

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION (ST) NO.2792 OF 2018

Dayananda Nilkant Naik] Applicant

Vs.

Indira Radhakrishnan Nair & Anr.] Respondents

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Mr. V.S. Kapse a/w Mr. Rajesh L. Dharap, for the Applicant.

Mr. E.K. Sasidharan, for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 22ND MARCH, 2018.

P.C.

Heard Mr. Kapse, learned Counsel for the applicant and Mr. Sasidharan, learned Counsel for respondent No.1 at length.

2. On the oral application of Mr. Kapse, leave to delete respondent No.2 is granted. Amendment to be carried out forthwith.

3. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicant, hereinafter referred to as 'defendant No.1' being partly aggrieved by the judgment and order dated 11th January, 2018 passed by the Appellate Court of Small Causes at Mumbai in Misc. Appeal No.295 of 2017, has challenged the said order. By that order, the Appellate Court allowed the appeal preferred by the defendant No.1 and quashed and set aside the judgment and order dated 3rd August, 2017 passed by the learned Judge, Court Room No.21 of the Court of Small Causes at

Mumbai in MARJI No.129 of 2017. The Appellate Court set aside ex-parte decree dated 1st August, 2016 passed by the learned trial Judge in R.A.E. Suit No.1350 of 2014 and restored the suit to its original position among other directions.

4. In support of this Application, Mr. Kapse invited my attention to the prayers made in the application under Order-IX, Rule-13 of the C.P.C, in particular, prayer clauses (b), (c) and (d). By prayer clause (b), defendant No.1 prayed for setting aside order dated 19th November, 2015 directing the suit to proceed ex-parte against defendant No.1. By prayer clause (c), defendant No.1 prayed for setting aside ex-parte decree dated 1st August, 2016 passed in the suit and by prayer clause (d), defendant No.1 prayed for restoration of the suit premises. He submitted that by order dated 11th January, 2018, the Appellate Court set aside the ex-parte decree. He invited my attention to clauses (b) and (c) of the operative part of the order which are to the following effect:

- (b) The exparte decree dated 01.08.2016 passed in RAE Suit No.1350 of 2014 is hereby set aside and the suit is restored to its original file.
- (c) RAE Suit No.1350 of 2014 be heard on merits by giving opportunity to both the parties to complete pleadings and to lead their respective evidence.

5. Mr. Kapse submitted that by clause (c), the Appellate Court directed the trial Court to hear the suit on merits by giving opportunity to both the parties to complete pleadings and lead respective evidence. This direction implicitly sets aside the order dated 19th November, 2015 directing the suit to proceed ex-parte. Mr. Kapse further submitted that the Appellate Court,

however, did not consider prayer clause (d) of the application at all and no reasons are given by the Appellate Court for that.

6. Mr. Kapse relied on the decision of this Court in the case of **Mrs. Subhalakshmi Subhash Rajdekar Vs. Smt. Urmila Rameshchandra Parikh and anr, 2003 (12) LJSOFT (URC) 105**, and in particular paragraphs 32 and 37 thereof to contend that once the ex-parte decree is set aside, restitution must follow. No discretion is left to act otherwise.

7. Mr. Sasidharan did not dispute the fact that defendant No.1 has prayed for restoration of the suit premises in terms of prayer clause (d) and the Appellate Court did not deal with this aspect at all. Mr. Sasidharan also made it clear that respondent No.1 does not intend to challenge the impugned order.

8. In view thereof, Mr. Kapase seeks permission to withdraw this Civil Revision Application with liberty to file Review Petition before the Appellate Court. He submits that this Civil Revision Application was instituted on 22nd February, 2018. The time spent by defendant in prosecuting this Civil Revision Application from 22nd February, 2018 till date may be excluded. He assures that within two weeks from today, he will file Review Petition and serve copy on the other side.

9. In view thereof, on the motion made by Mr. Kapse, Civil Revision Application is allowed to be withdrawn with liberty to file Review Petition. Civil Revision Application is disposed of. The time spent by the defendant No.1 in prosecuting this Civil Revision Application from 22nd February, 2018 till today shall be excluded while considering the delay, if any, in filing Review Petition. The Appellate Court is requested to consider prayer clauses (b) and (d) of the application under Order-IX, Rule-13 of the C.P.C. All the contentions

of the parties are expressly kept open.

10. Till Review Petition is decided, respondent No.1 shall not create third party interest in respect of the suit premises. Order accordingly.

[R.G. KETKAR, J.]