

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 5843 of 2015

With

Writ Petition No.5844 of 2015

Nargis Majid Oomerbhoy

...Petitioner

Versus

Captain Vinodkumar Baldevsingh
and another

...Respondents

....

Mr.R.S. Apte, Senior Advocate i/b. Kanchan Pandare, Advocate for the Petitioner.

Mr.P.S. Dani, Senior Advocate a/w. Kunal Mehta i/b. Snehal R. Modi, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 07th SEPTEMBER, 2016

P.C.

1. Heard Mr.R.S. Apte, learned Senior Counsel for the petitioner and Mr. P.S. Dani, learned Senior Counsel for respondent No.1, at length. Leave to delete respondent No.2 in Writ Petition No.5843/2015 is granted. Amendment shall be carried out forthwith.

2. Rule. Ms.Snehal Modi waives service on behalf of the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the petitions are taken up for final hearing.

3. By W.P. No.5843/2015 filed under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order

dated 23.2.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Marji Application No.117/2011. By that order, the Appellate Court dismissed the application filed by the defendant for recalling the order dated 3.2.2011 passed in Appeal No.716/2005 in Interim Notice No.2373/1999 and Interim Notice No.127/2000 in R.A.D. Suit No.1362/1999.

4. The respondent, hereinafter referred to as the 'plaintiff' has instituted suit for declaration of his tenancy rights in respect of the premises comprising of residential area on the first floor including the (chowk) together with the garage and servants quarters in the compound with the facility of parking three vehicles in the compound of the building known as Russi Villa, situate at 55, Peddar Road, Mumbai – 400 026 and delineated and surrounded in red and green colour boundary lines in the plan at Exhibit-A to the plaint and identified by alphabets (“A”, “B” and “C”) and for perpetual injunction.

5. During pendency of the suit, the plaintiff took out Interim Notice No.2373/1999 *inter alia* for following reliefs :

“a) that the Defendant her agents, servants and/or representatives be restrained by an order and injunction of this Hon'ble Court from trespassing, encroaching or entering upon the suit premises or any part or portion thereof or bringing any third person into the suit premises or any part or portion thereof or doing any act, deed or thing so as to disturb or interfere in any manner

whatsoever with the quiet and peaceful possession and enjoyment of the suit premises by the plaintiff or to do any act, deed or thing to dispossess the plaintiff except through due process of law from the suit premises being a portion of the building property Rusi Villa, situate on 55 Peddar Road, Mumbai-400025 comprising of the residential area on the first floor including the appurtenant passage thereto marked 'A' on the plan at Exhibit "A" to the plaint together with the garage and servants quarters in the compound marked 'C' & 'B' respectively on the plan at Exhibit "A" to the plaint and the facility of parking three vehicles in the compound marked 'D' on the plan at Exhibit 'A' to the plaint as a facility coupled with the tenancy rights and terms and conditions of the tenancy of the Plaintiff in respect of the suit premises particularly described in the Schedule to the plaint;

- b) that the Defendant her agents servants or representatives be restrained by an order of injunction of this Hon'ble Court from doing at any act or deed or thing so as to disturb obstruct or interfere in any manner whatsoever with the Plaintiff's parking of three vehicles in the compound of the property Russi Villa situate at 55, Peddar Road, Mumbai-400026 marked 'D' on the plan annexed to the plaint at Exhibit "A" and more particularly described in the Schedule to the plaint and the Police Authorities at Gamdevi police station be directed to ensure that Plaintiff and his family members are protected, and the order of this Hon'ble Court are properly implemented;
- c) that the Defendant her servants, agents and/or representatives be restrained from transferring the rent receipts for the suit premises being Russi Villa comprising of the residential area on the first floor including the chowk marked 'A' to the plan at Exhibit "A" to the plaint together with the garage and servants quarters in the compound

marked 'C' & 'B' on the plan at Exhibit "A" to the plaint and the facility of parking three vehicles in the compound at the point marked 'D' on the plan at Exhibit "A" to the plaint as more particularly described in the Schedule annexed to the plaint;

- d) for interim and ad-interim reliefs in terms of prayer (b), (c), (d), and (e);”

6. The plaintiff also filed interim notice No.127/1999 *inter alia* for following reliefs :

- “a) the Defendant her servants, agents, representatives, employees, watchmen and anyone claiming through her be restrained by an order of injunction of this Hon'ble Court from preventing the access to the guests and visitors of the Plaintiff, his family members and servants to enter the said building or his house or leave from house at any time of the day and night without any restriction whatsoever;
- b) the Defendant her servants, agents, representatives, employees, watchmen and anyone claiming through her be restrained by order of injunction of this Hon'ble Court from obstructing or preventing the entry of the painter, carpenter, milkman, news paper delivery boy and all other persons providing service to the plaintiff to enter the suit premises;
- c) the Defendant her servants, agents, representatives, employees, watchmen and anyone claiming through her be restricted by order of injunction of this Hon'ble Court from obstructing, interfering or preventing the Plaintiff, his family members, servants, plumber the access to our water pump which is located near the lift of the said building and access to the over head water tank which is located on the terrace of the said building for carrying out daily operations and

necessary repairs;

- d) the Plaintiffs be permitted to appoint his own watchmen/security guards for the protection of the family members, servants of the Plaintiff and for safety of the suit premises;
- e) ad-interim and interim reliefs in terms of prayer (a), (b), (c) and (d) above;”

7. By common judgment and order dated 23.8.2005, the learned trial Judge disposed of these notices. The learned trial Judge allowed Interim Notice No.2373/1999 in terms of prayer clause (a) only. Rest of the reliefs in terms of prayer clauses (b), (c) and (d) were rejected. As far as Interim Notice No.127/2000 is concerned, it was made absolute in terms of prayer clauses (a) and (b).

8. Aggrieved by this decision, the plaintiff preferred appeal No.716/2005. The defendant did not challenge that order. It appears that on 19.7.2007, Appellate Court passed order to proceed with the appeal exparte. The defendants did not appear and consequently appeal was allowed on 3.2.2011. Appellate Court allowed the appeal and order of the trial Court dated 23.8.2005 to the extent of rejecting relief in terms of prayer clauses (b) and (c) in Interim Notice No.2373/1999 and interim relief in terms of prayer clause (c) in Interim Notice No.127/2000 was set aside. The defendant was restrained from creating any disturbance or obstruction in plaintiff's parking three vehicles in the compound of the suit property at the place marked “D” on

the plan annexed to the plaint. The defendant was also restrained from transferring the rent receipt of the suit premises in favour of any third party. The defendant was further restrained from obstructing or preventing the plaintiff, his family members, servants, and plumber the access to the water pump which is located near the suit building and access to the overhead water tank which is located on the terrace of the suit building for carrying out daily operations and necessary repairs.

9. On 22.2.2011, the defendant filed Marji Application for condoning the delay and recalling order dated 3.2.2011. By the impugned order, Appellate Court rejected Marji Application. It is against this order, the defendant has instituted above Petition.

10. In support of this Petition, Mr. Apte submitted that there are various proceedings between the parties and due to inadvertence, Appeal remained to be attended by the defendant. On 15.2.2011, the defendant acquired knowledge about passing of the order on 3.2.2011. The defendant, therefore, filed application on 22.2.2011 for rehearing of the appeal on merits. He assures that if the appeal is restored, the defendant will appear before Appellate Court on 19.9.2016 and for that purpose no fresh notice be issued to the defendant. The defendant will extend full cooperation for disposal of appeal in a time bound manner.

11. On the other hand, Mr. Dani supported the impugned order. He submitted that the defendant was consistently remaining absent without any sufficient and reasonable cause. Appellate Court, therefore, was constrained to pass order on 19.7.2007 for proceeding with the appeal *exparte*. He submitted that perusal of the impugned order shows that for a continuous period of five years since filing of the appeal the defendant failed to attend the Court. The defendant has not shown any reasonable and sufficient cause for not attending the proceedings. As the defendant was consistently remaining absent and that on 19.7.2007, Appellate Court passed order to proceed with the matter *exparte*, no fault can be found with the impugned order. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

12. During the course of hearing, I called upon Mr.Apte as to whether the defendant intends to transfer the rent receipt. Upon taking instructions from Mr.Nadim Oomerbhoy son of the defendant, he states that during pendency of the suit, the defendant will not transfer the rent receipts. Statement made by Mr.Apte, on instructions, is recorded. In view thereof, prayer clause (c) of Interim Notice No.2373/1999 is taken care of.

13. Perusal of the impugned order shows that the

Appellate Court while dismissing Marji Application gave two reasons, namely, (1) on 19.7.2007 Appellate Court passed order to proceed with the appeal *ex parte* and (2) for a continuous period of about 5 years since filing of the appeal the defendant failed to attend the court inspite of service of notice. The Appellate Court, therefore, held that no reasonable and sufficient cause is shown for setting aside the order dated 3.2.2010.

14. In my opinion, if the Appellate Court was of the view that the defendant is not ready to argue the appeal, it could have by different ways and means ensured presence of the defendant to argue the appeal. One of the ways was to pass an order against the defendant that in the event of their failure to argue the appeal, Appellate Court will be constrained to strike out the defence in the suit. Other alternative was to impose costs on the defendant for not proceeding with the appeal. In my opinion, Appellate Court instead of deciding the appeal in the absence of the defendant, should have decided the appeal on merits. It is salutary principle that justice should not be done but it must be also seen to be done. By deciding the appeal in the absence of the defendant, Appellate Court has committed breach of the salutary principle.

15. That apart, as noted earlier the learned trial Judge partly allowed Interim Notice No.2373/1999 in terms of

prayer clause (a) only. Rest of the reliefs in terms of prayer clauses (b), (c) and (d) were rejected. Perusal of the prayer clauses of that Notice, extracted hereinabove, *prima facie* shows that the substantial part of prayer clause (b) is covered by wider prayer clause (a). As far as prayer clause (c) is concerned, I have already accepted statement of Mr.Apte.

16. As far as Interim Notice No.127/2000 is concerned, the learned trial Judge has allowed Notice in terms of prayer clauses (a) and (b). The substantial part of prayer clause (c) is also covered by prayer clause (b). As the Appellate Court has decided the appeal in the absence of the defendant, I am inclined to set aside the impugned order on this count alone subject to following conditions. Hence, following order:

- [i] Order dated 23.2.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Marji Application No.117/2011, is set aside and Marji Application No.117/2011 stands allowed. Appeal No.716/2005 stands restored to the file of Appellate Court.
- [ii] Parties agree that they will appear before the Appellate Court on 19.9.2016 and for that purpose no fresh notice be issued to them.
- [iii] Appellate Court is requested to decide the appeal within two weeks from the date of appearance of the parties. The Appellate Court to decide the appeal on its own merits and in accordance with law uninfluenced by the

observations made herein.

- [iv] All contentions of the parties on merits are expressly kept open.
- [v] Rule is made absolute in aforesaid terms with no order as to costs.
- [vi] It is made clear that if the defendant does not remain present on day fixed for hearing of the appeal, the impugned order shall stand revived without further reference to the Court.
- [vii] In view of disposal of Writ Petition No.5843/2015, Writ Petition No.5844/2015 does not survive and the same is disposed of.

(R. G. KETKAR, J.)

Deshmane (PS)