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

**CIVIL WRIT PETITION NO. 4602 OF 2022
WITH
INTERIM APPLICATION ST NO. 4700 OF 2021
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M/S. ABDUL KADER ALI MOHAMMEDPETITIONER
AND COMPANY

V/s.

KHUDADAD IRANI AND ORSRESPONDENTS

Mr. Rajendra K. Yadav Advocate for the Petitioner
Mr. Vijay A. Dhadam for Respondent nos. 2 & 3
Mr. H. P. Nagvekar a/w Sameer Kolge for Respondent nos. 4 & 5

CORAM : NITIN W. SAMBRE, J.

DATE: JULY 15, 2022.

P.C.:

1) Petitioner has initiated R.A.E. Suit No. 686/1039 of 2009 on the file of Small Causes Court, Mumbai claiming ownership of the Suit property which is identified as "Sea View Terrace". It is claimed that one Khudadad Irani was the monthly tenant i.e. in respect to flat no. 2

on the ground floor and the monthly rent was Rs. 609/-. Alleging that said Defendant was in arrears of sum of Rs. 41,212/- for a period from October 2003 till 31/05/2009 and has failed to clear the arrears inspite of the notice. A Decree for eviction was sought.

2) In the said Suit, in response to service of Suit summons the failure of the Defendant to defend the Suit has resulted into passing the exparte Decree on 08/07/2013 which reads thus:

- “1. Suit is decreed exparte.
2. Plaintiff is entitled to recover the possession of the suit premises viz. flat No. 2 having an area admeasuring approximately about 440 sq. ft. on the ground floor on the building known as “Sea View Terrace” at 67/69, Wood House Road, Colaba, Mumbai-05 from defendant after the appeal period is over.
3. No order as to costs.
4. Decree be drawn up accordingly.”

3) Petitioner thereafter took out execution proceedings, got the Decree executed and as such, possession of the Suit property stood vested in the Petitioner.

4) Respondents to present Petition have taken out MARJI

Application No. 274 of 2016 under the provisions of Order IX Rule 13 of Code of Civil Procedure, 1908 seeking setting aside exparte Decree dated 08/07/2013. Such prayer came to be allowed vide impugned Judgment dated 06/02/2020 with directions to the present Petitioner as under:

- “1. The application is allowed.
2. The exparte decree passed in RAE Suit No. 686/1039/2009 dated 08.07.2013 is set aside.
3. The plaintiff or any other person inducted in suit premises, if any, are directed to restore the possession of suit premises i.e. Flat No. 2, Ground Floor, “Sea View Terrace”, situate at 67/69, Wood House Road, Colaba, Mumbai – 400 005, of which he has taken possession under execution of possession warrant on 27.07.2016 in Execution Application No. 207/2014, to the applicants and respondents within two weeks of the order.
4. The plaintiff is also directed to return the articles and belongings lying in the suit premises as per inventory prepared by bailiff to the applicants and respondents within two weeks of the order.
5. If the plaintiff fails to do so, in that event, the applicants and respondents are at liberty to recover the possession of the suit premises as well as their articles and belongings through the process of court.
6. The parties to appear in suit before this Court on

02.03.2020 and suit to proceed according to the provisions of law.

7. The parties to bear their own costs.”

5) Petitioner-landlord feeling aggrieved, preferred Revision before the Small Causes Court being 67/2020 which was dismissed vide order impugned dated 19/01/2021. As such, this Writ Petition.

6) Heard Mr. Yadav, counsel appearing for the Petitioner and Mr. Dhadam for Respondent nos. 2 & 3 and Nagvekar counsel appearing for Respondent nos. 4 & 5.

7) Counsel for the Petitioner would invite attention to the issues framed in the Application which led to the passing of the order impugned dated 06/02/2020 which reads thus :

<u>“ISSUES</u>	<u>FINDINGS</u>
1) Whether the application is Maintainable?	Yes.
1A) Is the application within limitation?	Yes.
2) Whether there is sufficient reason to set aside exparte decree passed against the defendant?	Yes.
3) Whether the applicants are entitled	Yes.

to restore possession of the suit premises
as prayed?

4) Whether possession of Flat No. 7 is Does not survive.
handed over to the plaintiff instead of Flat
No. 2 in execution of decree in Execution
Application No. 207 of 2014?

5) Whether the applicant is entitled No.
for injunction as prayed?

6) What order? As per final order.”

8) His contentions are, the star ground raised in the Application for
setting aside exparte Decree was, Suit was initiated against the dead
person and there was no sufficient chance to the Respondent to
defend the Suit. According to him, death of the original Defendant was
denied. He would further claim that death certificate was produced on
record at the fag end of the proceedings was illegally executed and
accepted in evidence.

9) His further contentions are, if the oral evidence of Respondents
is appreciated, same can lead to the only conclusion that Respondents
who were Applicants in the Application under Order IX Rule 13 of
Code of Civil Procedure, 1908 have never accepted his tenancy. It is

urged that there is absence of landlord-tenant relationship which the Court below had failed to consider.

10) In addition, his contentions are, Respondents-Defendants have claimed restoration of possession in relation to flat no. 7 and not flat no. 2. Both the Courts below have committed an error in directing the restoration of the possession of Suit property without conducting an inquiry on the issue of identification of the property. So as to substantiate his contention, he would rely on the observations made by both the Courts below on the said issue.

11) As such, sum and substance of contentions of counsel for the Petitioner is, both the Courts below have committed an error in evaluating the evidence in favour of the Respondents and thereby admitting the death certificate of the Respondents-Defendants tenant.

12) While countering the aforesaid submissions, counsel for Respondent-Defendant would support the order impugned. According to him, there is enough evidence on record so as to establish the fact that Respondents herein were the tenants in Suit property which fact is established based on not only oral but also documentary evidence which are in the form of rent receipts.

13) I have appreciated the said submissions.

14) Suit Decree was executed by the Petitioner in relation to the premises viz. flat No. 2 having area about 440 Sq. Ft. on the ground floor in the building “Sea View Terrace” at 67/69 Wood House Road, Colaba, Mumbai – 400 005.

15) Respondents herein have taken out MARJI Application under Order IX Rule 13 of Code of Civil Procedure, 1908 for setting aside said exparte Decree. It is claimed that Respondents were tenant in the said premises viz room nos. 2 & 3 in relation to which Decree was executed some ten years back. Respondents are holders of valid rent receipt issued by landlord namely Khodadad Rustom Irani and Jal Rustom Irani. It is claimed that rent receipt in respect of the premises was then transferred in the name of Respondents namely Ms. Gover Irani and Ardeshir Irani. It is claimed that rent receipts were thereafter issued by original plaintiff i.e. Petitioner herein in the name of aforesaid persons. As a sequel of above, Plaintiff-Petitioner, present Respondent suffered an obstruction notice no. 63/2003 at the behest of Mumbai Port Trust in LE & C Suit No. 410/527/1980 Decreed on 19/10/2002. As such, the fact that Respondents at whose behest

MARJI Application is allowed were the tenant was a fact within the knowledge of present Petitioner and still the Petitioner has proceeded to file Suit against the dead person. It is the fact that even in the Execution Application No. 207/2014, show cause notice was unserved as it was reported that original defendant has expired long back.

16) It is claimed that since at the relevant time, Respondents were not in the country, taking undue advantage, Petitioner has executed the Decree against incorrect property. As regards death certificate of the original Defendant is concerned, same was produced at Exh. 132 certifying that the Defendant/Judgment Debtor expired on 29/06/1974. In view of provisions of Section 108 of the Evidence Act and the production of death certificate, aforesaid fact that Suit was filed and got decreed by the Petitioner against the dead person was very much established. Merely because death certificate Exh. 132 was provided at belated stage, by itself will not lead to the inference of order impugned being illegal.

17) Appellate Court while analyzing the legality of the order delivered on MARJI Application in detail has analyzed evidence as regards status of Respondents as that of tenant. The fact that father of non-

applicant was tenant i.e. original Defendant was not disputed. Apart from above, names of the parties reflected in the rent receipts at Exh. 38-39, period for which said rent receipts were issued has rightly prompted the Courts below to infer that Decree was obtained by the Petitioner intentionally against a dead person. Apart from above, since rent receipts were more than 30 years old, presumption under Section 90 has been rightly appreciated.

18) In the aforesaid background, against concurrent findings recorded by both the Courts below, I hardly see any convincing reason to form an opinion that orders impugned warrants interference as no illegality could be noticed therein.

19) Petitioner as such fails, stands dismissed.

20) In view of there being protection in favour of Petitioner already in operation, same is continued for a period of 6 weeks from today.

21) In view of disposal of Petition, connected Interim Applications also stand disposed of.

[NITIN W. SAMBRE, J.]