

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.3247 OF 2019

Sunitaben Kanaiyyalal Daftary and others.] Petitioners

Vs.

Riyaz Ahmed Nisar Ahmed] Respondent

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Mr. Vishal C. Ghosalkar, Advocate for the Petitioners.

Mr. Kunal Bhanage a/w Akshay Pawar, Advocate for the Respondent.

.....

CORAM : R.G. KETKAR, J.

DATE : 12th JUNE, 2019.

P.C.

Heard Mr. Ghosalkar, learned Counsel for the petitioners and Mr. Bhanage, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants' have challenged the judgment and order dated 16th February, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Misc. Appeal No.228 of 2018. By that order, the Appellate Court allowed the appeal preferred by the respondent, hereinafter referred to as 'plaintiff' and set aside the order dated 14th March, 2018 passed by the learned trial Judge in MARJI Application No.646 of 2015. The Appellate Court dismissed the said application.

3. Rule. Mr. Bhanage waives service. Having regard to the narrow controversy raised in this Petition as also as 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 against the defendants for recovery of possession of Room No.5 situate at 1st Floor, 144-46, Bapu Khote Street, Jamli Mohalla, Mumbai – 400 003 (hereinafter referred to as 'suit premises') invoking ground under section 16 (1) (n) of the Maharashtra Rent Control Act, 1999 (for short 'Act') (non user of the suit premises for a continuous period of six months without any reasonable cause immediately preceding the date of the suit). The defendants filed written statement at Exhibit 22 resisting the suit. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The plaintiffs had filed pursis at Exhibit 56 for striking out Issues No.1 and 3 framed on 19th November, 2012 giving up the grounds of unlawful subletting and arrears of rent. The plaintiff filed his affidavit of examination-in-chief on 14th August, 2013 and was cross-examined on 19th July, 2014. It appears that the suit was posted for further cross-examination of the plaintiff's witness on 10th September, 2014. On that day, Advocate for the defendants submitted that the defendants have taken out all the papers relating to the case from him and there are no instructions from the defendants to him to conduct further cross-examination. He prayed for adjournment of the matter. As the matter was old one, affidavit of evidence was filed by the plaintiff's witness in August, 2014 and no satisfactory ground was made out for adjournment, the learned trial Judge observed that nobody from the defendants is present in the Court. Under these circumstances, defendants did not want to cross-examine P.W.1. The learned trial Judge closed cross-examination of P.W.1 and adjourned the matter for further evidence of the plaintiff to the next date. The matter was thereafter posted on 7th November, 2014. On that day, the learned trial Judge passed order observing that the matter was kept for filing evidence of the defendants. The defendants and their learned Advocate were absent when the matter was called out repeatedly. The learned trial Judge was, therefore, of the view that the defendants did not want to lead evidence and accordingly closed their evidence and adjourned the

matter for arguments on the next date. Eventually, the suit was decreed on 9th February, 2015.

5. The defendants filed MARJI Application No.646 of 2015 on 15th September, 2015 under Order-IX, Rule-13 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), *inter alia*, contending that the decree passed against them was ex-parte. The plaintiff filed reply on 26th November, 2015 opposing that application. The defendants filed rejoinder dated 18th January, 2016. By order dated 14th March, 2018, the learned trial Judge allowed the application and set aside the ex-parte decree subject to defendants paying costs of Rs.5000/- to the plaintiff or depositing the same in the Court within one month from the date of the order. Upon payment or depositing the costs in the Court within the stipulated period, suit was restored to its original position and the defendants were allowed to defend the suit on merits. Aggrieved by this decision, the plaintiff preferred appeal. By the impugned order, the Appellate Court allowed the appeal.

6. In support of this Petition, Mr. Ghosalkar submitted that the Appellate Court allowed the appeal mainly on the ground that the decree passed by the trial Court on 9th February, 2015 was not ex-parte decree. In other words, the Appellate Court was of the view that the decree was passed by the trial Court on merits and, therefore, application under Order-IX, Rule-13 was not maintainable. He submitted that the impugned order is perverse. The Appellate Court has not properly considered the provisions of Order-XVII of the C.P.C. He also relied on the decision of **G. Ratna Raj (D) by Lrs Vs. Sri Muthukmarasamy Permanent Fund Ltd, 2019 SCC OnLine SC 114.**

7. Mr. Ghosalkar also invited my attention to Roznama dated 10th September, 2014 as also orders dated 10th September, 2014 and 7th November,

2014 passed by the learned trial Judge. He submitted that in the Roznama dated 10th September, 2014, the learned trial Judge did not record presence of the defendants. Even in the order dated 10th September, 2014, the learned trial Judge specifically recorded that nobody from the defendants' side was present. Though the learned trial Judge noted that defendants' Advocate submitted that the defendants have taken out all the papers relating to the case from him and he has no instructions to conduct further cross-examination from the defendants, the learned trial Judge did not satisfy himself as to whether Advocate for the defendants had issued notice calling upon them to make alternate arrangement by engaging Advocate. That apart, even the learned trial Judge did not issue notice to the defendants for making alternate arrangement. The learned trial Judge proceeded with the matter and closed cross-examination of P.W.1. He submitted that the defendants were not aware of the development that took place on 10th September, 2014. The learned trial Judge should have followed procedure laid down under Order-IX, Rule-6 r/w Order-XVII, Rule-2 of the C.P.C and should have issued notice to the defendants to engage Advocate. Unaware of this development, the defendants did not participate in the trial and, therefore, decree passed by the learned trial Judge on 9th February, 2015 is an ex-parte decree. The Appellate Court committed serious error in holding otherwise. He, therefore, submitted that the impugned order deserves to be set aside, thereby, restoring the trial Court's order.

8. On the other hand, Mr. Bhanage supported the impugned order. He submitted that considering the provisions of Order-IX, Rule-6 and Order-XVII, Rule-2 as also explanation thereto, it is clear that the decree passed by the trial Court on 9th February, 2015 is not ex-parte decree. The learned trial Judge had decided the suit on merits after considering the evidence adduced by the plaintiff. He submitted that Order-XVII, Rule-2 lays down that where,

on any day to which hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order-IX or make such other order as it thinks fit. Explanation thereto lays down that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present. He submitted that explanation to Order-XVII, Rule-2 considers the case where the evidence or a substantial portion of the evidence of any party is already recorded and the said party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present. He submitted that explanation to Order-XVII, Rule-2 makes a position clear by laying down that the Court to proceed with the case even in the absence of the parties when evidence or a substantial portion of the evidence of any party has already been recorded. In the present case, the plaintiff had closed evidence and it was for the defendants to adduce evidence. As the defendants failed to appear on the adjourned date, the Court proceeded with the suit on merits and, therefore, it cannot be said that the decree passed by the trial Court on 9th February, 2015 is an ex-parte decree. He, therefore, submitted that the Petition deserves to be dismissed.

9. I have considered the rival submissions advanced by learned Counsel for the parties. By order dated 15th March, 2019, Record and Proceedings were called for. With the assistance of the learned Counsel for the parties, I have perused the material on record as also original record. As mentioned earlier, the plaintiff has examined himself. From the record, it appears that his cross-examination was conducted on 19th July, 2014. The matter was adjourned to 10th September, 2014 for cross-examination of the plaintiff. On 10th September, 2014, the learned trial Judge passed the following

order;

:ORDER:

“The plaintiff Mr. Riyaz Nissar Ahmed is present in the Court along with his learned Advocate Mr. N.H. Matani. Defendants absent. Their learned advocate Mr. Jayesh Patel present in the Court, who submitted that the defendants have taken out all the papers relating to the case from him and there are no instructions from the defendants to him to conduct the further cross-examination. Still he prayed to adjourn the matter. The matter is old one. Affidavit of evidence is filed in the month of August, 2014. No satisfactory ground is made out for adjournment. Nobody from the defendants is present in the Court. Under these circumstances, it appears that defendants do not want to cross examine the P.W.1. Hence, cross-examination of P.W.1 is closed. The matter is adjourned for further evidence of the plaintiff on next date”.

10. A perusal of the above order clearly shows that the defendants were absent on 10th September, 2014. Their Advocate submitted that the defendants have taken out all the papers from him and he has no instructions to conduct further cross-examination of the plaintiff. As the matter was old one and affidavit of evidence was filed by P.W.1 in August, 2014, the learned trial Judge declined to accede to the request made by learned Advocate for the defendants for adjournment. The learned trial Judge thereafter proceeded to observe that under these circumstances the defendants do not want to cross-examine P.W.1. Accordingly, the learned trial Judge closed cross-examination of P.W.1 and adjourned the matter for further evidence.

11. On 7th November, 2014, the learned trial Judge passed the following order;

:O R D E R:

The matter is kept for filing evidence of defendants. The defendants and their learned advocate absent when called out repeatedly. It appears that the defendants do not want to lead evidence. Hence, defendant's evidence is

closed. The matter is adjourned for arguments to next date”.

Order-III, Rule-4 (1) and (2) of the C.P.C read thus;

4. Appointment of pleader._

(1)No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.

(2)Every such appointment shall be filed in Court and shall, for the purpose of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client”.

12. Rule-8(4) of the Rules framed by this Court under section 34 (1) of the Advocates Act, 1961 reads thus;

(4)When an Advocate who has filed a Vakalatnama for a party wishes to withdraw his appearance he shall serve a written notice of his intention to do so on his client at least seven days in advance of the case coming up for hearing before the Court. Leave of the Court to withdraw appearance may also be applied for if the client has instructed the Advocate to that effect.

The Advocate shall file a note in writing requesting the Court for permission to withdraw appearance and shall also file along with the note the letter of the client instructing him to withdraw his appearance or a copy of the intimation given to the client as above together with its written acknowledgment by the client. The Court if it is satisfied that no inconvenience is likely to be caused to the Court or the client may permit the Advocate to withdraw his appearance and while permitting the Advocate to do so may

also impose such terms and conditions as it may deem proper either in public interest or in the interest of the parties”.

Conjoint reading of the above provisions leads me to hold that the learned trial Judge committed serious error on 10th September, 2014 while proceeding with the suit on merits as also closing cross-examination of P.W.1. Instead of proceeding with the suit on merits, the learned trial Judge should have satisfied himself as to whether Advocate for the defendants had issued notice to the defendant through R.P.A.D intimating next date of hearing and calling upon them to make alternate arrangement by engaging Advocate. Be that as it may. None the less, the learned trial Judge should have issued notice to the defendants intimating the fact of their Advocate not proceeding with the matter and calling upon them to engage Advocate. Thus, the learned trial Judge proceeded with the suit in the absence of the defendants. If the Court wanted to proceed in the absence of the defendants, it should have followed procedure laid down under Order-IX, rule-6. Order-IX, Rule-6(a) reads thus;

6. Procedure when only plaintiff appears._ (1)....

“(a)When summons duly served._ if it is not proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte;”.

Order-XVII, Rule-2 reads thus;

“2.Procedure if parties fail to appear on day fixed._ Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit”.

In the present case, admittedly evidence of the defendants is yet to commence. In view thereof, explanation to Order-XVII, Rule 2 will not be applicable.

Order-XVII, Rule-3 reads thus;

“3. Court may proceed notwithstanding either party fails to produce evidence, etc-Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, **or to perform any other act necessary to the further progress of the suit, for which time has been allowed, [the Court may, notwithstanding such default,**_

- (a) if the parties are present, proceed to decide the suit forthwith, or
- (b) if the parties are, or any of them is, absent, proceed under rule 2.

I will assume for the time being that the present case falls in clause 1 “to perform any other act necessary to the further progress of the suit, for which time has been allowed” as it was for the defendants to further cross-examine P.W.1. Even in that case, the Court has discretion either to proceed with the suit forthwith or if the parties or, anyone of them is absent proceed under Rule-2. A perusal of Rule-2 of Order-XVII leaves no manner of doubt that when a party fails to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. Thus, it is necessary for the Court to follow procedure laid down under Order-IX or to make such other order as it deems fit. In the present case, instead of proceeding with the suit on merits from 10th September, 2014, the learned trial Judge should have issued notice to the defendants for making alternate arrangement. As the learned trial Judge failed to follow this procedure, the decree passed by the trial Court has to be treated as ex-parte. The Appellate Court was clearly in error in holding otherwise. In the case of **G. Ratna Raj (D) by Lrs** (supra), the Apex Court considered provisions of Order-VI, Rule-1(a) and Order-XVII, Rules-2 and 3. In paragraph 22, the Apex Court considered decision of **B. Janakiramaiah Chetty Vs. A.K. Parthasarthi,**

(2003) 5 SCC 641 and reproduced paragraphs 7 and 8.

13. In taking this view, I am fortified by following decisions:

- [1] Govinda Bhagoji Kambale Vs. Sadu Bapu Kambale, 2005 (1) Mh. L.J 651 and in particular paragraph 7 thereof.
- [2] Tahil Ram Issardas Sadarangani Vs. Ramchand Issardas Sadarangani, 1993 Supp (3) Supreme Court Cases 256.
- [3] Malkiat Singh Vs. Joginder Singh, (1998) 2 Supreme Court Cases 206.
- [4] R.P. Bros Vs. Fakhruddin Siraj Topiwala, 2017 (6) Mh.L.J 845.

14. In the light of the aforesaid discussion, the impugned order cannot be sustained and as such is set aside. The Order dated 14th March, 2018 passed by the learned trial Judge in MARJI Application No.646 of 2015 in R.A.E. Suit No.1383/2056 of 2006 is restored. The suit will proceed as directed by the learned trial Judge. It is made clear that I have not examined merits of the suit. All contentions of the parties on merits are expressly kept open. Office to transmit the Record and Proceeding forthwith to the trial Court.

15. Rule is made absolute in the aforesaid terms. In the peculiar facts and circumstances of the case, there shall be no order as to costs. Liberty is reserved to the plaintiffs to file application for disposal of the suit in a time bound manner. If such application is made, the learned trial Judge will pass appropriate order.

[R.G. KETKAR, J.]