

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12169/2015

Mrs. Indira w/o. Shripat Babu Gurav ... Petitioner
V/s.
Bhikhubhai Vesta Dubli @ Dubla @ Rathod & Ors. ... Respondent

Mr. Diwakar A. Dwivedi for the petitioner
Mr. Dinesh G. Mishra for the Respondent.

CORAM: K.K. TATED, J.
DATED : APRIL 2, 2016

PC. :

1. Heard the learned counsel for the parties. By this petition under Article 227 of the Constitution of India the Petitioner is challenging the concurrent findings of fact recorded by both the courts below while dismissing the application made by the petitioner under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside *exparte* decree dated 08.06.2010 by which the Trial Court directed the petitioner to hand over vacant and peaceful possession of the suit premises viz. room No.3, Vesta Mangal Chawl, Malpadongri No.1, Azad Road, Andheri (E), Mumbai – 400 093 (ground plus 1 floor) to the respondent plaintiff and also to pay sum of Rs.700/- towards arrears of rent for a period January 2005 to February 2006.

2. In the present proceedings, the respondent plaintiff filed RAE & R suit No.114/237/2006 in the Court of Small Causes at Mumbai for vacant and peaceful possession of the suit premises on the ground that the petitioner/ defendant sublet the suit premises and breached other terms and conditions of tenancy agreement. The summons was duly

served on the petitioner defendant. In spite of that neither the defendant filed his appearance nor anybody remained present before the Trial Court. Hence, the Trial Court passed *exparte* decree on 08.06.2010, holding that the plaintiffs have proved that the defendant has sublet suit premises to third person without their consent and has failed and neglected to pay arrears of rent. The court also held that the plaintiff is in reasonable and *bona fide need of the suit* premises for their own use and hardship will cause to the plaintiff if eviction decree was not passed.

3. Thereafter the petitioner defendant made an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 23.04.2012 which was registered as MARJI application No.120/2012 for setting aside the *exparte* decree. Same was rejected by the Trial Court by order dated 19.11.2014 holding that the petitioner failed to show sufficient cause for condonation of delay in taking out the application.

4. Thereafter the petitioner preferred Misc. Appeal No.74/2014 before the appellate court of Court of Small Causes Bandra, which was also dismissed by the Appellate Bench of the Small Causes Court by impugned judgment and decree dated 17.02.2015. Hence, the present Writ Petition.

5. The learned counsel for the petitioner submits that the petitioner is an illiterate lady. He submits that the summons of the suit was not duly served on her. He submits that for some period she had shifted to her native place at village Kodage (Guravwadi) Tq. Lanja, Dist. Ratnagiri. When she returned to Mumbai on 15.03.2012, she learnt

from one of her neighbours that in her absence, four persons from court had come to her place in the month of February 2012. Hence, the petitioner contacted her Advocate. Her Advocate, after taking search, learnt that an *exparte* decree was passed against her. Therefore, the petitioner made an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 23.04.2012. Therefore, there was delay on her part to take appropriate steps immediately for setting aside the *exparte* decree. He submits that during this period, the petitioner lost her husband as well as son. He submits that for want of knowledge about the suit filed by the respondent plaintiff, there is delay on their part to take steps for setting aside *exparte* decree. He submits that in the interest of justice, this Hon'ble Court be pleased to set aside the *exparte* decree and allow the petitioner to file her written statement in a suit filed by the respondent plaintiff and suit be decided on merits. He submits that if Writ Petition is not allowed, irreparable loss will be caused to the petitioner. He submits that as on today, the petitioner is in possession of the suit premises.

6. On the other hand, the learned counsel for the respondent plaintiff vehemently opposed the Writ Petition. The respondent filed Affidavit-in-Reply dated 02.08.2014. He submits that the plaintiff filed eviction application against the petitioner defendant on the ground that she sublet the suit premises. He submits that when the Court of Small Causes issued summons to the petitioner at her address as stated in the plaint, same was returned unserved with Bailiff remark "petitioner - defendant is residing at her native place". Thereafter the summons was duly served on the defendant at her native place "village Kodage (Guravwadi) Tq. Lanja, Dist. Ratnagiri". He submits that in spite of

service of summons, the petitioner failed and neglected to take any steps for defending her interest in the said suit. He submits that apart from that, the petitioner has made a false statement in her application for condonation of delay in making the civil application under Order IX Rule 13 of the Code of Civil Procedure, 1908. He submits that the petitioner's husband expired on 23.08.1999 and son on 08.12.2002 i.e. before filing the suit. This itself shows that the petitioner has made an incorrect statement in her application for obtaining favourable orders. On this ground also, the Writ Petition is liable to be dismissed. He submits that there are concurrent findings of fact recorded by both the courts below, on the basis of documents. If there are concurrent findings of fact, then the court should not interfere the same under Article 227 of the Constitution of India. Hence, there is no substance in the Writ Petition. Same be dismissed with costs.

7. Heard the learned counsel for the parties at length, gone through *exparte* decree passed by the trial court, application dated 23.04.2012 made by the petitioner under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside the decree, impugned orders passed by both the courts below, Affidavit-in-Reply filed by the respondent defendant and other documents.

8. It is to be noted that there are concurrent findings of fact recorded by the courts below. The Apex Court in the matter of ***V.Sumatiben Maganlal Manani (dead) by L.Rs. Vs. Uttamchand Kashiprasad Shah and Anr.*** 2011 (6) MLJ 1 held that the High Court, in exercise of its revisional jurisdiction, should not interfere with the findings of facts properly arrived at by the courts below. In the

matter of *Sarla Ahuja Vs. United India Insurance Co. Ltd.* AIR 1999 SC 100 the Apex Court held that it is not permissible to the High Court to reappraise and re-appreciate the evidence for reaching a different finding in revisional jurisdiction. In the matter of *Sunilkumar and Anr. Vs. Anilkumar* 2008 (9) SCC 241 the Apex Court held that normally, the High Court should not interfere with the concurrent findings of fact in Rent Act matters unless and until the orders passed by the courts below are perverse and contrary to law.

9. The Apex Court in the matter of *Jhon Impex Pvt. Ltd. Vs. Atul Kapur & Ors.* 2009 (15) SCC 285 held that if no sufficient or cogent reason has been assigned by the party as to why despite the receipt of notice, they did not appear before the court, the court should not set aside the *exparte* decree.

10. In the present proceedings, the respondent plaintiff filed a suit for eviction against the petitioner defendant on the ground that she sublet the suit premises etc. This was justified by the respondent because the summons issued to the petitioner defendant at her Bombay address returned unserved with bailiff remark “she is residing at her native”. The summons issued to the defendant at her native address was duly served. Apart from that though the summons was duly served on the petitioner, she failed to take appropriate steps to defend her rights. Apart from that she has made incorrect statement in her application taking ground that her son as well as husband expired during that period. If an incorrect statement is made to gain favourable orders, the question does not arise to allow such application. Both the courts below categorically held that though the

petitioner defendant was duly served by summons, she remained absent. Delay in making the application under Order IX Rule 13 of Code of Civil Procedure, 1908 also not explained.

11. Considering these facts, I do not find any substance in the Writ Petition. Same stands rejected.

(K.K. TATED, J.)