

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.511 OF 2018

Lilavati Gunavantraai Parekh	]	
(deleted)	]	
Tarulata Manharlal Shah	]	Applicant
Vs.		
Sita w/o Sooru Subha Shetty	]	
(deleted)	]	
Jayprakash Sooru Shetty	]	
(deleted)	]	
Hariprasad Sooru Shetty	]	
(deleted)	]	
Sanjeevi widow of Hariprasad	]	
Soora Shetty and others.	]	Respondents

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Mr. Durgaprasad Sabnis i/b Lex Firmus, learned Counsel for the Applicant.

Mr. Piyush M. Shah, learned Counsel for Respondents No.2 and 3.

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CORAM : R.G. KETKAR, J.

DATE : 9th APRIL, 2019.

P.C.

Heard Mr. Sabnis, learned Counsel for the applicant and Mr. Shah, learned Counsel for respondents No.2 and 3 at length.

2. Mr. Sabnis seeks leave to delete respondents No.1 and 4 to 8 on the ground that respondents No.2 and 3 [hereinafter referred to as “defendant No.3(a) and 3 (b)"] are only contesting respondents. In view thereof, on the request made by Mr. Sabnis, leave to delete respondents No.1 and 4 to 8 is granted. Amendment shall be carried out forthwith.

3. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicant, hereinafter referred to as 'plaintiff No.2' has challenged the order dated 1st August, 2018 passed by the learned Judge presiding over Court Room No.37 of the Court of Small Causes at Mumbai, Bandra Branch in MARJI Application No.43 of 2017 in R.A.E. Suit No.1831/5564 of 1985. By that order, the learned trial Judge allowed MARJI Application filed by defendants No.3 (a) and 3 (b) under Order-IX, Rule-13 of the C.P.C for setting aside ex-parte decree dated 2nd May, 2017 passed by the trial Court in R.A.E. Suit No.1831/5564 of 1985. Defendants No.3(a) and 3(b) are allowed to contest the suit on merits by filing additional written statement dealing with all the amended portions of the amended plaint of the present suit. Delay in filing the application is condoned subject to payment of costs of Rs.3000/- to be paid to plaintiff No.2.

4. Rule. Mr. Shah waives service on behalf of defendants No.3(a) and 3(b). Having regard to the narrow controversy raised in this Application as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Application is taken up for final hearing.

5. In support of this Application, Mr. Sabnis has taken me through the order dated 2nd May, 2017 passed by the learned trial Judge in R.A.E. Suit No.1831/5564 of 1985. In paragraph 6 of that order, the learned trial Judge noted that defendants No.1 to 6 had filed written statement at Exhibit 7. In paragraph 7, the learned trial Judge noted that defendants No.2, 3(a) and 3(b), 4, 5 and 6 had filed additional written statement at Exhibit 34. In paragraph 8 of that order, the learned trial Judge noted that defendants No.2, 3(a) and 4,5 and 6 had

filed additional written statement at Exhibit 40. On 3rd July, 2015, the trial Court passed order below Exhibit 1 to the effect that defendants No.2, 3(a) and 3(b) failed to file additional written statement, hence suit to proceed against them without additional written statement.

6. Mr. Sabnis submitted that in support of plaintiff's case, eight witnesses were examined. In paragraph 32, the learned trial Judge noted that though the defendants had filed written statement, they did not produce any evidence. Neither of the defendants have cross-examined P.W.1 to P.W.8 nor challenged their evidence. Evidence of P.W.1 to P.W.8 had gone unchallenged. The learned trial Judge observed that the evidence produced by the plaintiff and her witnesses is believable. The learned trial Judge accordingly decreed the suit under section 13 (1) (b) and 13 (1) (c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') and under section 108 (o) of the Transfer of Property Act, 1882 (for short 'T.P. Act').

7. Mr. Sabnis has invited my attention to MARJI application made by defendants No.3(a) and 3(b) under Order-IX, Rule-13 of the C.P.C for setting aside the ex-parte decree. In paragraph 10, it is asserted that Mr. Sooru Suba Shetty (since deceased) was the original tenant. Partition Suit bearing No.3192 of 1992 was filed on the Original Side of this Court. In that suit, compromise terms dated 23rd March, 2007 were filed. The suit was disposed of in terms of the consent terms on 30th March, 2007. Clause 10 of the consent terms provided that defendants No.3(a) and 3(b) (who are defendants No.2 and 3 in the High Court suit) were entitled to the suit premises namely Sadguru Restaurant along with tenancy rights, running business, furniture,

fixtures etc situate at Ish Kripa Building, M.G. Road, Vile Parle (East), Mumbai 400 057 along with attached Pan Shop.

8. In paragraph 11, it is asserted that the suit premises came to the share of defendants No.3 (a) and 3(b). In paragraph 15, defendants No.3(a) and 3(b) contended that defendant No.2 is their close relative and he was entrusted by all the defendants to look after the affairs of the eviction suit. In paragraph 16, it is asserted that up to 10th June, 2017, they were under bona fide impression that the suit was duly attended and prosecuted by defendant No.2. He submitted that basically no sufficient cause is made out for setting aside the ex-parte decree. Though the consent terms were filed on 23rd March, 2007 in the suit filed on the Original Side of this Court, explanation worth the name is not given in the entire application as to why follow up action is not taken by defendants No.3(a) and 3(b) from the date of passing decree in terms of the consent terms on 30th March, 2007 in Suit No.3192 of 1992 filed on the Original Side of this Court till 10th June, 2017. He submitted that defendants No.3(a) and 3(b) did not file affidavit of defendant No.2 as also Advocate representing them before the trial Court in the eviction suit. They also did not adduce oral evidence. The learned trial Judge, however, accepted case made out by defendants No.3(a) and 3(b) as gospel truth. The learned trial Judge also came to the conclusion that as defendant No.2 only filed additional written statement and not defendants No.3(a) and 3(b), it substantiated the case of defendants No.3(a) and 3(b) that defendant No.2 was looking after the eviction suit. The learned trial Judge was further of the view that defendant No.2 used to appear on behalf of other legal heirs and thus, he was authorized by defendants No.3(a) and 3(b) to contest the suit. He, therefore, submitted that the impugned order is perverse as it is based

on no material and hence, is liable to be set aside.

9. On the other hand, Mr. Shah has taken me through paragraph 9 as also paragraph 11 of the impugned order. He submitted that after considering the material on record, the learned trial Judge held that defendants No.3(a) and 3(b) proved that due to trust and faith they have authorized defendant No.2 to prosecute eviction suit on their behalf. Defendants No.3 (a) and 3(b) have proved that there was sufficient cause that prevented them from appearing in the eviction suit.

10. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, the plaintiffs have instituted the suit against the defendants for eviction. A perusal of trial Court's judgment dated 2nd May, 2017 shows that defendants No.1 to 6 had filed written statement at Exhibit 7, defendants No.2, 3(a) and 3(b), 4, 5 and 6 filed additional written statement at Exhibit 34 and defendants No.2, 3(a) and 4,5, and 6 had filed additional written statement at Exhibit 40. On 3rd July, 2015, the trial Court passed order below Exhibit 1 to the effect that defendants No.2, 3(a) and 3(b) failed to file additional written statement, hence the suit was ordered to proceed against them without additional written statement. The learned trial Judge has considered this aspect in paragraphs 9 and 11 which read thus;

“9.Since the points are inter-related they are discussed together. At the outset, the plaintiff No.2 has filed affidavit in sur-rejoinder and affidavit in reply, however, in the reply she claimed that “None of these defendants pointed out the facts of the High Court suit whereby all the defendants except the defendant No.3 (a) and 3(b), relinquished their rights in the suit premises as recorded in the Consent terms in the said High Court suit”. Now, this means

that defendant No.3(a) and 3(b) were not party to the Consent terms. Moreover, their rejoinder itself suggests that defendant No.2 had filed additional written statement after filing of the said consent terms in the High Court, it means it is proved by the defendants that defendant No.2 only was looking after the said proceeding in the High Court. The contention of the plaintiff No.2 that she is not aware about what was the original understanding between the defendant No.1 to 6, so she could not say and admit that the defendant No.2 was looking after the affairs of the present suit which is prepondering in favour of defendant No.3(a) and 3(b) that defendant No.2 was looking the affairs of the original suit. There is no rebuttal of this fact and that there is admission that additional written statement was filed by defendant No.2 only. In such circumstances, as per the provisions of Order 9 Rule 13, it will be material to see whether the grounds cited by the defendant No.3(a) and 3 (b) can be called as “sufficient cause from appearing for hearing of the suit”. In the written notes of arguments, in para 2 twice it is admitted by the plaintiff No.2 that defendant No.2 Jayaprakash Shetty used to appear on behalf of all other legal heirs and he used to attend the hearing of the suit on the authority granted by defendant No.3(a) and 3(b). The fact that defendants had settled the matter in High Court, did not produce the said consent terms in the trial court and sought deletion of their names, does not go to the root of the question that defendant No.3(a) and 3(b) had no sufficient cause for not appearing in the suit.

11.In this particular case as well, there is no reason to believe that there is deliberate delay on the part of defendants/applicants. There is no culpable negligence shown and no material shown by plaintiff No.2. In fact, there are other reasons also, which corroborates the said fact of non-appearance and i.e advocate K.A. Mankad had given up his practice before and no advocate was appointed in his place. No such fact could have been rebutted by plaintiff No.2 by bringing evidence in that regard that such

statement is false and on that count it could have been held that there is culpable negligence or mala fide or ulterior motive on the part of the defendants to delay the litigations. There is a consent terms filed by other defendants admittedly and therefore there is no likelihood that delay caused defendant No.3(a) and 3(b) would have benefited, so as to achieve goal of substantial justice, the word “sufficient cause” as occurring in section 5 of the Limitation Act are interpreted liberally in the present case as well, the law said to be applicable and therefore it can safely held that defendant No.3(a) and 3(b) have proved that there was “sufficient cause” that prevented them from appearing when the suit was called for hearing and it was to trust and faith on defendant No.2 who had failed to appear and keep the regular follow up and appoint another counsel in place of Mr. Mankad. In the interest of justice, point No.1 and 2 are determined in the affirmative.

11. A perusal of above extracted paragraphs shows that the learned trial Judge was of the view that as defendant No.2 only filed written statement, contention of defendants No.3(a) and 3(b) that he was authorized to look after the suit on their behalf stands substantiated. The learned trial Judge was of the view that defendants No.3(a) and 3(b) were not party to the consent terms. Rejoinder suggests that defendant No.2 had filed additional written statement after filing consent terms in the the High Court which means that it is proved by defendants No.3(a) and 3(b) that defendant No.2 only was looking after the proceedings in the High Court. In my opinion, the said finding has no connection whatsoever with the eviction suit. The finding of the trial Court that;

“the contention of plaintiff No.2 that she is not aware about what was the original understanding between defendants No.1 to 6 so she could not say and admit that the defendant No.2 was looking after the affairs of the present suit which is prepondering in favour of

defendant No.3(a) and 3(b) that defendant No.2 was looking the affairs of the original suit. There is no rebuttal of this fact and there is admission that additional written statement was filed by defendant No.2 only”.

I fail to understand reasoning of the learned trial Judge in paragraph 9. It is shocking that the learned trial Judge expected plaintiff No.2 to be aware of original understanding between defendants No.1 to 6. It is equally shocking to note that merely because original defendant No.2 filed additional written statement that conclusively established case of defendants No.3(a) and 3(b) that they authorized defendant No.2 to look after the eviction suit.

12. It is also interesting to note that under the consent terms dated 23rd March, 2007 entered in the suit filed on the Original Side of this Court, suit premises was allotted to share of defendants No.3(a) and 3(b). It is inconceivable that though the suit premises was allotted to defendants No.3(a) and 3(b), they will authorize defendant No.2 to look after eviction suit. It is also interesting to note that in pursuance of the consent terms, this Court disposed of the suit on 30th March, 2007. Eviction decree is passed on 2nd May, 2017. A perusal of MARJI Application filed by defendants No.3(a) and 3(b) does not make any reference to the steps taken by them after passing of the decree between consent decree dated 30th March, 2007 and passing of the eviction decree on 2nd May, 2017. Defendants No.3 (a) and 3(b) have not given any explanation as to why follow up action is not taken by them from the date of passing decree in terms of the consent terms on 30th March, 2007 in Suit No.3192 of 1992 filed on the Original Side of this Court till 10th June, 2017. Defendants No.3(a) and 3(b) have not stated anything about their making enquiries with defendants No.2 about eviction suit.

The said application is totally silent on this aspect.

13. In my opinion, the reasons given by defendants No.3(a) and 3(b) for setting aside ex-parte decree are palpably false and cannot stand to legal scrutiny. The learned trial Judge decided the application one sided. The findings recorded by the learned trial Judge are based on surmises and conjectures. The findings of the learned trial Judge are not only perverse but also are shocking. The findings are liable to be set aside and as such are set aside.

14. In **Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria**, AIR 2012 Supreme Court 1727, the Apex Court has dealt with false claims and false defences in paragraphs 84 and 85 which read thus;

84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

85. This Court in a recent judgment in **Ramrameshwari Devi and Others (AIR 2011 SC (Civ) 1776: 2011 AIR SCW 4000)** (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no

incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings”.

15. Applying the principles laid down by the Apex Court to the facts of the present case, I am satisfied that defendants No.3(a) and 3(b) have filed application for setting aside ex-parte decree which is nothing but abuse of process of Court and process of law. It is, therefore, necessary to impose exemplary costs on defendants No.3(a) and 3(b) for filing such applications. Hence, the following order.

: ORDER :

- [1] The impugned order dated 1st August, 2018 passed in MARJI Application No.43 of 2017 is set aside.
- [2] MARJI Application No.43 of 2017 is dismissed with exemplary costs of Rs.25,000/- to be paid by defendants No.3(a) and 3(b) to plaintiff No.2.
- [3] Rule is made absolute accordingly.

16. At this stage, Mr. Shah orally applies for stay of this order for a period of 8 weeks from today. He assures that within two weeks from today, defendants No.3(a) and 3(b) and all adult family members using/residing in the suit premises will file usual undertaking with advanced copy to the other side incorporating therein;

- [a] they are in possession and nobody else is in possession of the suit premises;
- [b] they have neither created third party interest nor parted with possession of the suit premises;
- [c] they will hereafter neither create third party interest nor part with possession of the suit premises;
- [d] defendants No.3(a) and 3(b) will deposit arrears of rent, if any, in this Court under intimation in writing to the learned Advocate for the plaintiff.
- [e] in case they are unable to obtain suitable orders from the higher Court within 8 weeks from today, they will handover vacant and peaceful possession of the suit premises to the plaintiff.

17. In view thereof, on the oral application made by Mr. Shah, this order is stayed for a period of 8 weeks subject to defendants No.3(a) and 3(b) filing the undertaking in the aforesaid terms within two weeks from today. It is made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendants No.3(a) and 3(b) commit breach of any of the clauses of the undertaking, stay shall stand vacated without further reference of the Court.

18. **List the application for reporting compliance 25th April, 2019.**

[R.G. KETKAR, J.]