

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.26 OF 2018

Kshirsagar Damodar Bhagoji (decd) through
Ravindra D. Kshirsagar and others ... Applicants
Vs.
Jona Marina D'Mellow and another ... Respondents

Mr. Sameer M. Tendulkar for Applicants.
Mr. V. E. Pereira for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JULY 16, 2018

P.C. :

Heard Mr. Tendulkar, learned Counsel for the applicants and
Mr. Pereira, learned Counsel for the respondent No.1 at length.

2. Leave to challenge the order dated 17.12.2015 passed by the
Appellate Bench of the Small Causes Court at Mumbai below exhibit-18
in Appeal No.11 of 2013 is granted. Amendment shall be carried out
forthwith.

3. Rule. Mr. Pereira waives service for respondents. At the request
and by consent of the parties, Rule is made returnable forthwith and the
Application is taken up for final hearing.

4. By this Application under Section 115 of the Code of Civil
Procedure, 1908 (for short 'C.P.C.'), applicants have challenged the
judgment and order dated 13.11.2017 passed by the learned Appellate
Bench of the Court of Small Causes at Mumbai in Marji Application
No.217 of 2017 in Appeal (St.) No.778 of 2017. By that order, the
learned Appellate Bench rejected the application filed by the applicants
for condoning the delay occurred in filing an appeal against the

judgment and decree 30.03.2009 passed in R.A.E. & R.Suit No.1178/1871 of 2003. By order dated 17.12.2015, the Appellate Court permitted the applicant to withdraw the Appeal No.11 of 2013 filed by the applicants against the judgment and order dated 11.05.2012 passed by the learned Judge rejecting the application filed by the defendant under Order IX, Rule 13 of C.P.C.

5. After arguing the Application for quite some time, Mr. Tendulkar, on instructions from the applicant No.2, who is present in the Court, states that - (1) applicants are giving up the challenge to the impugned order dated 13.11.2017 passed by the Appellate Bench of the Small Causes Court at Mumbai in Marji application No.217 of 2017 which was filed for condonation of delay in filing the substantive appeal under Section 96 against the judgment and decree dated 30.03.2009 passed by the learned trial Judge; (2) applicants will handover vacant and peaceful possession of the suit premises to the respondent No.1 on or before 20.08.2018 and will not seek further extension of time for vacating and handing over possession to the respondent No.1; (3) as the applicants are not pressing challenge to the order dated 13.11.2017, they will not prosecute Appeal (St.) No.778 of 2017 filed under Section 96 of C.P.C. against the ex-parte decree dated 30.03.2009; (4) applicants will clear the arrears of compensation from December 2015 till handing over possession on 20.08.2018 @ Rs.5,000/- per month within three months from today by paying the amount to the first respondent and will not seek further extension of time. Statements made by Mr. Tendulkar, on instructions, are accepted.

6. In view thereof, impugned order dated 17.12.2015 passed by the Appellate Bench of the Small Causes Court stands set aside. Appeal No.11 of 2013 filed by the applicants is restored to the file of the Appellate Court. The Appellate Court will proceed to decide the Appeal

only after ensuring that applicants have cleared arrears of compensation in the aforesaid terms within three months from today as also the applicants have handed over possession to the respondent No.1 on or before 20.08.2018. The Appellate Court will decide Appeal No.11 of 2013 on the basis of material on record and in accordance with law. Respondent No.1 shall not create third party interest nor part with possession and subject to his right to challenge the order in Appeal No.11 of 2013, if adverse to him, he shall abide by the outcome of the decision. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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