

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (Stamp) NO. 9635 OF 2018

Rani Kantilal Jain

... Petitioner

Vs.

Mr. Vishambar Khemchand Mehrotra & Anr. ... Respondents

...

Javed Akhtar Khan – Advocate for the Petitioner

Hasmit Trivedi a/w Ms. Ujwala Shetty i/b Vr. Law, Advocates for
Respondent No. 1.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 11th June, 2019.

P.C.

The Respondent-landlord filed the Suit in 1995 against two defendants. The first defendant is the husband, and the second defendant the wife. As both remained ex-parte, the Trial Court decreed the Suit in 2008. Later, with a delay of about four months, the second-defendant wife applied under Order 9, Rule 13 of the Code of Civil Procedure, to have the ex-parte decree set aside.

2) As I gather from the rival submissions at the bar, the second defendant has pleaded that her estranged husband had deserted her, but she has all along been possessing and enjoying the leased property. She has also explained the delay. According to her, she had cervical cancer and was under treatment. So the Trial

Court allowed the application. Then the landlord filed a revision application under Section 34 Maharashtra Rent Control Act, before the Appellate Bench of the Small Cause Court. It allowed the revision application.

3) Further aggrieved, the second defendant filed Writ Petition No. 3383 of 2010. This Court, after setting aside the order in revision, remanded the matter to the Trial Court, to take evidence on the second defendant's illness. For it has felt much hinges on a finding about her illness, to decide the delay condonation petition.

4) In the Trial Court, the second defendant led evidence. She claimed that she had been ill, so she relied on her daughter to be the witness to her cause. Accordingly, the second defendant's daughter got herself examined as a witness. When she produced her mother's medical records, the landlord, it seems, raised an objection—a technical one, though. The landlord insisted that the witness is not the author or the originator of the hospital records. And for that reason, they should not be marked.

5) Under those circumstances, the second defendant wanted to examine a witness from the hospital. And, indeed, she did examine one. When that witness claimed to be the authorized

person from the hospital to produce the records, again there arose an objection about his standing to represent the hospital. In other words, the landlord objected that even that authorized agent of the hospital is not the author of those documents. Those documents, as I see, are essentially the admission forms, treatment sheets, prescriptions, and so on. They may have originated from different sources—that is, different treating doctors and nurses. In that sense, the landlord has—hyper-technical as it sounds—insisted unless those authors of the documents were examined, they could not be marked. Then, the Trial Court passed an order, as part of the witness's examination-in-chief for the second defendant.

6) It pays to extract the landlord's objection as were recorded and the reasons the Trial Court supplied for its refusing to take the documents on record. And the order reads:

“The learned advocate for the defendant submitted that these are the complete documents and maintained in the hospital and produced by the authorized person. He also submitted that if he has to prove each and every document, he will require to call each and every doctor and prayed for Exhibiting the docs subject to the objection.

Though the witness has brought original records from the hospital, they are not prepared by him as stated above, and even if he is authorized to produce the docs in the court, he cannot prove the contents thereof. These are the medical documents of treatment and expert opinion. The necessary evidence as objected by learned advocate for the

plaintiff required to prove these documents. Merely marking Exhibit numbers to the documents will not amount that the document is proved. Therefore, though the document is exhibited tentatively subjected to the objection it will create question whether to admit the document for appreciation in evidence. Hence, the objection is sustained, and the defendant may prove the documents as per law.”

7) In the above factual backdrop, heard Shri J. A. Khan, the learned counsel of the petitioner, and Shri Hasmid Trivedi, the learned counsel for the respondent No.1.

8) As rightly contended by both the counsel, the case has a checkered history—hardly surprising. Perhaps, the landlord wanted to secure the property at the earliest. And his eagerness has caused more delay; thus, he has proved the proverb “more haste, less speed”.

9) The Suit was filed in 1995, and the defendants were set ex parte only in 2008. Now, nearly after 24 years, a tenancy matter refuses to leave the Trial Court. The parties are still vying with each other to score over the other, not on merits, but technicalities. A sorry state of affairs.

10) Many decades ago, in *Sangram Singh v. Election Tribunal, Kotah*¹, the Supreme Court has prophetically observed that a code of procedure must be regarded as such. It is the procedure, something designed to facilitate justice and further its

¹ AIR 1955 SC 425

ends, not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction, it has felt, leaves no room for reasonable elasticity of interpretation. And such an approach should be guarded against, lest the very means designed for the furtherance of justice should be used to frustrate it.

11) In *State of Gujarat vs. Ramprakash P. Puri*², the Supreme Court has once again observed that the procedural rules are intended to subserve and facilitate the cause of justice, but not to frustrate it. With a rhetorical flourish, V. R. Krishna Iyer, J has bemoaned in *Sushil Kumar Sen v. State of Bihar*³ that the processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act in the interest of justice where the tragic sequel otherwise would be wholly inequitable. According to him, justice is the goal of jurisprudence — processual, as much as substantive. On a pessimistic note, as he himself puts it, his Lordship has observed:

“[I]t is too puritanical for a legal system to sacrifice the

2 (1969) 3 SCC 156

3 (1975) 1 SCC 774)

end product of equity and good conscience at the altar of processual punctiliousness and it is not too radical to avert a breakdown of obvious justice by bending sharply, if need be, the prescriptions of procedure. *The wages of procedural sin should never be the death of rights.*

(italics supplied)

12) I am afraid any more technical hair-splitting will once again send this case in a spiral, eventually to be engulfed by a procedural vortex. Let it not be so.

13) Indeed, before this Court stayed the proceedings pending this Writ petition, the second defendant, based on the landlord's objection, examined a doctor—a radiologist, at that—to speak about the authenticity of the medical records, though he was not her treating doctor. Now the second defendant claims that she has exhausted her witnesses and wants to proceed with the matter.

14) The petitioner's counsel, too, informs the Court that the matter can be proceeded with before the Trial Court, once this Court decides on this petition.

15) Under these circumstances, without prejudice to the contentions of either party to the litigation, I dispose of this Writ petition with these observations and directions:

- (i) The second defendant's counsel has gone on record before this Court that the second defendant has no further

witnesses to be examined.

(ii) The Trial Court will mark all the documents the second defendant has so far produced, hear the respective counsel, and dispose of the delay condonation application, on merits.

(iii) In the course of its deciding the delay condonation petition, the Trial Court will consider the relevance of the documents the second defendant has produced, without reference to the fact that the authors or the originators of the documents have not been examined.

(iv) Officious as it may seem, if the Trial Court decides the delay condonation petition positively, it will immediately take up the application under Order 9, Rule 13 of CPC., and decide it on merits.

(v) The parties on either side must act with promptitude and a spirit of cooperation to enable the Trial Court to get on with the matter, expeditiously.

Regretting the avoidable delay that has occurred in this case at all stages, I dispose of this Writ Petition, as above.

(DAMA SESHADRI NAIDU, J.)