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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY***

***CIVIL APPELLATE JURISDICTION***

***CIVIL WRIT PETITION NO.2134 OF 2017***

Mustak Hamid Shaikh

..Petitioner.

V/s.

Umesh Jamanna Swami

..Respondent.

Mr.Prithvi Raj Singh for the Petitioner

Mr.Dilip Shukla i/b. D.D.Singh for the Respondent.

***CORAM : N.M.Jamdar, J.***

***DATED : 15 February, 2017***

**ORAL ORDER**

Not on board. Taken on production board by way of praecipe.

2. Heard the learned counsel for the parties. By this petition, the Petitioner has challenged the judgments and orders passed by the learned Small Cause Court Judge, Mumbai and the Appellate Bench of the Small Cause Court, Mumbai wherein the application for condonation of delay in setting aside the ex-parte decree has been rejected by both the Courts.

3. The Respondent filed a L.E. & C. Suit No.62/80 of 2012. The suit was decreed ex-parte on 9 April, 2014. Thereafter, Marji Application No.54/2015 was filed by the Petitioner on 16 February, 2015 for setting aside the ex-parte decree, which was rejected on 11 January, 2016 by the learned Small Cause Court Judge. Miscellaneous Appeal No.17/2016, which was filed by the Petitioner, was rejected by the Appellate Bench of the Small Cause Court, Mumbai on 5 January, 2017.

4. The learned counsel for the Petitioner sought to argue that due to various difficulties, the suit could not be attended to and also sought to advance the contention regarding the service of summons. The learned counsel for the Respondent submitted that for last two years, the Petitioner has used the suit premises without paying any amount whatsoever. In view of this contention, it was put to the learned counsel for the Petitioner that any indulgence can only be extended if the Petitioner clears the arrears of rent / compensation. The learned counsel for the Petitioner, after taking instructions from the Petitioner, who is present in the Court, submitted that the Petitioner is not using the premises in view of the electricity supply not being restored. If that was the contention, the Petitioner would have immediately moved for setting aside the ex-parte decree. From the submission of the Petitioner, it is clear that as on date, the Petitioner is not using the premises. The Petitioner is

also not ready to pay the compensation. It was put to the learned counsel for the parties that in these circumstances, if the Petitioner is agreeable to hand over the possession of the suit premises to the Court Receiver, who would appoint the Respondent-landlord as an agent, the suit could be restored by setting aside the impugned judgment and decree and the possession of the Respondent as an agent of the Receiver will be subject to the outcome of the suit. The learned counsel for the Respondent-landlord is agreeable to the same. The learned counsel for the Petitioner, on instructions from the Petitioner who is present, submitted that the Petitioner also agrees to this course of action. He, however, states that some time will be required for the Petitioner to remove the articles and machineries from the suit premises. The learned counsel for the Petitioner, on instructions, submits that the Petitioner undertakes not to create any third party rights, nor has he created any third party rights in the suit premises.

5. Accordingly, the writ petition is disposed of by passing the following order, in view of the stand taken by both the parties :-

- (a) The impugned judgments and orders in Marji Application No. 54/2015 dated 11 January, 2016, Miscellaneous Application No.17/2016 dated 5 January, 2017 and the judgment and decree dated 9 April, 2014 in L.E. & C. Suit No.62/80 of 2012 are hereby quashed and set aside and the suit stands restored to

the file of the learned Small Cause Court Judge, Mumbai, to be disposed of on merits;

- (b) A Court Receiver stands appointed in respect of the suit premises. The Receiver will immediately take possession of the suit premises, however, he will permit the Petitioner to remove the articles and machineries from the suit premises by giving four weeks time to the Petitioner;
- (c) The Receiver will appoint the Respondent as an agent of the Court Receiver and put him in possession thereof , without payment of any royalty;
- (d) The appointment of the Respondent as agent of the Court Receiver, will be subject to the outcome of the L.E. & C. Suit No.62/80 of 2012;
- (e) The writ petition is disposed of in the above terms.

All parties will act on an authenticated copy of this orders.

*(N.M.Jamdar, J.)*