

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.4318 OF 2019

Momina Fazalul Haque Khan and others.	]	Petitioners
Vs.		
Khatijabai d/o Moosaji Rajabali	]	
through her Constituted Attorney	]	
Juber Abbasali Moosaji	]	Respondent

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Mr. Bipin J. Joshi a/w Prayag Joshi a/w Sahil Ansari, learned Counsel for the Petitioners.

Mr. R.M. Nakhawa i/b Vasant Dhavan, learned Counsel for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 12th APRIL, 2019.

P.C.

Heard Mr. Joshi, learned Counsel for the petitioners and Mr. Nakhawa, learned Counsel for the respondent at length.

2. This Petition takes exception to the order dated 12th February, 2019 passed by the learned trial Judge below Exhibit 41 in T.E. & R Suit No.124/153 of 2008. By that order, the learned trial Judge allowed application Exhibit 41 taken out by the respondent/plaintiff and struck out defence of the petitioners, hereinafter referred to as 'defendants' for non compliance of the order dated 8th August, 2016 passed below Exhibit 13.

3. Rule. Mr. Dhavan 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. Mr. Joshi submitted that the plaintiffs took out application Exhibit 13 under Order-XV-A of the Code of Civil Procedure, 1908 (for short 'C.P.C') seeking directions to the defendants to deposit arrears of rent and permitted increases in the Court. By order dated 8th August, 2016, the application was partly allowed in the following terms;

- “(2) The defendant is directed to pay Rs.2,15,506/- towards arrears of rent and municipal taxes of the period from 01.04.2007 to 30.06.2016, within four weeks from today.
- (3) The defendant is further directed to go on paying Rs.987/- per month towards basic rent and Rs.1467/- towards municipal taxes per month from 01.07.2016 regularly, on or before 10th of each month, until final disposal of the suit.
- (4) The plaintiff is at liberty to withdraw the amount so deposited by the defendant.
- (5) In case in future, the mesne profits are awarded, the amounts so deposited by the defendant shall be adjusted”.

5. Mr. Joshi submitted that the plaintiff took out application Exhibit 41 for striking out defence of the defendants for non compliance of the order dated 8th August, 2016. By the impugned order, the learned trial Judge struck out defence. He submitted that in paragraph 7, the learned trial Judge noted that on 6th September, 2016, the original defendant deposited part payment of Rs.1,15,000/- in the Court vide Exhibit 20. Thereafter, he failed to pay remaining amount.

6. Mr. Joshi invited my attention to the order dated 19th March, 2019 passed by this Court in Writ Petition No.11482 of 2016 and Writ Petition (ST) No.8508 of 2019 and in particular paragraph 4 thereof. In paragraph 4 thereof, statement made by him that without prejudice to the rights and contentions of the defendants in the pending proceedings, they will deposit the balance amount in the Small Causes Court, Mumbai before the next date of hearing was recorded. Mr. Joshi submitted that in pursuance of that order, the defendants have deposited Rs.1,81,488/- in the trial Court on 28th March, 2019 which covers rent and municipal taxes from 1st July, 2016 to 31st March, 2019. In short, he submitted that the defendants have complied clauses 2 and 3 of the order dated 8th August, 2016. In view of Order-XXXIX, Rule-11 (2) of the C.P.C, he submitted that as the defendants have complied the order dated 8th August, 2016, impugned order striking out defence may be set aside.

7. Mr. Nakhawa, on the other hand, submitted that as the defendants did not comply the order dated 8th August, 2016, the learned trial Judge was justified in striking out defence. It is only after passing of the order by this Court on 19th March, 2019, the defendants have deposited Rs.1,81,488/- on 28th March, 2019. He submitted that though the defendants claim that they have fully complied the order dated 8th August, 2016, liberty may be reserved to the plaintiff to move this Court in case it transpires that the defendants have not complied the order.

8. In view thereof, the impugned order dated 12th February, 2019 passed below Exhibit 41 is set aside. The learned trial Judge while deciding the suit will consider defence of the defendants as also will permit them to adduce evidence. The plaintiff is at liberty to move this Court in case she establishes that the defendants have not complied the order dated 8th August, 2016. All contentions of the plaintiff in that regard are expressly kept open. Rule is made

absolute with no order as to costs. Liberty is reserved to the plaintiff to withdraw the amount deposited by the defendants unconditionally. Order accordingly.

[R.G. KETKAR, J.]