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

WRIT PETITION (L) NO.11940 OF 2017

Madhavlal N. Pittie, Esq.

...Petitioner.

VS

Tabussum Nisar Shaikh & Anr.

...Respondents.

.....

Mr B.N.Shukla i/b B.N.Shukla & Co. for the Petitioner.

Mr Akshay P. Shinde for the Respondents.

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**CORAM : B.P.COLABAWALLA, J.
JUNE 19, 2017.**

P.C. :

Rule. Respondents waive service. By consent, rule made returnable forthwith and heard finally.

2 The Petitioner has filed this Petition impugning the order dated 17th March, 2017 passed by the Appellate Bench of Small Causes Court in Revision Application No.281 of 2014 below Exh. 119 and 120 in R.A.E. Suit No. 89/157 of 2001 confirming the order dated 27th June, 2014 passed by the Trial Court.

3 The Petitioner-landlord is the Original Plaintiff while

Respondent No.2 is the original Defendant No.2 in the aforesaid Suit of 2001. The Petitioner has filed the said suit seeking a decree of eviction and for possession of the Shed No.2 situate in Shivilal Motilal Mansion/Compound, Bellasis Road, Bombay Central, Mumbai- 400 008.

4 On 20.12.2004, the Small Causes Court has framed issues. The Petitioner has led and closed his evidence on 28th October, 2010. Respondent No.2 has filed his affidavit in-lieu of examination-in-chief of one of its partner, namely, Shri. Suryakant Hiralal Parikh on 14th March, 2011 and that his cross-examination was lastly examined on 19th October, 2012.

5 While the cross-examination of Suryakant was in progress, Respondent No.2 filed an application on 4th April, 2014 below Exh. 119 stating that the said partner, namely, Suryakant is not keeping well as he is suffering from Kidney and heart problem, that he was required to undergo the treatment of dialysis thrice a week, that the Doctor has advised him to take complete rest and not to undertake any sort of strenuous work. It was in this backdrop contended that he could not undergo

further cross-examination and therefore his evidence may be ignored and Respondent No.2 may be permitted to examine another partner as D.W.No.1. The aforesaid application was opposed by the Petitioner by filing a reply and the Petitioner also prayed for appointment of Court Commissioner for the purpose of further cross-examination of Suryakant.

6 The learned Single Judge of the Small Causes Court allowed the application filed below Exh.119 vide impugned order dated 27th June, 2014 thereby permitting Respondent No.2 to examine another witness and further discarded the evidence of Suryakant from being read in evidence. The learned Judge further rejected the prayer sought by the Petitioner for appointment of Court Commissioner.

7 Being aggrieved and dissatisfied by the aforesaid order, the Petitioner filed Revision Application No.281 of 2004 which came to be dismissed by the impugned order dated 17th March, 2017. The Petitioner has filed the present Petition challenging both the aforesaid impugned orders. On 8th June, 2017 the present petition appeared before this Court. The

learned Advocate appearing for Respondent No.2 submitted that recently Suryakant has undergone a Kidney Transplant and that Suryakant is ready for further cross-examination from the stage where the cross-examination had stopped.

9 In view of the aforesaid statement, the following order is passed by consent of the parties.

ORDER

(a) The impugned orders passed by the Learned Single Judge of the Small Causes Court passed below Exh.119 and 120 on 27th June, 2014 in R.A.E. Suit No.89/157 of 2001 and confirmed by the Appellate Bench of Small Causes Court in Revision Application No. 281 of 2014 on 17th March, 2017 are hereby quashed and set aside.

(b) Respondent No.2 agrees and undertakes to this Hon'ble Court that it will continue to lead the remaining evidence of Shri. Suryakant Hiralal Parikh being D.W.No.1 in RAE Suit No. 89/157 of 2001 from the stage where it had stopped. The

said undertaking is accepted. Respondent No.2 further agrees that his earlier evidence shall remain on record and shall be read in evidence.

- (c) Considering that the suit is of the year 2001 and the next date before the Trial Court is 11th July, 2017, Respondent No.2 shall ensure that its witness Suryakant Parikh will be available before the Trial Court on 11th July, 2017 so that his cross examination can be continued by the original Plaintiff. Respondent No.2 further undertakes that it shall make its witness available on all further dates as directed by the Trial Court and shall not seek any adjournment without sufficient cause.

10 Rule is made absolute in the aforesaid term. In the facts and circumstances of the case there shall be no order as to costs.

(B.P.COLABAWALLA,J.)