

-- Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.3935 OF 2019**

Hemant Radhakrishna Sapale	]	Petitioner
Vs.		
Madhukar Dattatray Rege and another.	]	Respondents
.....		
Mr. Vikas J. Takalkar, Advocate for the Petitioner.		
Mr. Kunal Bhanage, Advocate for the Respondents.		
.....		

CORAM : R.G. KETKAR, J.

DATE : 19th JULY, 2019.

P.C.

Heard Mr. Takalkar, learned Counsel for the petitioner and Mr. Bhanage, 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 'plaintiff' has challenged the order dated 24th September, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai, Bandra Branch in Misc. Appeal No.33 of 2016. The petitioner has also prayed for restoration of R.A.E & R Suit No.6042 of 1977.

3. Rule. Mr. Bhanage waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. The plaintiff has instituted suit on 13th October, 1977 against the respondent, hereinafter referred to as 'defendant' for recovery of possession of tenement No.12 at Ganga Niwas, 1st Floor, Nanabhai Laxmanji Road, Malad

(West), Mumbai 400 064 (for short 'suit premises'), *inter alia*, on the ground that the defendant is monthly tenant in the suit premises. Monthly rent is Rs.48.11 paise. Defendant is in arrears of rent from 1st January, 1977 to 30th September, 1977 @ Rs.48.11 paise per month. Defendant has acquired suitable residential premises at Sunder Nagar, Goregaon (West), Mumbai. The defendant intends to induct strangers in the suit premises. The plaintiff terminated tenancy of the defendant by notice dated 14/19th January, 1977. After service of the notice, defendant replied the same through his Advocate on 27th January, 1977. Thus, the plaintiff has sought possession from the defendant invoking grounds under sections 12 and 13 (1) (l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

5. It is not necessary to set out other facts in detail. Suffice it to state that the suit was listed before the trial Court on 2nd August, 2014. On that date, the plaintiff filed application at Exhibit 28 for adjournment of the suit. The matter was adjourned to 6th August, 2014 under the caption "for orders". The plaintiff filed application on 23rd August, 2014 at Exhibit 29 for recalling the order dated 6th August, 2014. By order dated 23rd August, 2014, the learned trial Judge set aside the order dated 6th August, 2014. The learned trial Judge noted that the plaintiff is reluctant to file evidence though given opportunity. It is, however, desirable that matter is decided on merits. In the interest of justice, one more opportunity was given to the plaintiff. The learned trial Judge directed the plaintiff to file evidence on the next date, failing which, the suit was to stand dismissed/disposed of on the next date.

6. Instead of filing affidavit of evidence, the plaintiff filed application at Exhibit 30 on 20th September, 2014 for setting aside order dated 23rd August, 2014 passed below Exhibit 29. By order dated 20th September, 2014, the learned trial Judge rejected the application. In paragraph 5, the

learned trial Judge noted that suit was dismissed in default on 21st January, 1999. The plaintiff filed Misc. Notice No.102 of 1999 for restoration of the same. That notice was dismissed in default on 22nd October, 2001. The plaintiff took out Misc. Notice No.296 of 2001 for restoration of Misc. Notice No.102 of 1999. Misc. Notice No.296 of 2001 was dismissed in default on 4th March, 2002. The plaintiff, therefore, filed Misc. Notice No.109 of 2002 on 12th July, 2013. Misc. Notice No.109 of 2002 was allowed by order dated 10th January, 2014. Misc. Notice No.296 of 2001 was allowed by order dated 26th February, 2014. Misc. Notice No.102 of 1999 was allowed and the suit was restored to its original position. Suit was kept for hearing on 11th March, 2014.

7. In paragraph 6, the learned trial Judge thereafter recorded the progress made in the suit. The learned trial Judge noted that on 2nd August, 2014, the plaintiff filed application Exhibit 28 for adjournment. On 4th August, 2014, the plaintiff was given short date and the matter was kept on 6th August, 2014. On 6th August, 2014, the matter was called out thrice up to 1.30 p.m. The matter was kept for filing evidence of the plaintiff. The plaintiff did not file evidence. The matter was adjourned to 23rd August, 2014 under the caption "For Dismissal". On 23rd August, 2014, the plaintiff filed another application Exhibit 29 for setting aside the order dated 6th August, 2014. Application Exhibit 29 was allowed and the plaintiff was directed to file evidence on the next date of hearing, failing which, the suit was to stand disposed of. The matter was adjourned to 20th September, 2014. Instead of filing affidavit of evidence, the plaintiff filed application Exhibit 30 for recalling the order dated 23rd August, 2014. The learned trial Judge rejected the application on the ground that though time and again, ample opportunity was given to the plaintiff to file evidence, the plaintiff did not keep his affidavit of evidence ready.

8. Aggrieved by order dated 20th September, 2014 below Exhibit 30, the plaintiff filed Misc. Appeal No.33 of 2016 which was dismissed on 24th September, 2018. It is against this order, the plaintiff has instituted the present Petition.

9. The Petition was heard on 21st June, 2019. In paragraph 2 of the order dated 21st June, 2019, it was noted that the defendants will give proposal in writing to the learned Counsel for the plaintiff. If the plaintiff pays amount to the defendants specified in the proposal for relinquishing his tenancy rights in the suit premises, the defendant will relinquish his tenancy rights. In the alternative, the defendant will specify the amount which he is willing to pay to the plaintiff for converting tenancy rights into ownership rights. It was also made clear that in case, the plaintiff is not ready and willing to consider either of the proposal, he will keep affirmed affidavit of evidence ready. The matter was accordingly adjourned till today.

10. After hearing learned Counsel for the parties, I am convinced that controversy between the parties cannot be amicably resolved. Accordingly, I heard the parties on merits.

11. As mentioned earlier, though the suit is instituted in the year 1977, the plaintiff did not file evidence despite giving ample opportunities. In pursuance of this direction, Mr. Takalkar has tendered affidavit of the plaintiff duly affirmed, photo copy of which is taken on record and marked "X" colly. He assures that after restoration of the suit, he will file affirmed affidavit in the trial Court within one week.

12. On the other hand, Mr. Bhanage strenuously opposed the Petition on the ground that no indulgence should be shown to the plaintiff. The

plaintiff has dragged the defendant and the suit from 1977 till date. The defendants are innocent and solely with a view to harassing the defendants, the plaintiff has instituted suit and has not complied the directions issued by the Courts from time to time. He, therefore, submitted that the Petition deserves to be dismissed.

13. As mentioned earlier, the suit is dismissed as the plaintiff did not file affidavit of evidence. In my opinion, when the learned trial Judge had given ample opportunities to the plaintiff to file evidence, instead of challenging the orders, he should have kept his affidavit of evidence ready. Be that as it may, the fact remains that the plaintiff did not even keep his affidavit ready till the order was passed on 21st June, 2019. In pursuance of the order dated 21st June, 2019, now the plaintiff has kept his affidavit of evidence dated 9th July, 2019 ready. It is also relevant to note that delay in prosecuting the suit will not enure to the benefit of the plaintiff. It is also necessary to ensure that the suit is decided on merits rather than on technicalities. If the suit is not restored, in view of Order-IX, Rule-9 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the plaintiff will be precluded from filing the suit on the same cause of action. That apart, if the plaintiff has to file a fresh suit, ground under section 13 (1) (l) of the Act will also not be available to him under the Maharashtra Rent Control Act, 1999.

14. In view thereof, in the interest of justice, the suit requires to be restored by setting aside the orders dated 20th September, 2014 passed below Exhibit 30 and below Exhibit 1 as also the order dated 24th September, 2018 passed by the Appellate Court in Misc. Appeal No.33 of 2016. R.A.E & R Suit No.6042 of 1977 is restored to its original position. The plaintiff shall file affidavit of examination-in-chief in the trial Court on or before 26th July, 2019. Mr. Takalkar states that in addition to examining the plaintiff, the plaintiff

proposes to examine two more witnesses. He assures that on or before 31st October, 2019, the plaintiff will complete his evidence. He further submits that in case the plaintiff is unable to complete his evidence on or before 31st October, 2019, his evidence to stand concluded and the defendant will be at liberty to adduce his evidence. Rule is made absolute in the following terms;

- [1] orders dated 20th September, 2014 passed below Exhibit 30 and below Exhibit 1 in R.A.E & R Suit No.6042 of 1977 as also the order dated 24th September, 2018 passed by the Appellate Court in Misc. Appeal No.33 of 2016 are set aside.
- [2] R.A.E & R Suit No.6042 of 1977 is restored to its original position subject to costs of Rs.25,000/- to be deposited in this Court within two weeks from today. It is made clear that no extension shall be granted for complying this order.
- [3] In case the costs are not deposited within the stipulated time, the impugned orders shall stand revived without further reference to the Court (plaintiff's suit shall stand dismissed without further reference to the Court.)
- [4] The plaintiff shall file affidavit of examination-in-chief in the trial Court on or before 26th July, 2019.
- [5] The plaintiff shall complete his evidence on or before 31st October, 2019. If the plaintiff fails to complete his evidence, it shall stand concluded.
- [6] Upon depositing the costs, R.A.E & R Suit No.6042 of 1977 will be restored to its original position.
- [7] After deposit of the costs by the plaintiff, the Registry shall transmit the amount to "The Bombay Mothers & Children Welfare Society" having its address at 10, B.D.D Chawls, N.M. Joshi Marg, Lower Parel, Mumbai – 400 013. The Bank details of the said Society are as under:

“Account Name : The Bombay Mothers & Children
Welfare Society,
Bank : State Bank of India,
Branch : Lower Parel Branch,
A/c No. : 34227701406
IFSC Code No. : SBIN0003428”

15. **List the Petition for reporting compliance on 8th August, 2019.**

[R.G. KETKAR, J.]