

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO.20675 OF 2018

Abdul Kader Ali Mohammed and Company ... Petitioners
Vs.
Khudadad Irani and others ... Respondents

Mr. Rajendra K. Yadav for Petitioners.
Ms Kirti Taralkar i/b. G. H. Shukla & Co. for Respondents.

CORAM : R. G. KETKAR, J.
DATE : JULY 24, 2018

P.C. :

Heard Mr. Yadav, learned Counsel for the petitioners and
Ms Taralkar, learned Counsel for the respondents at length.

2. Ms Taralkar assures that G. H. Shukla & Co. will file
Vakalatnama on or before 27.07.2018.

3. By this Petition under Article 227 of the Constitution of India,
petitioners, hereinafter referred to as 'plaintiffs', have challenged the
order dated 20.06.2018 passed by the learned Judge, Court Room No.15
of the small Causes Court at Mumbai below exhibit-95 in Marji
Application No.274 of 2016. By that order, the learned trial Judge
allowed the application exhibit-95 filed by the defendants and allowed
production of electricity bills. The prayer made for admitting in
evidence and marking those as exhibits is kept in abeyance till next date.

4. In support of this Petition, Mr. Yadav strenuously contended that
the learned trial Judge committed serious error in entertaining and
allowing the application exhibit-95. He submitted that the defendants
filed application under Order IX, Rule 13 of the Code of Civil
Procedure, 1908 (for short 'C.P.C.') for setting aside ex-parte decree

dated 08.07.2013 passed in R.A.E.& R. Suit No.686/1039 of 2009. Along with this application, they filed list of documents on 31.08.2016. However, defendants did not rely upon the electricity bills.

5. Mr. Yadav further submitted that the plaintiffs have instituted Suit for recovery of possession of flat No.2, ground floor, Sea View Terrace situate at 67/69, Wood House Road, Colaba, Mumbai-400 005. Defendants have sought production of electricity bills in respect of flat No.7, which is not the suit premises. In other words, these documents are not relevant for deciding the controversy raised between the parties. Mr. Yadav invited my attention to the reply filed by the plaintiffs opposing application exhibit-95, and in particular paragraphs 5 and 7 thereof. In paragraph 5, plaintiffs contended that the documents sought to be produced by the defendants are in respect of flat No.7 and not in respect of the suit premises. In paragraph 7, it is contended that the electricity bills are forged and fabricated documents and the plaintiffs have disputed those documents. He submitted that while passing the impugned order, the learned trial Judge has not dealt with this contention at all. Lastly, he submitted that the defendants have not filed affidavit of junior Advocate to substantiate their claim that because of oversight and mistake of the junior Advocate, electricity bills were not produced. For all these reasons, he submitted that the impugned order deserves to be set aside.

6. On the other hand, Ms Taralkar supported the impugned order.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of application under Order IX, Rule 13 of C.P.C. filed by the defendants and in particular paragraph 1 thereof shows that the defendants came with the specific case that though plaintiff has filed

Suit for possession of flat No.2, they wrongly took possession of flat No.7. It is no doubt true that in the list of documents relied by the defendants, there is no reference to the electricity bills. It is however matter of record that in the affidavit of examination in chief filed by the applicants under Order XVIII Rule 4 of C.P.C. in January 2018 and in particular paragraph 5 thereof defendants have annexed electricity bills at exhibit-D collectively. A perusal of the application exhibit-95 shows that in paragraph 3, reference is made to the documents at exhibit-D collectively and it is contended that these documents were not produced because of the oversight of the junior Advocate. In paragraph 4, it is asserted that on account of mistake on the part of junior Advocate, different documents were filed instead of correct documents, namely electricity bills.

8. In paragraph 4 of the impugned order, the learned trial Judge has dealt with the contention of the plaintiffs that these documents are forged and fabricated by observing that plaintiffs had every opportunity to cross-examine the witness on those documents to substantiate his plea that these are forged and fabricated documents. It is not in dispute that though defendants have referred to the electricity bills in paragraph 5 of their examination-in-chief, those electricity bills were actually not produced which substantiates their claim that there was a mistake on the part the junior Advocate in not filing the electricity bills and filing some other documents. In so far as the contention of Mr. Yadav that suit premises is flat No.2 and electricity bills are in respect of flat No.7 and therefore electricity bills of flat No.7 are not relevant is concerned, as noted earlier, it is the case of the defendants that instead of executing decree in respect of the suit premises namely flat No.2, they have wrongly taken possession of flat No.7.

9. In view thereof, I do not find that the learned trial Judge has committed any error in allowing the Application. At the same time, the learned trial Judge has kept the prayer of admitting in evidence and marking those as exhibits in abeyance by observing that unless opportunity is given to the plaintiffs to file say on documents, it would not be proper to allow exhibiting the documents and admitting those in evidence.

10. The learned trial Judge also referred to provisions of Order VII, Rule 14(3) of C.P.C., which permits production of documents by the plaintiffs, which are not relied earlier. In my opinion, the learned trial Judge should have referred to provisions of Order VIII, Rule 1A of C.P.C. which is relevant while considering application for production of documents by the defendants.

11. Subject to this, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

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