

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) NO.4912/2016

Harish Shambhulal Hariani	... Petitioner
V/s.	
Mrs. Shah Nikhat Parvin Samir	... Respondent

Mr. Raj Patel i/b. Sunil R. More for the petitioner
Mr. Ali Javed Amerhasan Rizvi for the Respondent.

CORAM: K.K. TATED, J.
DATED : MARCH 10, 2016

PC. :

1. Heard the learned counsel for the parties. By consent of the parties, the matter is taken up for final hearing at the stage of admission itself.
2. By this petition under Article 227 of the Constitution of India, the petitioner - plaintiff challenges the order dated 20/01/2016 passed by the Appellate Bench of the Small Causes Court at Mumbai in Misc. Appeal No.455/2014 setting aside the judgment dated 19/09/2014 passed by the Small Causes court in Marji Application No.381/2014 which was filed by the defendant under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside the exparte decree dated 02/03/2012 with restoration of possession.
3. It was the case of the plaintiff that by agreement dated 03/11/2007, the suit premises was let out on tenancy basis to the defendant for residential purpose. Clause 3 of the said agreement

reads thus:

“3. To use the said premises for residential purpose only and not to use the said premises or any portion thereof either for the purpose of non-residential or any other purpose. The Room No.9 has no loft or mezzanine floor.”

4. In the present proceedings, the petitioner plaintiff filed R.A.E. & R. Suit No.83/124/2011 in the Small Causes Court on 24/12/2010 for vacant and peaceful possession of the suit premises viz. the residential premises being Room No.9, 1st floor, 13-F, Chakala Street, Cross Lane, Mandvi, Mumbai – 400 003 on several grounds i.e. arrears of rent, alternation, change of user etc. Following were the prayers made by the plaintiff in the suit:

“a. That the defendant be ordered and decreed to hand over the peaceful and vacant possession of the suit premises i.e. room No.9 1st floor, 13-F, Chakala Street, Cross Lane, Mandvi, Mumbai – 400 003, bearing CTS No.422. The suit premises is surrounded as under:

<i>On East</i>	<i>: Room NO.10</i>
<i>On West</i>	<i>: Room No.8</i>
<i>On North</i>	<i>: Common passage</i>
<i>On South</i>	<i>: Open Gully</i>

b. That the defendant be ordered and decreed to pay the arrears of rent, permitted increases, repair cess, property taxes and other taxes for the period from January 2010 till November 2010 amounting to Rs.9,438/- with interest thereon @ 15% p.a. and thereafter till the possession of the suit premises is handed over to the plaintiff.

c. that the defendant, her servants and/or agents and/or persons claiming under her be restrained permanently by an injunction order of this Hon'ble Court from further unlawfully subletting and/or assigning and/or creating further third party

interest and/or alienating and/or further parting with the possession of the suit premises described in prayer clause (a) above or any part thereof in any manner whatsoever.

d. that pending the hearing and final disposal of the above suit, the defendant, her servants and/or agents and/or persons claiming under her be restrained by a temporary injunction order of this Hon'ble Court from further unlawfully subletting and/or assigning and/or alienating and/or further parting with the possession of the suit premise described in prayer clause 9a) above or any part thereof in any manner whatsoever.

e. for interim and ad-interim reliefs in terms of prayer clauses (c) and (d) above;

f. that the defendant be ordered and decreed to pay to the plaintiff mesne profit in respect of the suit premises described in prayer clause (a) above for the period from the date of filing of this suit till the peaceful and vacant possession of the suit premises is handed over to the plaintiff.

g.

h.”

5. The plaintiff tried to serve the summons on the defendant through Bailiff. The Bailiff submitted his reports dated 27/01/2011, 17/03/2011 and 22/03/2011 stating that neither defendant nor any representative of defendant was available at the time of serving the summons. Thereafter the plaintiff, under Order V Rule 20 of the Code of Civil Procedure, 1908 served the respondent by substitute service i.e. by R.P.A.D. on 27/04/2011. The summons issued to the defendant by R.P.A.D. returned unserved with postal remarks “always close, not found”. Considering these facts, the trial court passed exparte decree on 02/03/2012 recording all these facts. Thereafter the plaintiff filed

execution application on 02/11/2012, wherein a warrant of possession was issued by the trial court on 08/07/2013. Same was executed on 30/07/2013 and the plaintiff took possession of the suit premises.

6. Thereafter the respondent defendant filed application dated 05/08/2013 under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside the *exparte* decree on several grounds. In that application, the defendant stated that she shocked to learn on 31/12/2013 at 10.30 am that the plaintiff has obtained decree and took possession of the suit premises (whereas an application under Order IX Rule 13 of Code of Civil Procedure, 1908 affirmed on 05/08/2013). The defendant in her application stated that during the period October 2012 and January 2013 she had shifted to her mother's place at Mumbai i.e. Room No.5, Sector-F, Lane D/2, Chhetah Camp, Mumbai – 400 088, for her pregnancy. It is also stated in the said application that in the first week of November 2012 she was taking medical treatment from Dr. Egbert Saldahna of Shreeji Hospital (Maternity Wing) at Ghatkopar (W), Mumbai – 400086. She was admitted in hospital on 12/06/2013 due to labour pain. Therefore, no one was present on behalf of her at suit premises when Bailiff attended for service of summons.

7. The trial court, considering the reasons given by the defendant in her application dated 05/08/2013, rejected the defendant's application for setting aside the *exparte* order by order dated 19/09/2014.

8. Being aggrieved by the said order of the trial court, the defendant preferred an appeal before the Appellate Bench of the Small

Causes Court. The Appellate Bench of the Small Causes Court allowed the said appeal, by judgment and decree dated 20/01/2016. Hence, the Writ Petition.

9. The learned counsel for the plaintiff submits that as per the tenancy agreement dated 03/11/2007, the suit premises was given to the defendant on tenancy basis for residential purposes only. He further submits that the defendant, in her application for setting aside *exparte* decree, made a false statement. He submits that though the defendant stated in her application for setting aside *exparte* decree that she was at her mother's place from October 2012 to January 2013, that cannot be considered a ground for setting aside the *exparte* decree. He submits that the Bailiff has submitted his reports dated 27/01/2011, 17/03/2011 and 22/03/2011 stating that when he tried to serve the respondents no one was at the suit premises.

10. The learned counsel for the plaintiff submits that the defendant, in para 5 of her application for setting aside *exparte* decree, specifically admitted that she has started using the suit premises for commercial purposes i.e. for office purpose. He submits that though the tenancy agreement was only with respect of the residential purposes, the defendant changed the use of tenancy premises without consent of the plaintiff. That amounts to breach of terms and conditions of tenancy agreement. He further submits that the defendant, at the beginning of her application stated that she was residing at the suit premises only. The initial para of her application reads thus:

"I Mrs. Nikhat Parveen w/o. Sameer Shah, aged about 33 years, occupation : Housewife, residing at Room No.9, 1st floor, 13F,

Chakala Street, X Lane, Masjid Bunder, Mandvi, Mumbai – 400 003, the defendant above named, do hereby state on solemn affirmation as under:”

11. The learned counsel for the plaintiff submits that, this itself shows that the defendant made a false statement on solemn affirmation that she was residing at the suit premises. He submits that the Bailiff's report as well as postal remark show that the defendant was not residing at the said place when they tried to serve the summons on defendant. He submits that these facts are not properly considered by the Appellate Bench of the Small Causes Court at the time of passing the impugned judgment and decree dated 20/01/2016. He submits that though the Appellate Bench of the Small Causes Court in para 8 to 10 and 12 recorded that the defendant seems to be residing at “284/96 Zodia Arcade, Flat No.203, 2nd floor, Maulana Azad Road, Mumbai – 400008”, same was not the case of the defendant in her application for setting aside the *exparte* decree. The learned counsel for the plaintiff submits that the Appellate Bench of the Small Causes Court has specifically recorded in para 9 and 10 that the suit premises was in use of the defendant for commercial purposes. He submits that, that was not the case of the defendant in her application. He submits that the Appellate Bench of the Small Causes Court failed to consider the tenancy agreement dated 03/11/2007 in which it was specifically stated that the suit premises was let out only for residential purpose.

12. The learned counsel for the plaintiff submits that the plaintiff obtained possession of the suit premises by following due process of law. Hence, the judgment and decree passed by the Appellate Bench of the Small Causes Court is contrary to the reasons disclosed by the

defendant in her application for setting aside the *exparte* decree under Order IX Rule 13 of the Code of Civil Procedure, 1908 and same deserves to be set aside.

13. On the other hand, the learned counsel for the defendant vehemently opposed the Writ Petition. He submits that the Appellate Bench of the Small Causes Court has considered the facts on record and after perusing the documents on record, set aside the order passed by the trial court on 19/09/2014, on defendant's application for setting aside the *exparte* decree. He submits that the plaintiff, in his plaint, made a false statement on solemn affirmation. He submits that the plaintiff, in the plaint, specifically stated that the defendant failed and neglected to pay the rent for the period January 2010 to June 2010. He submits that said rent was paid by the defendant on 23/07/2010. In support of this contention, the counsel for the defendant relies on rent receipt being No.941 dated 23/07/2010 (page 81). He submits that though the tenancy agreement shows that the suit premises was let out for residential purposes, same was in use of the defendant for commercial purposes only. He submits that even the Municipal Corporation record shows that the suit premises as "shop". In support of this contention, the learned counsel for the defendant relies on inspection extract of the corporation dated 23/02/2012 for the period 1996-1997 and 2009-2010 in which it is specifically stated that Room No.9 as "office premises". He further submits that the defendant, though stated in her application for setting aside the *exparte* decree, that she was residing in the suit premises, it is not correct. He submits that the defendant is an illiterate lady. She does not know English. Hence, whatever prepared by her Advocate, was signed by the

defendant. He submits that considering all these facts, the Appellate Bench of the Small Causes Court rightly set aside the order passed by the trial court on 19/09/2014. Hence, there is no question of interfering with the impugned order in the petition under Article 227 of the Constitution of India. He submits that there is no substance in the Writ Petition. Same is liable to be dismissed with costs.

14. Heard both sides at length. After hearing the parties, following points arise in the petition i.e. (i) whether the trial court has passed *exparte* decree on 02/03/2012 by following due process of law? and; (ii) Whether the defendant has made out a case for setting aside the *exparte* decree ?

15. It is to be noted that, the Bailiff reports 27/01/2011, 17/03/2011 and 22/03/2011 show that the defendant was not found in the suit premises for service. Hence, at the request of the plaintiff, the court allowed substitute service under Order V Rule 20 of the Code of Civil Procedure, 1908. Even the substitute service by R.P.A.D returned unserved with postal remark “always close, not found”. The reasons given by the defendant for setting aside the decree that during that period she was at her mother's place cannot be a ground for setting aside the *exparte* decree. The defendant, in para 8 of her application for setting aside *exparte* decree stated that between October 2012 to January 2013 she was at her mother's place. Whereas, the Bailiff reports dated 27/01/2011, 17/03/2011 and 22/03/2011 show that the defendant was not present in the suit premises when he tried to serve the summons. This itself shows that the defendant has made a false

statement on solemn affirmation that she was in use of suit premises in the year 2011. If defendant seeks to set aside the *exparte* decree by making a false statement, then defendant is not entitled to any relief.

16. The contention made by the learned counsel for the defendant about payment of rent and the suit premises was used for commercial purpose, cannot be considered in the present proceedings, because the defendant, on her own, made a misleading statement in her application for setting aside *exparte* decree. These facts are not considered by the Appellate Bench of the Small Causes Court while passing the impugned judgment and decree. The Appellate Bench of the Small Causes Court, in para 7 to 12 recorded the facts which were not pleaded by the defendant in her application dated 05/08/2013 for setting aside the *exparte* decree. Considering these facts, I am of the opinion that the petitioner has made out a case following the Writ Petition.

17. Hence, following order is passed:

- a. The impugned judgment and decree dated 20/01/2016 passed by the Appellate Bench of the Small Causes Court in Misc. Appeal No.455/2014 in Marji application No.381/2014 in R.A.E. & R. Suit NO.83/124/2011 is set aside.
- b. Order dated 19/09/2014 passed by the Small Causes Court in Marji application No.381/2014 is confirmed.
- c. Writ Petition stands disposed of accordingly.

(K.K. TATED, J.)