

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.149 OF 2018

Shanta Babarao Deshmukh	]	Applicant
Vs.		
Becharbhai Jivabhai Patel through	]	
Power of Attorney Manibhai Kishorebhai Patel	]	
and others.	]	Respondents

.....

Mr. Narendra B. Deshmukh, for Applicant.

Mr. Bhavin Bhatia, for Respondent No.2.

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CORAM : R.G. KETKAR, J.

DATE : 9th October, 2018.

P.C:

Heard Mr. Deshmukh, learned Counsel for the applicant and Mr. Bhatia, learned Counsel for respondent No.2 at length.

2. By this C.R.A under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicant, hereinafter referred to as 'plaintiff' has challenged the order dated 30th January, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai (Bandra Branch) below Exhibit 23 in Revision Application No.38 of 2017. By that order, the Appellate Court partly allowed application Exhibit 23 made by the plaintiff and directed to re-issue notice to respondent No.3 (defendant No.3) at the new address mentioned in the application. Prayer to re-issue notice to defendant No.1/respondent No.1 was rejected.

3. In support of this application, Mr. Deshmukh strenuously contended that the impugned order suffers from several errors of law apparent

on the face of the record. The Appellate Court has acted in excess of its jurisdiction illegally or material irregularity. He relied on Sections 78 (4) and (6) sections 101, 102, 103, 106, 107, 108 as also sections 56, 57 and 59 of the Indian Evidence Act, 1872 (for short 'Act'). He submitted that respondents No.2 and 3 contended that respondent No.1 is dead. However, for last 7 years, they did not take any steps for producing document. He submitted that the impugned order records production of;

[1] Certified copy of the Affidavit filed by Mr. Sevanti B. Shah, who is Secretary of respondent No.2.

[2] Certificate of death of respondent No.1.

[3] Affidavit of Manibhai K. Patel Constituted Attorney of respondent No.1/defendant No.1.

4. Mr. Deshmukh submitted that respondent No.2 did not produce original death certificate of respondent No.1 though respondents No.2 and 3 claimed that respondent No.1 has expired. Manibhai K. Patel, Constituted Attorney of respondent No.1 accepted service of notice on behalf of respondent No.1. While accepting service, he did not make endorsement to the effect that respondent No.1 is dead. He submitted that the Appellate Court committed serious error in believing the Bailiff's report which is a photo copy. He submitted that the impugned order is not a procedural order but has widespread ramifications. It substantially affects rights of the plaintiff. He submitted that defendant No.1 has entered into agreement with plaintiff on 24th October, 2004. As respondents No.2 and 3 have not produced cogent and concrete material establishing death of respondent No.1/defendant No.1, adverse inference requires to be drawn against them. He submitted that as respondents No.2 and 3 have not established death of respondent No.1, the Court has to proceed on the premise that respondent No.1 is alive. He has also invited my attention to the contentions raised in paragraph 6-C as also paragraph 6-(ix).

5. Mr. Deshmukh invited my attention to the decision of this Court in **Gangadas s/o Moujibhai Patel Vs. Harshvardhan s/o Balkrushna Bhadupotey and others, 2003 (1) Mh. L. J 203** to contend that the said decision does not lay down correct law in relation to definition of expression 'premises' given in section 7 (9) of the Maharashtra Rent Control Act, 1999. As the subordinate Courts are bound by the decision of this Court as per Article 215 of the Constitution of India, this Court should clarify and hold that the said decision does not lay down correct law.

6. On the other hand, Mr. Bhatia supported the impugned order. He has taken me through the Affidavit of Sevanti B. Shah, Secretary of respondent No.2 setting out therein that as per his knowledge, respondent No.1/defendant No.1 has already expired on 28th November, 2010 in New York, U.S.A. He has enclosed certified copy of death certificate of respondent No.1. As the plaintiff raised objection to production of certified copy of death certificate of respondent No.1, he has produced original death certificate before the Appellate Court. He has also invited my attention to certificate of cremation issued by Freshpond Crematory. Com and submitted that respondent No.1 has expired. He submitted that the plaintiff is deliberately delaying the proceedings before the trial Court and that present C.R.A is abuse of process of law as also abuse of process of Court. Hence, C.R.A may be dismissed with exemplary costs.

7. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. A perusal of the impugned order shows that the plaintiff had filed application Exhibit 23 for effecting service of notice. The Appellate Court perused the Bailiff Report and documents produced on record. The Appellate Court noted that respondent No.2 has produced certified copy of Affidavit filed by Mr. Sevanti B. Shah,

certificate of death, copy of Affidavit filed by Manibhai K. Patel. Mr. Bhatia submitted that respondent No.2 has produced original death certificate of respondent No.1 before the Appellate Court. That apart, the Appellate Court has also considered the Bailiff's report which records death of respondent No.1. After considering this material on record, the Appellate Court observed that there is no reason to disbelieve the Bailiff's report, copy of death certificate and affidavits of Sevati B. Shah and Manibhai K. Patel. The Appellate Court, therefore, held that notice of Revision Application cannot be re-issued against respondent No.1. As notice on respondent No.3 could not be served for want of new address, new address given by the plaintiff in the application was noted and the Appellate Court directed to issue notice to respondent No.3 at the new address mentioned in the application.

8. Mr. Deshmukh relied on Sections 78 (4) and (6) as also sections 101, 102, 103, 106, 107, 108 as also sections 56, 57 and 59 of the Act. I failed to appreciate relevancy of these provisions in the context of controversy raised in this C.R.A. As far as the submission based on the decision of **Gangadas s/o Moujibhai Patel** (supra) is concerned, the said decision has no relevance in so far as deciding validity of the impugned order. In my opinion, the present C.R.A is nothing but abuse of process of Court as also abuse of process of law. Accordingly, C.R.A is dismissed by imposing exemplary costs of Rs. 10,000/- payable by the plaintiff to respondent No.2. Costs shall be paid within 4 weeks from today failing which respondent No.2 is at liberty to take out application under Order-XXIX, Rule-11 of the C.P.C for dismissal of the proceedings filed by the plaintiff. Order accordingly.

[R.G. KETKAR, J.]