

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

WRIT PETITION NO.9951 OF 2019

Mayur Champaklal Aghada	...	Petitioner
Versus		
State of Maharashtra		
And Others	...	Respondents

**ALONG WITH
WRIT PETITION (L) NO.25251 OF 2019**

Mayur Champaklal Aghada	...	Petitioner
Versus		
State of Maharashtra		
And Others	...	Respondents

.....

Mr. Hamed Kadiani a/w Ms. Kavisha Shah and Minal Pawar i/b India Law Alliance for the Petitioner.

Mr. Y.S. Jahagirdar, Senior Advocate a/w Ms. Prabha Rathod i/b Mr. Suraj S. Shah for Respondent Nos.2, 3 and 5.

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CORAM : S.C. GUPTE, J.

DATE : 10 OCTOBER 2019

P. C. :

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. Heard learned Counsel for the parties.

2 This writ petition challenges an order passed by the Court of Small Causes at Mumbai on an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 ("Code") and the order of the

Appellant Bench of that Court confirming it. By the impugned orders, the application of the Petitioner (original defendant) for setting aside *ex parte* decree of eviction passed against him was rejected by the courts below on the ground of delay. There is some controversy between the parties as to the length of this delay. It is the case of the Respondents (respondent nos.2 to 5) that the delay is of over nine years, whereas it is the case of the Petitioner that the delay is of 651 days. Even a delay of 651 days, by itself, is quite daunting and calls for an adequate explanation on the part of the applicant for its condonation. The courts have not found any adequate explanation for the delay.

3 It was the case of the Petitioner before the trial court that the delay should be condoned, since there was a fraud practiced by the plaintiffs in securing the decree of eviction against the Petitioner herein. The circumstances stated in support of this case of fraud were, firstly, that plaintiff no.4 had promised the Petitioner that no further steps would be taken in the matter, since the Petitioner had, in the meantime, paid the outstanding rent and secondly, that plaintiff no.4 had asked him (i.e. the Petitioner) to pay a donation of Rs.67,000/- in favour of D.M. Jariwala Girls' Orphanage and told him not to worry about the notice, if such donation was paid. It was also the Petitioner's case that plaintiff no.4 had asked him to hold on to the demand draft of the balance outstanding rent (of Rs.30,682/-) till further order. The trial court was of the view that there was no sufficient documentary evidence in support of this case, apart from the

bare words of the defendant that such assurances were given to him by plaintiff no.4. The trial court observed that in order to prove a case of fraud, there must be allegations of dishonesty clearly pleaded with particularity ; burden of proof also lay on the party claiming such fraud. The court was of the view that in the present case, the contention that plaintiff no.4 had played a fraud upon the court by making an assurance under the garb of seeking donation and obtaining a decree by suppressing material facts, was not supported by any documentary evidence. Besides, the court held that the original MARJI application under Order IX Rule 13 of the Code was disposed of as withdrawn by the court on 20 April 2011 without any liberty reserved under the defendant to file a fresh application on the same cause of action. The original MARJI application for condonation of such delay was itself after a whopping delay of 651 days, whereas MARJI application, on which the order actually came to be passed, was filed on 20 April 2011.

4 The appellate court confirmed this order in appeal. The Court observed, firstly, that the original MARJI application filed under Order IX Rule 13 of the Code (MARJI Application No.274 of 2006) was withdrawn by the defendant at his own risk without reserving liberty to file a fresh application; MARJI application of 2011 (MARJI Application No.259 of 2011), accordingly, would have to be taken be taken as having been filed in the year 2011, that is to say, after a delay of more than seven years. The court, accordingly, came to a conclusion that the delay was not merely 651 days, but of more than

seven years. Even if one were to consider the approach of the court in this behalf to be erroneous, the court nevertheless has come to an alternative conclusion that even the delay of 651 days in filing original MARJI application was itself unexplained. The court observed that the defendant had, after service of a notice before execution, i.e. Misc. Application No.107 of 2004, on 2 April 2004, appeared in the notice and even engaged an Advocate. His case that even though he had attended every date in this application, he chose not to file any reply in view of settlement talks between the parties, was not believed by the court. The court was of the view that the defendant, in the present case, could not prove the cause itself, let alone sufficiency of such cause. The court, accordingly, was of the view that the case law cited by the defendant before it was of no assistance to the defendant. Apropos the defendant's case that plaintiff no.4 had assured him that she would withdraw the suit and that was how the defendant did not appear in the suit, the court observed that in the appeal memo, the defendant's case was that on legal advice given by his Advocate, he had issued a cheque of outstanding rent to the rent collector ; it was not the defendant's case that a cheque was issued in favour of the rent collector on instructions of plaintiff no.4. In the backdrop of these circumstances, the court was of the view that the defendant's statement that plaintiff no.4 had given him an assurance and that was how he did not appear in the suit, could not be accepted. The court observed that the defendant had already appointed an Advocate and he was expected to seek legal advice from the advocate before remaining absent in the matter. The defendant's

case that at the relevant time, he was just 21 years' old or was unaware of the legal practice, was also not accepted by the court. The court found that the fact that despite being aware of payment of outstanding rent by cheque, plaintiff no.4 had deposed in her affidavit in view of evidence that rent amount was still due, would not amount to a fraud on the court. The court particularly noticed that the suit was not decreed on the ground of default of payment of rent, but on the ground of *bona fide* requirement of the plaintiffs-landlords.

5 There is no infirmity to be found in the concurrent orders passed by two courts below. There is nothing on record to justify the defendant's case that he was either prevented by a reasonable excuse from attending the hearings before the trial court or that the plaintiffs had played any fraud on the court or on the defendant, and which had vitiated the *ex parte* decree passed in the suit.

6 Learned Counsel for the Petitioner relies on several cases, which underline the importance of the plaintiff coming to the court with clean hands and eschew suppression of material facts. There is no exception to the principles of law cited by the Petitioner. The whole point of the matter is that there is no such case proved in the present case. It is not, therefore, necessary to take any particular note of the cases cited by the Petitioner in this behalf.

7 Accordingly, there is no merit in the challenge to the impugned orders. The writ petition is dismissed.

8 Learned Counsel for the Petitioner prays for limited protection for some further time. He is, however, not prepared to give any undertaking to vacate the suit premises, either by himself or through members of his family, who are in occupation of the suit premises along with him. The decree is of 2002. Seventeen years have passed since. MARJI application for setting aside that decree, taken out after a long delay of 651 days, was withdrawn and fresh sets of MARJI applications separately for condonation of delay and setting aside the *ex parte* decree under Order IX Rule 13 of the Code, were thereafter filed. These have been considered by the two courts below and rejected. This court has, in the present writ petition, found no merit in the Petitioner's challenge to these orders and dismissed the same with a speaking order. There is no question, in the premises, of granting any further stay of execution of the eviction decree. The application is rejected.

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9 The petition decided above was in respect of shop premises ; this petition is in respect of a room occupied by the defendant for residence. There were two separate suits for eviction from these two separate premises. In the suit, which is the subject matter of the petition decided above, the decree of eviction has been passed on 10 June 2003, whereas the decree in case of residential room is of 26 August 2003. Besides these dates, all other circumstances are common. These circumstances and the grounds urged by the Petitioner for setting aside the *ex parte* decree passed in case of the shop in the

light of those circumstances, have been comprehensively dealt with herein-above. There is no merit even in this petition, which challenges the decree of eviction in respect of the residential room for the same reasons and on more or less similar facts. The writ petition is accordingly dismissed and the application for stay of the decree is also rejected, for the same reasons, as stated above.

(S.C. GUPTE, J.)