

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2191 OF 2016

Babulal Prabhulal Daiya

...Petitioner

Versus

The State Of Maharashtra And Ors.

...Respondents

....

Mrs.Smita N. Mhatre, Advocate for the Petitioner.

Mr. Hero Khaildas Vazirani a/w. Ms. Pushpa Himatgir Goswami,
Advocate for Respondents No.2(1) to 2(3).

Mr.A.R. Metkari, AGP, for Respondent-State.

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CORAM : R. G. KETKAR, J.

DATE : 30th SEPTEMBER, 2016

P.C.

1. Heard Ms.Smita Mhatre, learned Counsel for the petitioner, Mr.A.R. Metkari, learned A.G.P. for respondent No.1-State and Mr. H.K. Vazirani, learned Counsel for respondents No.2(1) to 2(3), at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant' has challenged the judgment and order dated 27.8.2015 passed by learned Judge, presiding over Court Room No.20 of the Court of Small Causes at Mumbai below Exhibit-20 in Execution Application No.352/2014 arising from L.E. & C. Suit No.102/114 of 2007 as also the judgment and order dated 7.12.2015 passed by Appellate

Bench of Court of Small Causes at Bombay in Revision Application No.290/2015. By order dated 27.8.2015 below Exhibit-20, the learned trial Judge allowed the application and rejected application Exhibit-13 and reissued warrant of possession in compliance to order dated 27.8.2014 passed below Exhibit-10 for grant of police help to execute the warrant of possession. Aggrieved by this decision, the defendant preferred Revision Application which was dismissed by the Appellate Court as not maintainable. Appellate Court relied upon the decision of Full Bench of this Court in **Bhartiben Shah & Anr. Vs. Gracy Thomas & Ors., 2013(2) Bom.C.R. 1**. Appellate Court held that the order passed by the learned trial Judge was procedural order and did not affect the substantive rights of the defendant.

3. In support of this Petition, Ms.Mhatre submitted that the petitioner is a statutory tenant in respect of the suit premises. The petitioner is occupying the suit premises from 1981 and is in possession till date uninterruptedly. The petitioner is regularly paying rent to the respondent. Though the petitioner was paying rent regularly to the respondents No.2(1) to 2(3), they were not issuing rent receipts. She further submitted that the learned trial Judge decreed the suit instituted by the respondents No.2(1) to 2(3) on 29.3.2014. The order records appearance

of Advocate Mr.Mohan P. Tekavde on behalf of the defendant. However, Mr.Tekavde had given no objection and hence appearance of Mr.Tekavde was wrongly shown by the trial Court which gives impression that he was heard by the trial Court. She submitted that Advocate Mr.Tekavde ought not to have appeared in the matter.

4. She submitted that as the learned trial Judge passed exparte decree the defendant has filed application under Order IX Rule 13 of C.P.C. on 30.7.2016 and the next date of hearing before the trial Court is 10.10.2016. She submitted that the defendant had filed application Exhibit-13 and order was passed on 28.8.2014 and stay was granted till disposal of Exhibit-13. That stay was continued on 5.9.2014 subject to the defendant depositing 50% of the decretal amount of arrears in the Court on or before 19.9.2014. She submitted that the petitioner has complied the order dated 5.9.2014 and that receipt to that effect is also issued.

5. Respondents No.2(1) to 2(3) filed application Exhibit-20 for vacating stay of warrant of possession on the ground that the Marji Application No.525/2014 filed by Devraj was dismissed on 29.4.2015. The learned trial Judge allowed the application Exhibit-20 filed by the respondents and rejected the application Exhibit-13 filed by the judgment debtor. She submitted that as the decree was

passed exparte and the petitioner has already adopted proceedings under Order IX Rule 13, the Courts below were not justified in rejecting the application Exhibit-20 and reissuing warrant of possession. This will render the proceedings under Order IX Rule 13 infructuous and will cause serious prejudice to the defendant. She, therefore, submitted that the petition requires consideration and the warrant of possession be stayed till disposal of order IX Rule 13 proceedings.

6. On the other hand, Mr.Vazirani supported the impugned orders. He submitted that the defendant has not challenged the decree passed on 29.3.2014. The decree passed by the trial Court is not stayed. He has taken me through the impugned orders and submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the learned trial Judge decreed the suit on 29.3.2014. While decreeing the suit, the learned trial Judge noted that that the defendant had filed written statement at Exhibit-7 denying the assertions made by the plaintiffs. The plaintiffs examined two witnesses. The defendant did not adduce any evidence. Later on defence was also struck out. After

considering the evidence on record, the learned trial Judge decreed the suit.

8. After the suit was decreed, the plaintiff filed darkhast proceedings. On 16.8.2014, the Executing Court issued warrant of possession and directed the bailiff to execute warrant of possession and file report on or before 27.8.2014. On 27.8.2014, the bailiff submitted report setting out therein that when he visited the suit premises, the defendant and his brother Devraj were present. He explained the purpose of his visit and contents of writ of possession. They requested 20 days time on the ground that it is not possible for them to immediately vacate the suit premises. They refused to vacate the suit premises and did not deliver the possession and the same was given in writing on separate piece of paper which was enclosed along with the report. The writing along with the report shows that the defendant agreed to vacate the suit premises within 20 days. On 27.8.2014, the learned trial Judge passed order below Exhibit-10 reissuing warrant of possession. The petitioner filed application at Exhibit-13 on 28.8.2014 inter alia praying for directions to the decree holder to furnish documents such as execution application along with all supporting papers and exhibits; for keeping the execution proceedings in abeyance; directing the bailiff not to proceed in the matter. On the same day, the learned trial Judge kept the warrant of possession in abeyance and directed the

decree holder to file say on 1.9.2014.

9. The decree holders filed reply dated 1.9.2014. The petitioner filed rejoinder on 5.9.2014.

10. By order dated 5.9.2014, the learned trial Judge granted application Exhibit-16 and the order dated 28.8.2014 passed below Exhibit-13 was extended till the disposal of the application subject to the judgment debtor depositing 50% of the decree amount in the Court on or before. Ms.Mhatre submitted that the petitioner-judgment debtor has complied the said order. Mr. Vazirani, however, disputes the said position.

11. In the meantime, Marji Application No.525/2014 was taken out by Devraj, brother of the petitioner. That application was dismissed. Aggrieved by this decision, Devraj preferred Appeal No.32/2015 which was dismissed with costs of Rs.5000/-. Writ Petition No.9559/2015 filed by Devraj was disposed of as withdrawn. It is thereafter decree holder filed application Exhibit-20 for reissuing warrant of possession. By the impugned order dated 27.8.2016, the learned trial Judge allowed the application Exhibit-20 and rejected the application Exhibit-13. Aggrieved by that decision, the defendant preferred revision application which was rejected on the ground of maintainability. While dismissing the application Exhibit-13 and allowing the application Exhibit-20, the learned trial Judge noted the

bailiff's report Exhibit-9 wherein the petitioner and his brother were present in the suit premises. They requested 20 days time to vacate the suit premises and accordingly the petitioner herein gave writing. As the petitioner failed to vacate the suit premises, the decree holder filed application Exhibit-10. The Courts below held that as the decree passed by the trial Court on 29.3.2014 is not stayed, the decree holder is entitled to proceed further.

12. In view thereof, I do not find that the Courts below committed any error in passing the impugned orders. If at all the petitioner has filed proceedings under Order IX Rule 13 of C.P.C., he is at liberty to prosecute said proceedings. Subject to that, the petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)