

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****CIVIL REVISION APPLICATION NO.662 OF 2016**

Eldred Anthony Nicholas Lobo	... Applicant
v/s	
Lachman K. Gidwani, since deceased, by	
his heirs and legal representatives Smt Rani	
L. Gidwani and others	... Respondents

Mr P.S. Dani, Sr. Counsel with Mr Ooril Panchal and Zain Mukhi i/b
M/s Mahimtura and Co. for Applicant.

CORAM : B.P. COLABAWALLA, J.

DATE : JUNE 13, 2017

P.C.:

1. Admit. None for the Respondents though duly served.
Taken up for final hearing forthwith in view of the fact that notice
was issued to the Respondents for final disposal of this Civil Revision
Application.

2. This Civil Revision Application has been filed under
section 115 of the Code of Civil Procedure 1908 by the Applicant
(original Plaintiff – landlord in RAE Suit No.51 of 2011), taking

exception to the judgment and decree dated 10th August 2016 whereby the learned Trial Court had directed the Plaintiff to proceed with the Suit against Defendant No.2 (Respondent No.2 herein) and recording a compromise against Defendant Nos.1, 3 and 4. All the Defendants before the Trial Court were the heirs and legal representatives of one Shri Lachman K. Gidwani, who was the original tenant. The only reason why the Trial Court refused to record the compromise against Defendant No.2 was because he had failed to remain present before the Trial Court when the consent terms were tendered and taken on record. It is in these circumstances that the Applicant – original Plaintiff is before me seeking to set aside the impugned order in so far as it directs to proceed with the suit against Defendant No.2. For the sake of convenience, I shall refer to the parties as they were arrayed before the Trial Court.

3. The brief facts giving rise to the present controversy are that the Plaintiff is the landlord and owner of the property bearing City Survey No.F-905 and bearing Final Plot No.126, Town Planning Scheme IV, Bandra alongwith building standing thereon, situated at 49, Turner Road, Bandra (West), Mumbai 400 050 (the said

property). One of the tenements on the second floor of the said property was given on a monthly tenancy to one Mr Lachman K. Gidwani. This tenement on the second floor was a flat admeasuring approximately 290 sq.ft. (hereinafter referred to as the suit premises). The monthly rent charged to the said Mr Gidwani was Rs.70/-. Mr Gidwani died on or about 13th July 1989 leaving behind Defendant Nos.1 to 4 as his only heirs and legal representatives. None of these heirs or legal representatives reside in the suit premises. Since the death of Mr Gidwani the suit premises remained vacant and unused, the Plaintiff filed RAE Suit No.51 of 2011 before the Small Causes Court, Bandra inter alia under section 16(1)(n) of the Maharashtra Rent control Act 1999 for obtaining a decree and directing the Defendants to handover vacant possession of the suit premises as the suit premises were lying vacant and unused for a period of more than six months prior to the date of the suit. In this Suit, on 2nd April 2011, the Trial Court framed the issues. Thereafter, the parties decided to settle the matter and on 5th September 2015, all the Defendants (including Defendant No.2) addressed a letter to the Plaintiff for settlement. By the said letter, the Defendants agreed to unconditionally surrender their tenancy rights with respect to the suit

premises and further agreed to handover quiet, vacant and peaceful possession of the suit premises upon filing consent terms recording the terms of the settlement. One of the terms of settlement was that the Plaintiff would waive or give up his right to mesne profits on possession being handed over. This letter of 5th September 2015 was signed by all the Defendants including Defendant No.2. On the basis of this letter,, consent terms were drawn up between the parties and duly executed by the Plaintiff as well as Defendant Nos.1 to 4. Thereafter, on 27th October 2015, the said RAE Suit No.51 of 2011 was listed before the Trial Court when the Plaintiff and his Advocate were present. Defendant No.1 was present. Defendant No.3 was also present not only for himself but as the Constituted Attorney of Defendant No.4. However, the Defendant No.2 was not present even though he had executed the consent terms. On account of absence of Defendant No.2, the Trial Court did not accept or take on record the consent terms dated 24th October 2015 and adjourned the matter to 14th December 2015 for framing issues / consent terms.

4. Thereafter, the Suit came up on several dates before the Trial Court. Since the Trial Court did not take on record the consent

terms, the Respondents filed an application under Order XXIII Rule 3 (Exh.22) inter alia urging the Trial Court to take on record the consent terms and pass a decree in terms thereof. In the said Application, the Plaintiff categorically pleaded that though Defendant No.2 had executed the consent terms in the presence of Defendant No.3, Defendant No.2 was not remaining present before the Trial Court. Finally, this Application (Exh.22) was heard on 16th April 2016 and thereafter adjourned to 6th May 2016. On none of these dates, Defendant No.2 ever appeared before the Trial Court. Therefore, in order to secure his presence, on 6th May 2016, the Plaintiff filed an Application for issuance of notice to Defendant No.2 requiring him to be personally present before the Trial Court. This application came to be allowed on the same day and Court notice was ordered to be issued to Defendant No.2. Accordingly, the Bailiff served a notice calling upon Defendant No.2 to remain present before the Trial Court on 17th June 2016. The Bailiff's report shows that the said notice was duly received by Defendant No.2 through his wife – Mrs Sania Rohan Gidwani on 13th June 2016 who accepted service for and on behalf of Defendant No.2. The Bailiff's report is at Exh.'H' to this Civil Revision Application. Despite this notice, Defendant No.2 did not appear

before the Trial Court on 17th June 2016 and the matter was thereafter adjourned to 22nd July 2016.

5. Finally when the matter came on board on 10th August 2016, the Trial Court took on record the consent terms dated 24th October 2015 and after perusal of the same, ordered that the consent terms were legal and valid and marked as Exh.27 on the file of the Trial Court. By a separate order dated 10th August 2016 passed below Exh.1, the learned Trial Court decreed the Suit in terms of the consent terms dated 24th October 2015 as against Defendant Nos.1, 3 and 4 and directed that the Suit be proceeded against Defendant No.2. This is despite the fact that these consent terms were duly signed by Defendant No.2 and who remained absent before the Trial Court though served with the Court notice. It is aggrieved by this order of the learned Trial Court directing that the Suit be proceeded against Defendant No.2 that the present Civil Revision Application is filed.

6. Even in this Civil Revision Application, notice was issued to the Respondents including putting them to notice that it shall be taken

up for final disposal. Despite this, no appearance has been entered on behalf of any of the Respondents including Respondent No.2 (Defendant No.2 in the Suit). In this backdrop, the matter has now come up before me today.

7. In this factual background, Mr Dani, learned Senior Counsel appearing on behalf of the Plaintiffs, submitted that there was no reason for the Trial Court not to record the compromise under Order XXIII Rule 3 even against Defendant No.2 as it was done against Defendant Nos.1, 3 and 4. There was no justification for not recording the compromise against Defendant No.2 merely because Defendant No.2 remained absent on the date when the consent terms were taken on record. He submitted that Defendant No.2 had never appeared or contested the Suit and in fact was a signatory to the letter dated 5th September 2015 under which all the Defendants had shown their willingness to settle the matter and handover quiet, vacant and peaceful possession of the suit premises to the Plaintiffs. Pursuant to this letter, consent terms were drawn up and which were duly signed by all the Defendants including Defendant No.2. Despite this, and though according to Mr Dani, there was no need to file an

application before the Trial Court for issuing a Court notice asking Defendant No.2 to remain present in Court on 17th June 2016, the same was done and the record clearly shows that a Court notice was duly served on Defendant No.2, asking him to appear before the Court on 17th June 2016. Despite this, none appeared on behalf of Defendant No.2. Looking to all these facts, Mr Dani submitted that the order passed by the Trial Court to proceed with the Suit against Defendant No.2 was clearly perverse and ought to be interfered with in my revisional jurisdiction under section 115 of Civil Procedure Code 1908.

8. I have heard Mr Dani, learned Senior Counsel appearing on behalf of the Applicants at length. I have perused the papers and proceedings in the Civil Revision Application. I have also given my careful consideration to the impugned order. Despite service of notice of this Civil Revision Application, none have appeared on behalf of the Respondents. The facts in this case would clearly reveal that after the Suit was filed by the Applicants (Plaintiffs in RAE Suit No.51 of 2011), the Defendants were eager and willing to settle the matter. It is in this light that the Defendants addressed a letter dated 5th

September 2015 to the Plaintiffs whereby they agreed to surrender the tenancy rights in respect of the suit premises and handover quiet, vacant and peaceful possession upon filing consent terms recording the terms of the settlement. This letter can be found at page 36 (Exh.'C') and has been signed by Defendant No.2. After this, consent terms were drawn up dated 24th October 2015 which are at Exh.'D' (page 38 of the paper-book). These consent terms record that the parties to the Suit have arrived at a settlement whereby they have agreed to resolve their disputes amicably. The consent terms further record that the Plaintiff, on filing of the consent terms, waives and / or gives up his claim for mesne profits in respect of the suit premises and in turn the Defendants undertake to vacate and handover vacant possession of the suit premises to the Plaintiff simultaneously upon filing of the consent terms. These consent terms have been signed by all the Defendants including Defendant No.2.

9. When these consent terms were sought to be filed in Court, the Trial Court did not take them on record only on the ground that Defendant No.2 was not present at that time. I must mention here that the Defendant Nos.1,3 and 4 were present in Court on the

said date. Since the consent terms were not taken on record for the aforesaid reason, the Plaintiff also filed an application (Exh.24) seeking a Court notice to be issued to Defendant No.2 to remain present in Court. That Application was allowed and in fact a Court notice was issued to Defendant No.2 which was duly received by him as is evidenced from the report of the Bailiff at pages 59 – 60 to the paper-book. Despite this, Defendant No.2 chose not to appear before the Trial Court.

10. Looking to all these facts, I fail to understand why the Trial Court refused to record the compromise even against Defendant No.2 merely because he chose to remain absent on the date when the consent terms were taken on record. It has never been disputed by any person that the letter dated 5th September 2015 agreeing to settle the matter as well as the consent terms that were arrived at pursuant to the aforesaid letter, were both signed by all the Defendants including Defendant No.2. This being the case, I find that the Trial Court was in error in not recording the compromise even against Defendant No.2 and instead ordering the Suit to proceed against Defendant No.2. This is further apparent considering the fact that

after the compromise was recorded against Defendant Nos.1, 3 and 4 on 10th August 2016, the possession of the suit premises has been handed over by all the Defendants to the Plaintiff on 19th August 2016.

11. In these circumstances, I find that there was absolutely no justification on the part of the Trial Court to pass the impugned order dated 10th August 2016 in Exh.1 and Exh.27 in so far as it does not record the compromise between the Plaintiff and Defendant No.2 and directs that the Suit to proceed further against Defendant No.2.

12. In these circumstances, Civil Revision Application is allowed in terms of prayer clause (b). The Trial Court is now directed to record the compromise in terms of the consent terms dated 24th October 2015 even against Defendant No.2. For this purpose, R.A.E. Suit No.51 of 2011 shall come up on the board of the Trial Court on 30th June 2017. The Civil Revision Application is disposed of in the aforesaid terms.

(B.P. COLABAWALLA, J.)