

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3095 OF 2015

Abdul Hamid Ibrahim Khatri	...Petitioner
<i>Versus</i>	
Vithal Mahadev Chauhan And Anr.	...Respondents

WITH

Writ Petition NO. 3096 OF 2015

Abdul Hamid Ibrahim Khatri	...Petitioner
<i>Versus</i>	
Prasad Vithal Chauhan	...Respondent

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Mr. Prasad Dani, Senior Advocate a/w. Ms. Usha Gadagkar and Mr. Hamza Tatli, i/b. Diamondwala & Co. for the Petitioner in both Writ Petitions.

Mr. J.M. D'Silava, Advocate for the Respondents in both Writ Petitions.

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CORAM : R. G. KETKAR, J.

DATE : 07th June, 2016

P.C.

1. Heard Mr. Prasad Dani, learned Senior Counsel for the petitioner and Mr. J.M. D'Silava, learned Counsel for the respondents, at length.

2. Rule. Mr. D'Silava waives service on behalf of the

respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

3. Writ Petition No.3096/2015 is directed against the judgment and order dated 20.2.2015 passed by the Appellate Bench of the Small Causes Court, Mumbai in 2(a) Appeal No.1/2012 arising from the judgment and decree dated 30.11.2011 passed in R.A.E. & R. Suit No.656/974 of 2010. By that order, Appellate Court allowed the appeal preferred by respondent herein and quashed and set aside the judgment and decree dated 30.11.2011 passed by learned trial Judge in R.A.E. & R. Suit No.656/974 of 2010. The Appellate Court directed the defendant to file written statement before the trial Court on appearance of the parties subject to payment of exemplary costs of Rs.10,000/- to be paid to the respondent (petitioner herein) within a period of 15 days from the date of the order. Trial Court was directed to accept the written statement and also frame issues on the basis of the pleadings of the parties and give opportunity to both the parties to lead their evidence and decide the suit afresh within a period of one year from the date of

receipt of record and proceedings. The defendant was directed to deposit monthly rent of suit premises at the rate of Rs.550/- per month in the trial Court under protest till final disposal of suit.

4. Writ Petition No.3095/2015 is directed against the judgment and order dated 20.2.2015 passed by the Appellate Bench of the Small Causes Court in 2(a) Appeal No.2/2012 arising from R.A.E. & R Suit No.655/973 of 2010. By that order, the appellate Court allowed the appeal and quashed and set aside the judgment and decree dated 30.11.2011 in that Suit. The appellate Court directed the defendants to file written statement before the trial Court on the date of appearance of the parties subject to payment of exemplary costs of Rs.10,000/- to be paid to the respondent within a period of 15 days from the date of the order. Trial Court was directed to accept the written statement and also frame issues on the basis of the pleadings of the parties and give opportunity to both the parties to lead their evidence and decide the suit afresh within a period of one year from the date of receipt of record and proceedings. The defendants were directed to deposit monthly rent of suit premises at the rate of Rs.440/- per month in the trial Court

under protest till final disposal of suit.

5. In support of these petitions, Mr. Dani submitted that the petitioner, hereinafter referred to as the plaintiff, has instituted two suits on 15.6.2010 on the ground of unlawful sub-letting, default and non-user of the suit premises against the defendants. The suit summons were served on the defendants on 21.6.2010. As no written statement was filed by the defendants, the trial Court passed 'no WS' order on 15.12.2010. On 27.4.2011 the defendants took out applications for condonation of delay in filing written statement as also for setting aside 'no WS' order. By order dated 6.5.2011 the applications were rejected. The suits instituted by the plaintiffs were decreed on 30.11.2011. Aggrieved by these decisions, the defendants preferred appeals before the appellate Court on 27.12.2011. During pendency of the appeals, the appellate Court passed interim order staying eviction decree subject to the defendants depositing arrears of interim compensation at the rate of Rs.10,000/- / Rs.7,000/- per month towards the use and occupation of the suit premises from December, 2011 to July, 2014 within a period of three months from the date of the order

and continue to deposit interim monthly compensation of Rs.10,000/- / Rs.7,000/- per month pending final disposal of the appeals for ensuing months on or before 10th day of each month. The defendants were directed to deposit the arrears as per the decree, if already not deposited.

6. Mr. Dani submitted that the defendants did not challenge that order. At the same time, they did not even comply said order. He invited my attention to the impugned order. In particular in paragraph-12, the Appellate Court expected the plaintiff to bring on record the circumstances to show as to why the advocate for the defendants did not instruct the defendants to either file revision application or appeal against the order rejecting applications for condonation of delay as also for setting aside 'no WS' order. He further submitted that while allowing the appeals, the appellate Court even did not ensure compliance of the order dated 25.7.2014 directing the defendants to deposit interim monthly rent at the rate of Rs.10,000/- / Rs.7,000/-. As against this, the appellate Court directed the defendants to deposit contractual rent at the rate of Rs.550/- / Rs.440/- per month. In fact, having regard to the fact that the defendants

failed to comply the order dated 25.7.2014, the appellate Court should have directed the defendants to comply with that order or in any case if the defendants did not comply ought to have vacated the interim order.

7. On the other hand, Mr. D'Silava supported the impugned orders. He submitted that the appellate Court after considering various decisions cited before it, was satisfied that the Advocate representing the defendants was negligent in prosecuting the suit. He should have advised the defendants to challenge the orders dated 6.5.2011 rejecting the applications filed by them for condoning the delay in filing written statement as also for setting aside 'no WS' order. That itself demonstrates that the defendants were innocent and they should not suffer because of negligence on the part of their Advocate.

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

9. Following facts are undisputed. Suits are instituted on 15.6.2010. Suit summons were served on the defendant on

21.6.2010. As the defendants did not file written statement in the suits, 'no WS' order was passed on 15.12.2010. On 27.4.2011 applications were taken out by the defendants for condoning the delay in filing written statement and also for setting aside 'no WS' order. On 6.5.2011 both the applications were rejected by the trial Court. The defendants did not challenge these orders. On 30.11.2011 the suits were decreed. On 27.12.2011 appeals were preferred by the defendants. On 25.7.2014, the appellate Court granted stay to the decree by the trial Court subject to the defendants depositing Rs.10,000/- / Rs.7000/- per month in the trial Court in addition to the contractual rent at the rate of Rs.550/- / Rs.440/- per month. The defendants neither challenged that order nor complied with that order.

10. Perusal of the impugned order shows that in paragraph-12, the appellate Court expected the plaintiffs Advocate to bring on record the circumstances to show as to why the Advocate for the defendants did not instruct them to challenge order dated 6.5.2011 by filing either revision or appeal. To say the least, the approach of the trial Court is perverse. In fact, the defendants owe that explanation and not the plaintiffs.

That apart, the appellate Court also did not consider whether the defendants complied the order dated 25.7.2014.

11. In my opinion, the appellate Court though observed that the defendants were not vigilant in prosecuting the suit, still allowed the appeals and set aside the trial Courts decree and permitted the defendants to file written statement. In fact, in paragraph-19 the appellate Court appears to have referred to the interim order passed by it while granting stay. Despite that it however did not direct the defendants to comply the interim order. In view thereof, the impugned orders cannot be sustained and are liable to be set aside thereby restoring the appeals to the file of the appellate Court. The appellate Court will decide the appeals uninfluenced by the observations made in this order.

12. As it is not disputed that the defendants have not complied the order dated 25.7.2014, Mr. D'Silava upon taking instructions from the defendants who are present in Court states that within six weeks from today, the defendants will deposit the amount as per the orders dated 25.7.2014 passed in appeals. They will not further seek extension of time for complying the orders dated 25.7.2014. He further states that it

is understood by the defendants that in case they do not comply the orders dated 25.7.2014, they will handover vacant and peaceful possession of the suit premises to the plaintiff as an agent of the Court Receiver during pendency of the appeals. Hence, the following order :

- [i] Impugned orders, namely, (i) the judgment and order dated 20.2.2015 passed by the Appellate Bench of the Small Causes Court in 2(a) Appeal No.2/2012 arising from R.A.E. & R Suit No.655/973 of 2010 and (ii) judgment and order dated 20.2.2015 passed by the Appellate Bench of the Small Causes Court, Mumbai in 2(a) Appeal No.1/2012 arising from the judgment and decree dated 30.11.2011 passed in R.A.E. & R. Suit No.656/974 of 2010 are set aside and the appeals are restored to the files of the trial Court. The parties agree that they will appear before the appellate Court on 20.6.2016.
- [ii] In case the defendants do not deposit the arrears within six weeks from today as per the orders dated 25.7.2014, they shall hand over vacant and peaceful possession of

the suit premises to the plaintiff as an agent of the Court Receiver during pendency of the appeals without payment of any royalty and security.

[iii] Rule is made absolute in aforesaid terms with no order as to costs. Writ Petitions are disposed of accordingly.

[iv] List the Petitions for compliance before this Court after eight weeks.

(R. G. KETKAR, J.)

Deshmane (PS)