

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2426 OF 2018

Ashok Atmaram Bhilare	]	Petitioner
Vs.		
Vishnu Keshav Patel	]	Respondent

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Mr. Adenwala Mohammed Shakeel, learned Counsel for the Petitioner.
Mr. Dinesh G. Mishra, learned Counsel for the Respondent.
Ms. Asha Bhuta, learned Counsel for the Intervener.
Mr. Joseph Fransis Rajnaigam, authorized officer of the Church is present.

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CORAM : R.G. KETKAR, J.

DATE : 13TH FEBRUARY, 2019.

P.C:

Heard Mr. Adenwala, learned Counsel for the petitioner, Mr. Mishra, learned Counsel for the respondent and Ms. Bhuta, learned Counsel for the Intervener-The Church of Our Lady of Health, Sahar, Mumbai (for short 'Church').

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 7th November, 2017 passed by the Appellate Bench of the Court of Small Causes at Mumbai (Bandra Branch) in MARJI Application No.48 of 2017 in Appeal (Stamp) No.178 of 2017 arising out of R.A.E & R Suit No.450/852 of 2010. By that order, the Appellate Court rejected the application made by the petitioner for condoning delay of 715 days in filing the substantive appeal against the judgment and decree dated 6th May, 2015 passed by the learned trial Judge in R.A.E & R Suit No.450/852 of 2010.

3. Respondent No.1, hereinafter, referred to as 'plaintiff' had instituted the suit against Suresh Atmaram Bhilare hereinafter referred to as 'defendant No.1' and the petitioner Ashok Atmaram Bhilare, hereinafter referred to as 'defendant No.2' for recovery of possession of Room No.4, Ground Floor, Chanduramji Chawl, situate at Dr. Charat Singh Colony, A.G. Link road, Andheri (East), Mumbai – 400 093, more particularly described in paragraph 1 of the plaint, hereinafter referred to as “suit premises”. The plaintiff claimed possession under sections 15, 16 (1) (b), 16 (1) (g) and 16 (1) (a) of the Maharashtra Rent Control Act, 1999 (for short 'Act') read with section 108 (o) of the Transfer of Property Act, 1882 (for short 'T.P. Act'). The defendants were duly served with summons. They contested the suit by filing written statement at Exhibit 11. They denied all the assertions made in the plaint. They further contended that the plaintiff is neither landlord nor owner of the suit premises. Church is the owner and landlord of the suit premises. The plaintiff has no locus to maintain the suit. The suit is also bad for non joinder of necessary parties i.e Church. The defendants contended that the plaintiff by practicing fraud on all the tenants collected rent unlawfully.

4. As the defendants raised preliminary issue in respect of jurisdiction under section 9-A of the Code of Civil Procedure, 1908, the learned trial Judge had framed that issue. Defendant No.1 was examined as D.W.1 at Exhibit 16. Mr. Lawrence Francis Rajnaigam, sole trustee of Church was examined as D.W.2 at Exhibit 20. The learned trial Judge held that the Small Causes Court has jurisdiction to entertain and try the suit.

5. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues at Exhibit 39. To substantiate his claim, the plaintiff has examined himself at Exhibit 41 and produced documentary evidence such as assessment bills and receipts at Exhibit 43(1) and (2),

counterfoil of rent receipt at Exhibit 44, demand notice along with postal acknowledgment and receipt at Exhibit 45 (1) to (3) and reply of the defendants' Advocate. The defendants did not adduce any evidence in support of their claim. The defendants also failed to cross-examine the plaintiffs' witness. By order dated 6th May, 2015, the learned trial Judge decreed the suit. It appears from the Bailiff's report filed with list Exhibit 13 that when he went to execute decree on 8th February, 2016, at that time, defendant No.2 was not present. His wife Mrs. Ashwini and minor sons Abhishek and Amit were present. They refused to vacate the suit premises. Accordingly, Bailiff submitted report to the effect that warrant of possession could not be executed. On 5th March, 2016, the decree was executed and Bailiff had locked and sealed the suit premises. Defendant No.2 applied for certified copy of the trial Court's judgment on 13th April, 2017. He was given tentative date for taking delivery of judgment on 21st April, 2017. He collected certified copy on 24th April, 2017 and filed MARJI Application in May, 2017 for condoning delay in filing the appeal against the trial Court's judgment. By the impugned order, the Appellate Court rejected the application. It is against this order, defendant No.2 has instituted the present Petition.

6. In support of this Petition, Mr. Adenwala strenuously contended that defendant No.2 was all along diligent in prosecuting the suit. Defendant No.1 is the real elder brother of defendant No.2. Defendant No.2 relied on his brother. Defendant No.1 was looking after the suit. He submitted that the plaintiff won over defendant No.1 and in collusion with him obtained the decree of eviction. The plaintiff has practised fraud upon the Court as he is not the landlord and owner of the suit premises. The owner and landlord of the suit premises is the Church. Without impleading the Church, the plaintiff has filed suit. The suit is, therefore, bad for non joinder of necessary party.

7. Mr. Adenwala submitted that the defendants engaged Advocate L.R. Castelino. On 12th December, 2014, he filed application at Exhibit 49 for discharge. He submitted that in that application at Exhibit 49, it was alleged that on last 3 to 4 occasions, the defendants were absent. He attempted to contact the defendants but in vain. He had issued a letter fixing the date to take instructions in the matter. The said letter returned with postal remark “not claimed”. Mr. Adenwala submitted that the said letter was not received by the defendants. In such state of affairs, the Court ought to have issued notice to the defendants and in the alternative, appointed Advocate through Legal Aid. Thus, the defendants were totally unaware of their Advocate taking discharge in the matter.

8. Mr. Adenwala submitted that the plaintiff falsely implicated defendant No.2 in criminal case. On 7th March, 2016, he was arrested. After 2 to 3 days, he was enlarged on bail. After he was enlarged on bail, defendant No.2 engaged Advocate Mr. Sandeep D. Sher Khan. Mr. Sandeep D. Sher Khan filed appearance on 11th April, 2016. He, however, did not take any steps thereafter. Defendant No.2 was under bona fide impression that after engaging Advocate and his filing appearance on 11th April, 2016, he will take necessary steps.

9. Mr. Adenwala submitted that defendant No.2 is working as a Watchman and is getting meagre salary of Rs.7,000/- per month. After raising loan, he engaged Advocate. He submitted that the very fact that defendant No.1 did not file appeal substantiates defendant No.2's contention that he was won over by the plaintiff. He submitted that it is settled principle of law that while considering the application for condonation of delay, the Court has to adopt liberal approach. In support of this submission, he relied on the following decisions;

- [1] **Ana Vitoria Viera Dalgado Lobo Vs. Geraldo Lobo, 2011 (2) Goa, L.R 365** to contend that litigant should not suffer because of the negligence on the part of the Advocate.
- [2] **Collector, Land Acquisition Anantnag Vs. Mst. Katiji, AIR 1987 Supreme Court 1353** to contend that the liberal approach is required to be adopted while considering the application for delay.
- [3] **Meghmala Vs.G. Narasimha Reddy, (2010) 8 Supreme Court Cases 383** to contend that as the plaintiff obtained decree by practicing fraud upon the Court, judgment of the trial Court is vitiated.

10. Mr. Adenwala submitted that the plaintiff has filed suit not only against the present defendants but against other 13 tenants. He has invited my attention to the order dated 12th November, 2018 passed by the learned trial Judge below Exhibit 31 in R.A.E & R Suit No.561/942 of 2012 where the learned trial Judge allowed the application for intervention made by the Church. Mr. Adenwala also invited my attention to the order dated 18th October, 2016 passed by this Court (S.J. Kathawalla, J.) in Notice of Motion (L) No.2945 of 2016 in Suit (L) No.933 of 2016. By that order, the learned Single Judge though granted liberty to recover possession of the suit premises occupied by the tenant restrained the plaintiff from creating any new tenancy or inducting any person in any of the premises/units in the structure of the suit property. Notwithstanding that injunction in force, the plaintiff after obtaining possession of the suit premises has inducted third party. Mr. Adenwala submitted that no prejudice will be caused to the plaintiff, in case, the suit is restored to its original position and permitting the defendants to cross-examine the plaintiff's witness and adduce evidence. Defendant No.2 can be put to terms such as costs. For all these reasons, he submitted that the impugned order deserves to be set aside.

11. Ms. Bhuta made oral application for intervention on behalf of the Church. After arguing the matter for some time, she states that Joseph Fransis Rajnaigam, authorized officer of the Church is present in the Court. She has tendered photo copy of his Aadhar Card which is taken on record and marked 'A' for identification. Upon taking instructions from him, she submits that she is not pressing intervention in the present proceedings. Statement made on instructions by Ms. Bhuta is recorded.

12. On the other hand, Mr. Mishra supported the impugned order. He submitted that the defendants were thoroughly negligent in prosecuting the suit. He has taken me through paragraphs 10,11,12 and 13 of the impugned order. He submitted that by order dated 18th October, 2016, this Court (Coram: S.J. Kathawalla, J.) permitted the plaintiff herein to recover possession of the premises occupied by the tenants. In other words, this Court also did not hold that the plaintiff is neither landlord nor owner of the suit premises. He, therefore, submitted that the contention of defendant No.2 that plaintiff has no locus to maintain suit is devoid of substance. He submitted that the defendants did not cross-examine the plaintiff's witness. They also did not adduce any evidence. The trial Court decreed the suit on 6th May, 2015.

13. On 8th February, 2016, the Bailiff went to execute the decree. At that time, wife of defendant No.2 along with minor children was present. They refused to vacate the suit premises. Thus, defendant No.2 acquired knowledge of passing of the decree on 8th February, 2016. However, the appeal is filed along with application for condonation of delay only in May, 2017. In any case, the decree was executed on 5th March, 2016. The Bailiff locked and sealed the suit premises. Even thereafter defendant No.2 did not take steps immediately for challenging the decree. Application for certified copy was made only on 13th April, 2017 and appeal along with application for condonation of delay is

presented in May, 2017. The Appellate Court, therefore, rightly held that no sufficient cause is made out and whatever reasons given by defendant No.2 for condoning delay are vague and, therefore, discretion cannot be exercised for condoning delay.

14. Mr. Mishra relied on the decision of this Court in **Bipin H. Doshi Vs. Jawaharlal Prajapati, 1999 (3) Bom. C.R. 97**, to contend that financial difficulties cannot be a ground for condoning delay. He also relied on the decision in **Parimal Vs. Veena, AIR 2011 Supreme Court 1150** to contend that expression “sufficient cause” is the cause for which defendants could not be blamed for their absence. In the present case, defendant No.2 utterly failed to make out a sufficient cause for condoning the delay of 715 days. As the Appellate Court has refused to condone delay, no case is made out for interfering with discretionary order passed by the Appellate Court. He, therefore, submitted that no case is made out for interfering with the impugned order.

15. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit against the defendants for recovery of possession by invoking various grounds available under the Act. It is also not in dispute that the defendants were duly served and in fact they filed written statement at Exhibit 11. From the material on record, it is evident that the defendants did not cross-examine the plaintiff's witness. They also did not adduce any evidence in support of their case. It was contended that in the midst of the trial, Advocate engaged by the defendants obtained discharge on 12th December, 2014. The letter allegedly sent by their Advocate was not received by the defendants. The defendants were totally unaware of this development. Defendant No.2 being a poor and illiterate person is not aware

of niceties of law. Defendant No.2, therefore, should not suffer because of negligence of the Advocate.

16. A perusal of application Exhibit 49 filed by the Advocate L.R. Crestelino before the trial Court shows that on 3 to 4 occasions, the defendants remained absent. He attempted to contact the defendants but was not successful. He had sent a letter fixing date for taking instructions in the matter. The said letter returned with postal remark “unclaimed”.

17. I have perused the original record. The record indicates that Advocate L.R. Castelino had sent letters through Speed Post to defendant No.1 and defendant No.2. Both the envelopes were returned with remark “unclaimed”. In case of **David K.N. Vs. S.R. Chaubey (Chaturvedi), 2003 (4) BCR 612**, learned Single Judge of this Court after considering the law on the subject has held that return of envelope with remark “unclaimed” is a valid service. In view thereof, it is not possible to accept submission of Mr. Adenwala that the defendants did not receive the letter sent by Advocate Castelino and, therefore, unaware of his obtaining discharge in the matter.

18. It is sought to contend that defendant No.2 solely relied on his elder brother defendant No.1. He was won over by the plaintiff. It is not possible to accept this submission. A perusal of the trial Court's order shows that the defendants raised objection as regards jurisdiction of the Small Causes Court to entertain and try the suit. Defendant No.1 was examined as D.W.1 at Exhibit 16. Even if, it is accepted that defendant No.1 deliberately did not remain present, nothing prevented defendant No.2 to participate in the trial. No reason is assigned by defendant No.2 for not participating in the trial. No material is placed on record by defendant No.2 to show that he was in contact with his Advocate.

19. Not only that, from the material on record, it is evident that on 8th February, 2016, the Bailiff tried to execute the decree. That time, defendant No.2 was not present. However, his wife was present. Thus, the Appellate Court rightly held that defendant No.2 acquired knowledge of passing of the decree on 8th February, 2016. Not only that, on 5th March, 2016, decree was actually executed and the Bailiff had locked and sealed the suit premises. Even, thereafter defendant No.2 did not promptly take steps. He claims to have engaged Advocate Sandeep Sher Khan on 11th April, 2016 and alleges that the said Advocate did not take any steps in the matter. It is material to note that the decree was already passed by the trial Court on 6th May, 2015 and the decree was also executed on 5th March, 2016. Engaging Advocate in April, 2016 in the suit which was disposed of will not come to rescue of defendant No.2. Even otherwise, no affidavit is filed of Advocate Sandeep Sher Khan or Advocate Castelino. The Appellate Court has considered the material on record and has held that defendant No.2 has not made out a sufficient cause.

20. Mr. Adenwala relied on the decision of **Ana Vitoria Vieira Dalgado Lobo** (supra). In that case, the petitioners challenged the order by which delay of 3 years and 3 months in filing the appeal against the decree was allowed. In paragraph 10, the learned Single Judge observed that before passing preliminary decree, defendant No.1(a) was not served in the suit. Defendant No.1 (a) was served sometime in December, 2002 and on her behalf for the first time Advocate Nasolkar filed vakalatnama on 17th March, 2003 and thereafter she was represented by different Advocates till she preferred appeal against the preliminary decree along with an application for condonation of delay. It is in that context, the Appellate Court condoned the delay. This Court declined to interfere with that order. In my opinion, the facts obtaining in that case and facts obtaining in the present case are materially different.

21. Mr. Adenwala also relied on the decision of **Collector, Land Acquisition Anantnag** (supra) to contend that liberal approach should be adopted while considering the application for condonation of delay. There is no dispute about this proposition. At the same time, the applicant has to make out a sufficient cause for condoning delay. After perusing the material on record, I do not find that the Appellate Court committed any error in holding that no sufficient cause was made out by defendant No.2 for condoning delay.

22. It was also contended that the plaintiff obtained the decree by practising fraud upon the Court. The plaintiff is neither landlord nor owner of the suit premises. It is not possible to accept this submission. The defendants though took that plea in the written statement, they did not substantiate the said plea. It is settled principle of law that fraud is to be pleaded and proved. In the instant case, no proof is given by the defendants in support of plea of fraud. On the other hand, order dated 18th October, 2016 passed by the learned Single Judge permitted the plaintiff herein to file suit for recovery of possession. In view thereof, decision in **Meghmala** (supra) does not advance case of defendant No.2. Hence, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed with no order as to costs.

[R.G. KETKAR, J.]