

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5774 OF 2017

Mrs. Shantaben Prataprai Doshi

Through Constituted Attorney

Mr. Abhay Vinodrai Doshi

...Petitioner

Versus

Anantraí Jayantilal Shah

and others

...Respondents

WITH

Civil Application No.7 Of 2019

IN

Writ Petition NO. 5774 OF 2017

....

Mr. J.S. Kini a/w. Sapna Krishnappa i/b. Suresh Dubey, Advocate for the Petitioner.

Ms. Rekha Mehta, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 16th JANUARY, 2019

P.C.

1. Heard Mr. J.S. Kini, learned counsel for the petitioner and Ms. Rekha Mehta, learned counsel for the respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 21.7.2016 passed by the learned Judge, Court Room No.26 of the Small Causes Court at Mumbai in Marji Application No.147/2016 as also the judgment and order dated

18.2.2017 passed by the Appellate Bench of the Small Causes Court at Bombay in Misc. Appeal No.413/2016. By these orders, the Courts below dismissed the application filed by the defendant for setting aside exparte decree dated 29.3.2016 passed by the learned trial Judge in R.A.E. Suit No.271/2015.

3. The respondents, hereinafter referred to as the 'plaintiffs', had instituted suit against the defendant for recovery of possession of flat No.13-A on the first floor, Devkaran Bhavan/Putalibai Bhavan, Zaver Road, Opp. Jain Temple, Mulund (West) Mumbai – 400 080 (for short, 'suit premises') on the ground of non-user as contemplated by Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). The suit was instituted on or about 23.1.2015. The summons was served on the defendant on 17.3.2015. Despite service, the defendant failed to appear in the matter. On 25.2.2016, the learned trial Judge adjourned the suit for exparte hearing to 15.3.2016. On 15.3.2016, the case was adjourned to 29.3.2016. On 29.3.2016, the learned trial Judge decreed the suit and directed the defendant to hand over possession of the suit premises to the plaintiffs within three months from the date of the judgment.

4. The defendant filed application under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') on April, 2016 that is

to say within thirty days from passing of the decree. The plaintiffs filed reply Exhibit-6 opposing the application. By order dated 21.7.2016, the learned trial Judge rejected the application. Aggrieved by that order, the defendant preferred Misc. Appeal before the Appellate Bench of the Small Causes Court. By order dated 18.2.2017, the appeal was dismissed. It is against these orders, the defendant has instituted present petition.

5. The petition was heard on 2.4.2018 and notice was issued to the respondents for final disposal of the petition. Till next date, ad-interim order in terms of prayer clause (b) was granted.

6. In support of this Petition, Mr. Keni submitted that the defendant is suffering from various ailments. She is aged about 80 years. The ailments suffered by the defendant are very serious as bone joint are damaged severely due to which there is problem with the knee due to which the defendant is unable to walk or move properly without support. She is also suffering from the serious problem of urinary incontinent and involumentar urination. She is required to attend to doctors and requires constant help without which she cannot even manage her own daily activities. He submitted that the defendant was bed ridden for about 7 to 8 months in the year 2014 and for a large part of the year 2015. She was required to stay at Mulund (West) at her

son's house, despite the relations of the defendant and her son not being cordial. He submitted that the defendant was unaware of proceedings instituted by the plaintiffs. The defendant, however, recollected that her signature was taken somewhere in the year 2015 by some person which possibly was the summons of the Court. As the defendant was not aware of the proceedings, she did not appear in the Court. She did not instruct anyone to appear on her behalf in the matter. On 17.4.2016, the defendant was informed by neighbour that some Court officials have come from the Court. The defendant contacted an Advocate and acquired the knowledge from the internet about passing of the decree exparte. He submitted that the defendant is staying in the suit premises for considerable long period of time. Irreparable harm, injury and prejudice will be caused to her in case the exparte decree is not set aside. He submitted that in the interest of justice exparte decree deserves to be set aside by restoring the suit to its original position for deciding the same on merits. No prejudice would be caused to the plaintiffs if the exparte decree is set aside.

7. Mr. Keni has taken me through the application filed by the defendant under Order IX Rule 13 of C.P.C. and in particular paragraphs-2 to 8 thereof.

8. On the other hand, Ms. Mehta supported the impugned

orders. She has invited my attention to paragraph-4 of the plaint where the plaintiffs asserted that the defendant has not been using the suit premises for the purpose for which the same were let out for more than six months prior to filing of the suit without reasonable cause. The suit premises are lying vacant and closed for more than ten years. The defendant has been residing in the alternate premises as shown in the title of the plaint. Ms. Mehta submitted that the defendant is residing in Jayesh Bhavan, Near Punjab Bank, 1st floor, Zaver Road, Mulund (West), Mumbai – 400 080 whereas the suit premises is flat No.13-A on the first floor, Devkaran Bhavan/Putalibai Bhavan, Zaver Road, Opp. Jain Temple, Mulund (West) Mumbai – 400 080.

9. She submitted that the writ of summons of the suit was served upon the defendant at the address shown in the cause title of the suit. She submitted that the defendant admitted service of writ of summons of the suit. Despite service, she did not appear in the suit. Assuming everything in favour of the defendant about her ailments she could have given Power of Attorney as at her own showing she is residing at Mulund (west) at her son's house. She further submitted that even the decree was executed and the plaintiffs obtained possession on 30.11.2016. She, therefore, submitted that no case is made out for interfering with the impugned orders.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the plaintiffs have instituted suit under Section 16(1)(n) of the Act. It is not in dispute and is rather a matter of record that the writ of summons was duly served on the defendant. Even otherwise in paragraph-5 of the application under Order IX Rule 13 of C.P.C., the defendant admitted service of writ of summons of the suit. Despite service, she did not appear and contest the suit. On 25.2.2016, the learned trial Judge adjourned the case for exparte hearing on 15.3.2016. On 15.3.2016, the case was adjourned for exparte judgment on 29.3.2016. The defendant did not participate in the suit and on 29.3.2016 the suit was decreed exparte. The defendant filed Marji application under Order IX Rule 13 of C.P.C. within thirty days for setting aside that exparte decree.

11. The learned trial Judge considered the reasons given by the defendant for her absence. The learned trial Judge noted that the defendant, though came with the case that she is suffering from various ailments, did not produce the medical papers. In the absence of medical papers, the bare words of the defendant through her Constituted Attorney cannot be believed. The learned trial Judge came to the conclusion that the defendant did not show any sufficient cause for her

failure to participate in the proceedings. The learned trial Judge accordingly rejected the application.

12. Aggrieved by this decision, the defendant preferred appeal. During the course of hearing of the appeal, the defendant produced medical papers before the Appellate Court without filing any application under Order XLI Rule 27 of C.P.C.. This aspect is considered by the Appellate Court in paragraph-17 of the impugned order.

13. The Appellate Court further noted that the defendant produced photo-copies of the medical papers without following proper procedure and without giving any opportunity to the other side for raising any objection for its production or admissibility. The Appellate Court also noted that though the defendant had opportunity to lead evidence before the trial Court for establishing sufficient cause that prevented her from participating in the trial Court, she did not adduce any oral or documentary evidence. Merely because the defendant is 80 years old that by itself is not sufficient ground for setting aside exparte decree. The Appellate Court accordingly dismissed the appeal.

14. As mentioned earlier, the plaintiffs have also executed the decree on 30.11.2016. The defendant had filed application under Order IX Rule 13 through her Constituted Attorney. However, after service of writ of summons of the suit, the defendant did not contest the suit by

appointing Constituted Attorney. In view thereof and for the reasons recorded in the impugned orders, I do not find that the Courts below committed any error in dismissing the application. Hence, the petition fails and the same is dismissed. The petitioner shall remove the articles within four weeks from today. In view of dismissal of the writ petition, civil application No.7 of 2019 for producing the medical papers on record does not survive and the same is also disposed of. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)