

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3985 OF 2017

Mr. Pradeep Bhalchandra Keer	.. Petitioner
Vs.	
Mr. Suresh Madhavrao Kshirsagar	.. Respondent

...

Mr. Chandrakant N. Chavan a/w Mr. Manoj Mane for the Petitioner.
Mr. Jayesh Rathod for the Respondent.

**CORAM : M.S. SONAK, J.
DATE : 10 AUGUST 2017.**

P.C. :

1. Not on board. In view of urgency, taken on production board.
2. Heard Mr. Chandrakant Chavan for the Petitioner and Mr. Jayesh Rathod for the Respondent.
3. Rule. With the consent of and at the request of learned counsels for the parties, Rule is made returnable forthwith.
4. The challenge in this petition is to the order dated 20.12.2016 made by the Appellate Bench of the Small Causes Court allowing the respondent's Misc. Appeal No.404/2016 and setting aside the exparte judgment and decree dated 12.08.2016 passed in MARJI Application No.831 of 2015 in RAE Suit No.589/984 of 2011 and passing certain directions in paragraph 21 of the impugned judgment and order.

5. Mr. Chavan learned counsel for the petitioner submits that though the respondent made a reference to certain grounds in support of this application seeking the setting aside of the exparte decree on the grounds were not supported by any documents whatsoever. He submits that if it was indeed true that the respondent had suffered on the ground of the death of one of his daughters and the divorce of another, it was easily possible to produce documents to that effect. Mr. Chavan further submits that it was indeed true that the grandson of the respondent was physically challenged and was taking treatment in the hospital, then it was easily possible for the respondent to produce documentary evidence in support of the same. He submits that since no documentary evidence whatsoever has been produced, it is clear that these reasons did not exist. He submits that learned Trial Judge had rightly rejected the application for recall of the exparte judgment and decree and that the Appellate court by only relying upon “morality” has reversed the decision of the learned Trial Judge. Mr. Chavan submits that morality can never be a substitute for proof in a court of law. On this ground, he submits that the impugned order made by the Appellate Bench is in excess of jurisdiction and it is required to be interfered with.

6. Mr. Jayesh Rathod learned counsel for the respondent submits that the respondent is 75 years of age, one of his daughters expired at the age of 21 and another daughter was the victim of a failed marriage which involved physical and mental violence upon the respondent and his daughter. He submits that out of the said marriage, the respondent has delivered a physically challenged child. The petitioner, at this stage is required to take this child to Ali Yavar Jung National Institute for hearing so that the child has some modicum of treatment in order to face the future. Mr. Rathod submits that all these

facts have been stated on oath and it was not possible for the petitioner at the relevant time to take such statement with documents. He submits that there is no reason to interfere with the order of the Appeal Court which has exercised discretion in a positive manner. He submits that discretion has been exercised reasonably and the same cannot be interfered with.

7. Upon due consideration of the rival submissions and upon perusal of material on record, I am satisfied that the impugned order to the extent, it set aside the exparte order of eviction, warrants no interference. This part of the order is purely discretionary and it cannot be said that the discretion has been exercised arbitrarily or unreasonably.

8. The Appeal Court, in this case, has considered the circumstances that the respondent was 75 years of age and was plagued with severe misfortune concerning his daughter and his grand son. Merely because no documents have been annexed along with the application, it cannot be said that the grounds stated by the respondent are fanciful or non-existent. The Appeal Court is right in this approach in assuming that the 75 year old man will not, on oath, cite such unfortunate circumstances, unless, such circumstances were in existence. This is not a case where the Appeal Court has permitted itself to be influenced entirely by merely consideration in place of legal or factual consideration. This is a case of justice being tempered with mercy. Accordingly, there is no case to interfere under Article 227 of the Constitution of India.

9. In a matter of such nature, no doubt, there is some negligence attributable to the party seeking to set aside the exparte

decree on the ground that there was sufficient cause for not attending the proceedings despite the service of summons. However, the Appeal Court has rightly considered the issues and recorded the conclusion that its on account of unfortunate circumstances beyond the control of the respondent that there may have been some lapses in attending to these proceedings. The Appeal Court has exercised the discretion in a positive manner and there is no arbitrariness or unreasonableness in the exercise of such discretion. The Hon'ble Supreme Court in the case of **N. Balakrishnan Vs. M. Krishnamurthy (1998) 7 Supreme Court Cases 123**, though in the context of determining sufficient cause in the matter of condonation of delay has held that the positive exercise of discretion, is not to be likely to be interfered with, unless it is established that the discretion has been exercised unreasonably or arbitrarily.

10 No doubt, in a matter of its nature, the petition, is bound to suffer some prejudice. Therefore, the Appeal Court, was required to consider the issue of award / enhancement of costs. In the facts and circumstances of the present case, the cost of Rs.5000/- appears to be quite meagre considering that the petitioner had succeeded in obtaining a decree of eviction on the ground of *bona fide* requirement. The costs are therefore enhanced to Rs.25,000/-.

11. Learned counsel for the petitioners submits that there are arrears of rent and permitted increase. Learned counsel for the respondent submits that he has no instructions in this regard. It is always open to the petitioner to make suitable application before the learned Trial Judge who will consider and dispose of such application on its own merit and in accordance with law.

12. The impugned order, except with regard to quantum of costs, is not interfered with. The quantum of costs stand enhanced to Rs.25,000/-. If the respondent has already paid the cost of Rs.5000/-, the respondent shall be entitled to adjustment. Payment of costs shall not be a condition precedent. However, the respondent shall pay / deposit such cost within a period of six weeks from today. Further, learned Trial Judge is directed to dispose of eviction proceeding expeditiously and the respondent is directed to co-operate in the matter of such expeditious disposal without seeking any unnecessary adjournments.

13. Rule is dispose of in the aforesaid terms.

14. The parties to act on the basis of the authenticated copy of this order.

(M.S. SONAK, J.)