

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 12450 OF 2016

Davabhai D. Patel And Anr. ...Petitioners

Versus

Mr. Bharat Jethalal Maniar
And Ors. ...Respondents

With

Writ Petition No. 12451 OF 2016

Mahesh Davabhai Patel ...Petitioner

Versus

Mr. Bharat Jethalal Maniar
And Ors. ...Respondents

....

Mr. Pankaj S. Shah, Advocate for the Petitioners.
Mr. Ankit Lohia a/w. Arun Mehta, Sanket Shah, Advocate for the Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 26th OCTOBER, 2016

P.C.

1. Not on board. At the request of Mr. Shah taken up for admission.
2. Heard Mr. Pankaj Shah, learned Counsel for the petitioners and Mr. Ankit Lohia, learned Counsel for the respondents, in both the Petitions, at length.
3. Writ Petition No.12450/2016 challenges the judgment and order dated 19.1.2016 passed by the learned Judge, presiding over Court Room No.8 of the Court of

Small Causes at Mumbai in Marji Application No.588/2013 in R.A.E. Suit NO.220/375 of 2011 as also judgment and order dated 4.10.2016 passed by Appellate Bench of the Court of Small Causes at Bombay in Misc. Appeal No.90/2016. By these orders, the Courts below dismissed the application made by the petitioners, hereinafter referred to as the 'defendants' under Order IX Rule 13 of C.P.C.

4. Writ Petition No.12451/2016 challenges the judgment and order dated 19.1.2016 passed by the learned Judge, presiding over Court Room No.8 of the Court of Small Causes at Mumbai in Marji Application No.565/2013 in R.A.E. Suit No.219/374 of 2011 as also judgment and order dated 4.10.2016 passed by the Appellate Bench of the Court of Small Causes at Bombay in Misc. Appeal No.88/2016. By these orders the Courts below dismissed the application made by the petitioner, hereinafter referred to as the 'defendant' under Order IX Rule 13 of C.P.C. Since common questions of law and facts arise in these Petitions, same can be conveniently disposed of by this common order.

5. The respondents instituted suit for recovery of possession of the suit property. The suit was decreed exparte on 11.5.2012. While decreeing the suit, in paragraph-2 the learned trial Judge recorded that despite the defendant being duly served with writ of summons, as

is evident from bailiff's report at Exhibit-7, he failed to appear before the Court and answer the claim made against him. Hence by order dated 6.12.2011, the suit was ordered to proceed *exparte*. Perusal of the application and in particular paragraphs-6 & 7 made by the defendant under Order IX Rule 13 of C.P.C. shows that the defendant has not made any comment as regards the bailiff's report at Exhibit-7 as also findings recorded by the learned trial Judge in paragraph-2 of the order. What is contended is that "the defendant was not served with the writ of summons and, therefore, he could not participate in the proceedings. It appears that the writ of summons was attempted to be served by substituted service by pasting at defendant's business premises". In paragraph-7 it is asserted that the defendant's Advocate took inspection of the premises and applied for certified copy of the *exparte* decree. In other words, in the entire application, the defendant has not attacked the bailiff's report at Exhibit-7 as also finding recorded by the learned trial Judge in paragraph-2 of the order. This has to be appreciated on the backdrop of the fact that the defendant claims to have taken inspection of the proceedings.

6. In view thereof, I do not find that the Courts below committed any error in rejecting the application. In the result, Petitions fail and the same are dismissed.

7. However, it will be open to the defendant to file fresh applications under Order IX Rule 13 of C.P.C. giving details as also challenging bailiff's report at Exhibit-7 and finding recorded in paragraph-2 by the trial Court while passing *ex parte* decree. If such applications are made, all contentions of the respondents including maintainability of such applications, are kept open.

8. Mr. Shah states that the petitioner in Writ Petition No.12451/2016 Mr. Mahesh Davabhai Patel who is son of petitioner in Writ Petition No.12450/2016 is present in the Court. He has tendered photo copy of his Aadhaar Card, which is taken on record and marked "X" for identification. Upon taking instructions from him, Mr.Shah states that within four weeks from today, the petitioners will take out applications under Order IX Rule 13 of C.P.C. and serve copy in advance on the other side within the same period. He further states that the defendants will file undertaking in both the Suits incorporating therein :

- i. that they are in possession and nobody else is in possession;
- ii. that the defendants have neither created third party interest nor parted with the possession;
- iii. that the defendants will hereafter neither create third party interest nor part with the possession;
- iv. that within four weeks from today the defendants

will deposit arrears of rent if any in the trial Court under intimation in writing to other side; and

- v. that the defendants will not apply for further extension of time for filing applications under Order IX Rule 13 of C.P.C. or for depositing arrears of rent in the trial Court.

9. Mr.Lohia states that the plaintiffs have already filed darkhast in the trial Court. If the defendant is given liberty to file application, all contentions of the plaintiffs may be kept open. In view thereof, the darkhast shall not proceed for a period of four weeks with clear understanding that no further time will be sought for filing applications or for depositing arrears of rent or for extension of interim relief. The defendants shall apply for interim relief pending application under Order IX Rule 13 of C.P.C. The trial Judge will pass appropriate order uninfluenced by any observations made herein and in accordance with law. All contentions of the parties on merits are expressly kept open. It is made clear that these directions are without prejudice to the rights and contentions of the parties.

(R. G. KETKAR, J.)