

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13273 OF 2017

Municipal Corporation of Greater Mumbai
and Others

...Petitioners

vs.

Suhas Pandurang Nagvekar and Another

...Respondents

Mr. N.V. Walawalkar, senior counsel a/w. Ms. Oorja Dhond, for the
Petitioners.

Mr. P.J. Thorat, for Respondent Nos. 1 and 2.

CORAM : **R.G. KETKAR, J.**

DATE : **AUGUST 06, 2019**

P.C.

. Heard Mr. N.V. Walawalkar, learned senior counsel for the
Petitioners and Mr. P.J. Thorat, learned counsel for Respondent Nos.
1 and 2 at length.

2. Leave to amend so as to correct the prayer clause (b) is
granted. The Petitioners shall substitute the words “trial Court” by
the words “Appellate Court”. Amendment shall be carried out
forthwith.

3. By this Petition under Article 227 of the Constitution of India,
the Petitioners, hereinafter referred to as the Defendants have
challenged the judgment and order dated 14th November, 2014
passed by the Appellate Bench of the Small Causes Court in Misc.
Appeal No. 174 of 2013 in Marji Application No. 343 of 2012. By that
order the Appellate Court dismissed, the Appeal preferred by the

Defendants and upheld the order dated 20th June, 2013 passed by the learned trial Judge in Marji Application No. 343 of 2012 filed in R.A.E. & R. Suit No. 191/315 of 2011.

4. The Respondents hereinafter referred to as Plaintiffs had instituted the eviction suit against the Defendants for recovery of the possession of 4 rooms on the first floor, a hall and 2 rooms on the second floor facing West and 3 rooms of the first floor, second floor and third floor of rear extension in the building known as “Saroj-Nalini Niwas” situate at Murari Ghag Marg, Prabhadevi, Mumbai 400 025 (in short “suit premises”).

5. The suit summons was served on the Defendants on 14th March, 2011. On behalf of the Defendants, Ms. Rita Karia, Dy. Law Officer appeared before the Registrar of the Small Causes Court on 21st March, 2011. It appears taht the Defendants thereafter did not participate in the trial. On 14th July, 2011 ex-parte order was passed against the Defendants below Exhibit 1. Ultimately, on 8th September, 2011 the learned trial Court passed ex-parte decree and the decree came to be executed on 7th March, 2012 and the Respondent-Plaintiffs obtained possession of the suit premises. On 25th April, 2012 Marji Application No. 343 of 2012 was taken out under Order IX Rule 13 of Code of Civil Procedure, 1908 for setting aside the ex-parte decree. On 20th June, 2013 the learned trial Judge rejected the Marji Application. Aggrieved by that order, the Defendants preferred

Misc. Appeal which is also dismissed. It is against this order the Defendants instituted present Writ Petition.

6. With the assistance of the learned counsel for the parties, I have gone through the record of the original record of the case. After perusing the material on record, I do not find that the Courts below committed any error in passing the impugned order.

7. The only contention advanced by Mr. N.V. Walawalkar, senior counsel is based on paragraph 19 of the Appellate Court's judgment. It is to the following effect.

19. One more anomaly has been surfaced on record that in an application by the Defendant for setting aside ex-parte decree, there is no mention of the long leave of Smt. Surekha Haldankar and misplace of brief or papers and/or diary of Advocate Ms. Rita Karia. This application neither bears name of the person nor bears signatures of deponent or its Advocates. No one has vouched about its contents. This exhibits sheer negligence, inaction and lethargy of the Defendant in approaching the Court for setting aside the ex-parte decree. What else is required to be shown more than what is discussed hereinabove to show as to how there is absolutely no case made out by the Defendant exhibiting sufficient cause for setting aside the ex-parte decree by condoning the delay.

He submitted that in fact the Defendants ought to have pointed out Marji Application No. 343 of 2012 which was on 25th April, 2012 for setting aside the ex-parte decree dated 8th September, 2011. However, unfortunately the attention of the Appellate Court was not invited to this application and on behalf of the Defendants draft application was also filed containing various blanks. The Appellate Court had made observation in paragraph 19 on the basis of draft

application (Exhibit C) at Pages 50 to 59). He therefore, submitted that paragraph 19 from the Appellate Court's order may be struck out.

8. Mr. Thorat does not dispute the fact that Defendants had filed Marji application No. 343 of 2012 for setting aside the ex-parte decree. In so far as this aspect is concerned, a perusal of Marji Application No. 343 of 2012 shows that it is varified by Mr. Rajdhar Bhivsan Wadile working as Administrative Officer in Mumbai Municipal Corporation. The affirmation was made before the Superintendent of Court of Small Causes on 25th April, 2012. The learned trial Judge issued notice to the Plaintiff. I have also gone through the original record and I find that the said application in fact is filed in the trial Court and is forming part of the original record. As the Defendants did not invite attention of the Appellate Court to the Marji Application No. 343 of 2012, the Appellate Court dealt with the draft application which was also inadvertently filed by the Defendants. In view thereof, the paragraph 19 from the Appellate Court's judgment is struck out. In my opinion, the said finding recorded in paragraph 19 are also not necessary for determining the real controversy between the parties.

9. In view thereof, the Petition fails and same is dismissed.

(R.G.KETKAR, J.)