

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2845 OF 2018

Abhishek Vasant Chavan	]	Petitioner
Vs.		
The Life Insurance Corporation of India	]	Respondent

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Mr. E.A. Sasi, for Petitioner.

Mr. Shrinivas Bhavé a/w G. Yadav i/b Bhavé & Co., for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 20TH JUNE, 2018.

P.C:

Heard Mr. Sasi, learned Counsel for the petitioner and Mr. Bhavé, learned Counsel for the respondent at length.

2. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. This Petition takes exception to;

[1] the order dated 8th February, 2017 passed by the learned trial Judge below Exhibit 29 in R.A.D. Suit No.660 of 2012; and

[2] the order dated 5th January, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in MARJI Application No. 299 of 2017 in Revision Application (ST) No.1098 of 2017.

By order dated 8th February, 2017, the learned trial Judge allowed the application made by the respondent, hereinafter referred to as 'defendant' for striking out paragraphs 2 and 3 of affidavit of examination-in-chief of plaintiff's witness. Aggrieved by that decision, the plaintiff instituted Revision Application before the Appellate Bench of the Court of Small Causes at Mumbai. As there was delay of 187 days in filing the Revision Application, the plaintiff took out MARJI Application No.299 of 2017 for condoning delay. By order dated 5th January, 2018, the Appellate Court rejected the application. Resultantly, Revision Application stands dismissed as delay was not condoned.

4. It is common ground between the parties that pending the suit, the plaintiff did not file any application for interim relief. Instead of filing application under Order-VII, Rule-11(d) of the Code of Civil Procedure (for short 'C.P.C'), the defendant filed application under section 9-A of C.P.C requesting the trial Court to decide the preliminary issue viz; whether Small Causes Court has jurisdiction to entertain, try and decide the suit in view of the provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (for short 'P.P. Act'). The plaintiff filed Affidavit by way of examination-in-chief on 8th June, 2016. The defendant, therefore, filed application for striking out paragraphs 2 and 3 of that Affidavit before the trial Court which was allowed by the trial Court and the Revision Application now stands dismissed on account of the Appellate Court refusing to condone delay.

5. In my opinion, entire exercise was futile exercise on the part of the parties. Admittedly, no application for interim relief was made by the plaintiff. In view thereof, application dated 14th July, 2012 made by the defendant under section 9-A itself was wholly mis-conceived. It was, therefore, unnecessary on the part of the plaintiff to file Affidavit of evidence and consequently, it was wholly unnecessary to strike out paragraphs 2 and 3 of that Affidavit. The

application filed under section 9-A of the C.P.C shall be treated as application under Order-VII, Rule-11(d) of the C.P.C. It is settled position of law that while deciding application under Order-VII, Rule-11(d), the Court has to proceed on the basis of the averments made in the plaint and the documents, if any, filed along with the plaint and need not consider defence set up by the defendants. In the facts and circumstances of the case, in my opinion, following order will meet the ends of justice;

- [1] Application dated 14th July, 2012 at Exhibit D Pages 42 to 46 filed under section 9-A of the C.P.C shall be treated as one under Order-VII, Rule-11(d) of the C.P.C.
- [2] The learned trial Judge will decide that application on the basis of the assertions made in the plaint and the documents annexed at Exhibit A to G to the plaint.
- [3] For deciding application under Order-VII, Rule-11(d), the trial Court will not permit the parties to adduce evidence. The trial Court will hear the parties and pass appropriate order in accordance with law.
- [4] In view thereof, impugned orders stand dissolved.
- [5] Affidavit of examination-in-chief filed by the plaintiff's witness shall be returned to the plaintiff.
- [6] Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]