

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 2322 OF 2020****WITH****WRIT PETITION NO. 2335 OF 2020**

Mr. Narayan Janu Dhumal

Through CA

Smt. Yashodabai Vishnu Sardesai

.....Petitioner

Vs.

Mr. Vithal Shankar Nalawade

.....Respondent.

Mr. Jagdish N. Jayale for the Petitioner.

Mr. Umesh J. Desai for the Respondent.

CORAM : A. S. GADKARI, J.**DATE : 27th OCTOBER, 2021.****PC:-**

Petitioner, Original Defendant/Tenant has invoked jurisdiction of this Court under Article 227 of the Constitution of India, impugning Judgments and Orders dated 11th February, 2020 passed by the Appellate Bench of Court of Small Causes at Mumbai (Bandra Branch) in Miscellaneous Appeal No.156 of 2019 in Marji Application No.21 of 2014 in R.A.E. & R. Suit No.158 of 2010, thereby dismissing the said Appeal preferred by him and in Revision Application No. 104 of 2019 in Marji Application No. 21 of 2014 in R.A.E. & R. Suit No. 158 of 2010, thereby dismissing the said Revision preferred by him respectively.

Miscellaneous Appeal No. 156 of 2019 was preferred by the Petitioner before the Appellate Bench of Court of Small Causes, Mumbai (Bandra Bench) against the Order dated 2nd May 2019 passed in Marji Application No. 21 of 2014 by the learned Judge (C.R.No.33) of the Court of Small Causes, Mumbai (Bandra Bench), thereby rejecting his application filed below Exh.9, under Order 9 Rule 13 of the Civil Procedure Code, for setting aside ex-parte decree dated 17th June 2013 passed in R.A.E. & R. Suit No.158 of 2010.

Revision Application No. 104 of 2019 was filed by the Petitioner against the Order dated 2nd May 2019 passed in Marji Application No.21 of 2014 by the learned Judge (C.R.No.33) of the Court of Small Causes, Mumbai (Bandra Bench), thereby allowing the said application filed by the Respondent/original Plaintiff for issuing Show Cause Notice to the Petitioner, before execution of the decree dated 17th June 2013 passed in R.A.E.& R. Suit No. 158 of 2010 and for making it absolute.

2 Brief facts giving rise for filing of the present Petitions are as under:-

(a) Respondent-Landlord had filed R.A.E. & R. Suit No.158 of 2010 against the Petitioner-Tenant for eviction, on various grounds, more specifically pleaded in the plaint of the said Suit. Despite due service of writ of summons, Petitioner did not appear before the Trial Court and therefore the suit proceeded ex-parte against him. The Trial Court by its

Judgment and Order dated 17th June, 2013 was pleased to decree the said Suit with costs. Trial Court also directed the Petitioner to hand over the vacant and peaceful possession of the suit premises within stipulated period and also issued notice before execution.

(b) Respondent, subsequently, filed Marji Application No.21 of 2014 before the Trial Court for issuing Show Cause Notice to the Petitioner (Judgment Debtor) before execution of the Decree and making it absolute.

(c) After receipt of notice of the said Marji Application, Petitioner appeared before the Trial Court and filed her reply dated 28th February, 2016 below Exh-9. In the said reply, Petitioner prayed for setting aside the ex-parte decree dated 17th June, 2013, as contemplated under Order 9 Rule 13 of the CPC and for dismissal of Marji Application No.21 of 2014.

(d) The Trial Court, by its common Order dated 2nd May, 2019 was pleased to allow the said Marji Application No.21 of 2014 and dismissed reply/application of the Petitioner filed below Exh-9, for restoration of the said Suit.

(e) Feeling aggrieved by the said Order dated 2nd May, 2019 thereby rejecting his application filed below Exh.9 under Order 9 Rule 13 of C.P.C. for setting aside ex-parte decree dated 17th June 2013 passed in R.A.E.& R. Suit No.158 of 2010, the Petitioner preferred Miscellaneous

Appeal No.156 of 2019 on 15th June, 2019 before the Appellate Bench of the Court of Small Causes at Mumbai (Bandra Branch).

(f) Petitioner also preferred Revision Application No. 104 of 2019 against the Order dated 2nd May 2019 passed by the Trial Court in Marji Application No.21 of 2014, thereby allowing the said Application, made the Show Cause Notice absolute and the Respondent/Original Plaintiff was given liberty to take out execution application to execute the said decree.

(g) Various grounds were taken by the Petitioner in the said Appeal and Revision including the ground that, the Suit premises is situated in a slum area; the Slum Authority has declared the said area as Slum and therefore the provisions of Rent Act are not applicable to the Suit premises. The Appellate Court predominantly considered the factum of proper service of suit summons upon the Petitioner and came to the conclusion that, no case for setting aside the impugned Order was made out and was pleased to dismiss the said Appeal, so also the Revision by its Judgments and Orders dated 11th February 2020.

3 Petitioner has preferred Writ Petition No.2322 of 2020 against the Judgment and Order dated 11th February 2020 passed in Miscellaneous Appeal No. 156 of 2019 thereby confirming the Order dated 2nd May 2019 passed below Exh.9, dismissing the said application for setting aside ex-parte decree and restoration of the said Suit.

Petitioner has preferred Writ Petition No. 2335 of 2020 against the Judgment and Order dated 11th February 2020 passed in Revision Application No. 104 of 2019, confirming the Order dated 2nd May 2019 passed in Marji Application No. 21 of 2014, thereby allowing the same by making Show Cause Notice absolute and granting liberty to the Respondent to take out application for execution of decree passed in R.A.E.& R. Suit No. 158 of 2010.

4 These Petitions were heard on earlier occasion. After hearing the learned counsel for the Petitioner at length, when this Court was not inclined to interfere with the Order dated 2nd May, 2019 passed below Exh.9 in Marji Application No.21 of 2014 and Judgment and Order dated 11th February, 2020 passed in Miscellaneous Appeal No.156 of 2019, as this Court was satisfied that, the service of summons upon the Petitioner was duly and properly effected and there was no ground made out for setting aside the decree as contemplated under Order 9 Rule 13 of the CPC, Mr. Jayale, learned counsel for the Petitioner, on instructions, seeks leave to withdraw Petition No.2322 of 2020 with liberty to file a substantive First Appeal as contemplated under Section 96(2) of the CPC, challenging the Judgment and Order dated 17th June, 2013 passed by the Court of Small Causes at Mumbai (Bandra Branch) in R.A.E. & R Suit No.158 of 2010.

He submitted that, filing of a substantive Appeal under Section 96(2) of C.P.C. against the Judgment and Decree dated 17th June 2013 is

permissible in view of the decision of the Supreme Court in the case of Bhivchandra Shankar More Vs. Balu Gangaram More & Ors. reported in 2019(4) ALL MR 409 (S.C.).

5. It is to be noted here that, the Hon'ble Supreme Court in paragraph Nos.11 and 12 of the said decision has held as under:-

“11. It is to be pointed out that the scope of Order IX Rule 13 Code of Civil Procedure and Section 96(2) CPC are entirely different. In an application filed under Order IX Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex-parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex-parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order IX Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed.

12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of

*the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed. In **Bhanu Kumar Jain v. Archana Kumar and Another**, (2005) 1 SCC 787 : [2005(5) ALL MR 257 (S.C.)], the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order IX Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras (36) and (38), it was held as under:-*

“36.A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. [See (2004) 5 SCC 385, Deepal Girishbhai Soni and Other. v. United India Insurance Co. Ltd., Baroda and Chandravathi P.K. and Others v. C.K. Saji and Others (2004) 3 SCC 734].”

.....

“38. The dichotomy, in our opinion, can be resolved by holding that whereas the Defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him

under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in Rani Choudhury v. Lt.-Col. Suraj Jit Choudhary (1982) 2 SCC 596, P. Kiran Kumar v. A.S. Khadar and Others (2002) 5 SCC 161 and Shyam Sundar Sarma v. Pannalal Jaiswal and Others (2005) 1 SCC 436."

In view of the aforesaid principles of law enunciated by the Hon'ble Supreme Court in the case of Bhivchandra Shankar More (supra), the Petitioner is having substantive remedy of filing an Appeal under Section 96(2) of the CPC and therefore, leave to file such an Appeal has to be granted to the Petitioner and is accordingly granted.

It is needless to mention that, the said leave is subject to the law of limitation as may be applicable for filing of the Appeal.

6 In view of the above, Writ Petition No.2322 of 2020 is disposed off as withdrawn by granting liberty to the Petitioner to file a substantive Appeal thereby impugning the Judgment and Order dated 17th June 2013,

passed by the Court of Small Causes at Mumbai (Bandra Branch) in R.A.E. & R Suit No.158 of 2010.

If the Petitioner prefers the said First Appeal, in that case the Respondent-landlord will be at liberty to file an application for fixing additional compensation with respect to the rented premises as per the law laid down by the Hon'ble Supreme Court in the case of *Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., reported in 2005(3) Bom.C.R.274.*

It is further needless to mention that, the First Appellate Court will also be at liberty to impose any conditions as may be permissible under the provisions of law while granting stay to the Judgment and Decree passed by the Trial Court.

7 As far as Writ Petition No. 2335 of 2020 is concerned wherein the Order dated 2nd May 2019 passed in Marji Application No. 21 of 2014 by the learned Judge (C.R.No.33) Court of Small Causes is impugned, it is to be noted here that, filing of the said Marji Application No.21 of 2014 is a consequence of passing of Judgment and Decree dated 17th June 2013, in R.A.E.& R. Suit No. 158 of 2010. As the said Judgment and Decree is passed in favour of the Respondent, he filed the said Marji Application for issuance of notice to the Petitioner before execution of the decree. As noted herein above by an Order dated 2nd May 2019, the Trial Court allowed the said application and permitted the Respondent to take out an application for

execution of decree passed in the said R.A.E.& R. Suit No. 158 of 2010.

8 In Writ Petition No.2322 of 2020, this Court has permitted the Petitioner to file a substantive appeal against the Judgment and Decree dated 17th June 2013. If the Petitioner filed such an appeal and succeeds in it, in that event the Order dated 2nd May 2019 passed in Marji Application No. 21 of 2014 granting permission to the Respondent to execute the Decree may not survive. However, if the Petitioner fails in the said substantive Appeal, in that case the Respondent will have to pursue execution of decree dated 17th June 2013 passed in R.A.E.& R. Suit No. 158 of 2010.

In view of the above, it will be appropriate in the interest of justice that, the effect and implementation of Order dated 2nd May 2019 passed in Marji Application No. 21 of 2014 in R.A.E.& R. Suit No. 158 of 2010 by the learned learned Judge (C.R.No.33) of Court of Small Causes, Mumbai (Bandra Bench) be kept in abeyance till the decision of the First Appeal to be preferred by the Petitioner.

In case the Petitioner fails in his substantive appeal preferred against the Judgment and Decree dated 17th June 2013, the Respondent will be at liberty to pursue execution of Decree in furtherance of the said Order dated 2nd May 2019.

Nothing further survives in Writ Petition No.2335 of 2020 and is accordingly disposed off.

9 At this stage, the learned counsel for the Respondent landlord made a grievance that, since the year 2010, the Petitioner has not paid any amount towards rent and therefore, interim relief granted in his favour may not be continued till filing of the substantive first Appeal before the Appellate Court.

 Mr. Jayale, on instructions submitted that, the Petitioner will deposit 50% of the arrears of rent as of 31st October, 2021 in the Registry of the Small Causes Court before filing the substantive First Appeal under Section 96(2) of the CPC. The said statement is accepted as undertaking given to this Court.

 In case, the Petitioner fails to deposit the said amount before filing of the substantive first Appeal before the Appellate Court, the Appellate Court is requested to consider to issue further necessary directions in respect of the payment of arrears of rent and additional monthly compensation, if any, to be fixed at the time of granting the stay to the impugned Judgment and Order as contemplated under Order 41 Rule 5 of the CPC.

10 Mr. Jayale, learned counsel submitted that, the Petitioner will file An Appeal before the Appellate Court of Small Causes at Mumbai within a period of four weeks from the date of uploading of the present Order on the High Court Website.

In view thereof, ad-interim relief granted by the Appellate Court, which was continued by this Court, by its Order dated 11th March, 2020 in Writ Petition No.2335 of 2020 and further continued from time to time is further extended by four weeks from the date of uploading of the present Order on the High Court Website.

(A.S. GADKARI, J.)

SANJIV
SHARNAPPA
MASHALKAR

Digitally signed
by SANJIV
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