an application under Section 152 of C.P.C., defendant has instituted these Petitions.

6. In support of these Petitions, Mr. Patil strenuously contended that the defendants were not given opportunity to participate and contest the Suit. The learned trial Judge relied upon the Commissioner's report. The learned trial Judge was not justified in relying only upon the Commissioner's report and decreeing the Suit. As the defendants were not given opportunity to contest the Suit, the impugned orders deserve to be set aside thereby permitting defendants to file written statement and also cross-examine plaintiff's witness and lead their evidence. On merits, Mr. Patil submitted that the Courts below were not justified in passing the decree on the ground that defendants No.1 and 2 have carried out additions and alterations of permanent nature and that, defendants No.1 and 2 have unlawfully sublet the suit premises in favour of defendant No.3.

7. As far as the order passed in an application under Section 152 of

C.P.C. is concerned, he submitted that none of the parties to the proceedings filed application under Section 152. Application was filed by Vinod Kalyanji Bhagat and Tanuja Bhagat, who were not party to the proceedings. The learned trial Judge was, therefore, not justified in entertaining their application.

8. On the other hand, Mr. Pawar supported the impugned orders. He submitted that during the pendency of the appeal, respondent No.1 died on 30.06.2008 leaving behind, Hitesh Suresh Bhagat (son) and Maniben Kalyanji Bhagat (mother). Advocate for respondent No.1, therefore, addressed a letter to the petitioners, who were the appellants before the appellate Court for amending the appeal memo and bringing on record Maniben Kalyanji Bhagat, mother of respondent No.1 - plaintiff (since deceased). However, petitioners did not suitably amend the appeal memo. He further submitted that Tanuja is the grand-daughter of Maniben and niece of respondent No.1 Suresh Kalyanji Bhagat. Vinod is the real brother of respondent No.1 – Suresh Bhagat. He also relied upon Section 152 of C.P.C. to contend that Court has power to correct clerical mistake on its own motion or on the application made by any of the parties to the proceedings. He submitted that in fact from the record, it would be evident that decree was executed and possession was obtained on 22.03.2004, and therefore, the direction issued by the Courts below against the defendants to handover possession was required to be deleted. He submitted that even in the order dated 27.04.2011, while issuing injunction restraining respondents from creating third party rights or inducting any third party, this Court noted that decree has already been executed and the respondents have taken possession.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on

record. As noted earlier, respondent No.1 had instituted Suit against defendants for recovery of possession of the suit premises. Perusal of the trial Court's order dated 22.02.2003 shows that defendants were duly served with the writ of summons. Though defendants No.1 and 2 engaged Counsel to file written statement, they did not file written statement. Defendant No.3 remained absent. Thus, despite service of suit summons on defendants, they chose to remain absent. During the pendency of the Suit, original plaintiff took out interim notice for appointment of the Court Commissioner. Court Commissioner visited the suit premises after giving notices to the defendants and after inspection, submitted a report along with photographs. After considering the plaintiff's evidence together with documents as also Commissioner's report and after recording that defendants chose not to contest the Suit, the learned trial Judge observed that the evidence adduced by the plaintiff remained unchallenged and accordingly, decreed the Suit.

10. Defendants filed application under Order 9, Rule 13 of C.P.C. for setting aside ex-parte decree. As noted earlier, Order 9, Rule 13 application was rejected by the learned trial Judge on 06.07.2004. Appeal preferred therefrom was also dismissed on 16.03.2006. Though defendants instituted four Petitions in this Court challenging these orders, they did not press Writ Petitions and Petitions were disposed of on 25.01.2007. I have already extracted the order dated 25.01.2007. Perusal of the order shows that while giving liberty to the defendants to file appeal, this Court directed that the same shall be considered on merits in accordance with law.

11. Mr. Patil submitted that the impugned decrees passed by the Courts below are liable to be set aside as no opportunity was given to

the defendants to participate and contest the Suit. It is not possible to accept this submission. In the first place, defendants were duly served with the suit summons. Despite that, they chose not to participate in those proceedings. Secondly, against the ex-parte decree, defendant has as many as 4 options available, namely, (i) filing of application under Order 9, Rule 13; (ii) filing of substantive appeal under Section 96; (iii) filing of Review Petition and lastly, (iv) filing of Suit on the ground that decree was obtained by playing fraud upon the Court. The proceedings filed by the defendants under Order 9, Rule 13 were decided against the defendants with liberty to file substantive appeal under Section 96. In the substantive appeal, defendants have to challenge the decree passed by the trial Court on merits. In other words, in the substantive appeal, defendants cannot be permitted to agitate the points which are available in proceedings under Order 9, Rule 13 of C.P.C. In view thereof, the Court has to proceed to decide the appeal on its own merits and not on the grounds available for setting aside ex-parte decree under Order 9, Rule 13. In view thereof, it is not possible to accept the submission advanced by Mr. Patil that the impugned decrees are liable to be set aside for giving opportunity thereby restoring the Suits with permission to the defendants to file written statement and cross examine plaintiff's witness and lead evidence in support of their case.

12. As far as merits of the case are concerned, the Courts below have considered the fact that the evidence of the plaintiff remained unchallenged. In view thereof, no fault can be found in the decrees passed by the Courts below.

13. That brings me to the contention advanced by Mr. Patil that application under Section 152 was made by persons, who were not parties to the proceedings. Section 152 of C.P.C. reads thus,

“152. Amendment of judgments, decrees or orders.- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission **may** at any time be corrected by the court either of its own motion or on the application of any of the parties.

(emphasis supplied) ”

14. Mr. Pawar submitted that Maniben died executing Will and appointed Tanuja Bhagat as Executrix. As far as Hitesh Suresh Bhagat is concerned, though he was brought on record, he was arrested in MCOCA case and died. In fact perusal of record shows that on behalf of the original plaintiff, letter dated 15.09.2008 was addressed to the Advocate for defendants for bringing on record Maniben Bhagat, mother of original plaintiff and Hitesh, son of original plaintiff. Vinod is the real brother of original plaintiff – Suresh Bhagat and Tanuja is the grand-daughter of Maniben Bhagat and is also Executrix. In view thereof, it cannot be said that they are totally strangers to the lis between the parties. That apart, Section 152 enables the Court to exercise its power suo motu for correcting any clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.

15. While allowing the application under Section 152, Court has noted that decree was executed on 22.03.2004. This is also evident from - (i) paragraph 5 of the application dated 02.04.2004 wherein defendants No.1 and 2 have stated that possession of the suit premises was forcibly taken on 22.03.2004; (ii) paragraphs 22 and 33 of the trial Court's order dated 06.07.2004 dismissing notice under Order 9, Rule 13. In paragraph 22, the learned trial Judge has noted the submission advanced on behalf of the plaintiffs that the decree was executed on 22.03.2004. In paragraph 33, the learned trial Judge noted that the decree was executed on 22.03.2004, after passing two years. Thereafter, plaintiff

has handed over the possession to Mr. Hira Chauhan and Mr. Rahul D. Jadhav by executing leave and licence agreement in their favour on 23.03.2004. Thus, from the record, it is evident that decree was executed and possession was obtained on 22.03.2004. In view thereof, I do not find that the trial Court has committed mistake in deleting the direction issued to the defendants to handover vacant and peaceful possession of the suit premises. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petitions fail and the same are dismissed.

16. At this stage, Mr. Patil orally applies for continuation of the ad-interim order dated 27.04.2011 for a period of 12 weeks from today. He further assures that petitioner will not apply for further extension. Mr. Pawar opposes this application.

17. Having regard to the fact that the interim order is operating from 27.04.2011 as also having due regard to the fact that the petitioner intends to challenge this order in the higher Court, I find that the request made by Mr. Patil is reasonable. In view thereof, notwithstanding dismissal of the Petitions, interim order dated 27.04.2011 shall remain in force for a period of 12 weeks from today with express understanding that petitioner will not apply for further extension. Order accordingly.

(R. G. KETKAR, J.)

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