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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7804 OF 2016**

M/s. Bonanza Pharmaceuticals

... Petitioner
(Orig. Defendant No.3)

V/s

Kirtilal Kalidas Doshi and Others

.... Respondents.
(Respondent Nos. 1 to 5
original Plaintiffs and
Respondent Nos. 6 to 8
Orig. Defendant Nos.1, 2
and 4)

Mr. Surel Shah a/w Vaibhav Mehta a/w Mitaali Shah i/b Vaibhav Mehta & Associates for the Petitioner.

Mr. Viraj Parika a/w Sonam Singh i/b Anand Gandhi for Respondent No.2.

CORAM: NITIN W. SAMBRE, J.

DATE: OCTOBER 06, 2022

P.C.:-

1] This Petition is by the judgment-debtor/original Defendant No.3. Respondent Nos. 1 to 5/original Plaintiffs initiated RAE Suit No.785/1257 of 2005 for eviction of the tenants including the Petitioner from suit premises viz. Room Ns. 3 & 4 situated on Plot No.26 in Devkaran Mansion at 32, Vithaldas Road, Princess Street, Mumbai 400 002.

2] Plaintiffs have sought eviction on the ground of arrears of rent and unauthorized subletting. The aforesaid suit came to be decreed on 09/07/2010 against the Petitioner pursuant to the judgment delivered by Court No.20.

3] Alleging that decree against the Petitioner is ex-parte, proceedings under Order 9 Rule 13 were taken out by the Petitioner vide Marji Application No.471 of 2011 before the Small Causes Court. The said Application came to be rejected vide impugned judgment and order dated 13/02/2012. Petitioner/Defendant No.3, feeling aggrieved, preferred Misc. Appeal No.73 of 2012 against the aforesaid judgment which came to be dismissed by Division Bench of the Small Causes Appellate Court vide impugned judgment and order dated 21/01/2016. As such, this Writ Petition under Article 227 of the Constitution of India.

4] The concurrent findings recorded by both the Courts below vide impugned judgments is sought to be assailed on the ground that both

the courts below have failed to consider oral consent extended by Respondent Nos. 1 to 5 i.e. Plaintiffs qua transfer of tenancy in favour of the Petitioner/Defendant No.3 by Respondent Nos. 6 and 7. Mr. Shah, Counsel for the Petitioner submitted that Respondent No.6 has accordingly accepted an amount of Rs 10 lakhs and monthly compensation of Rs 3000/-. He would further urge that delay in preferring Application under Order 9 Rule 13 was sought to be condoned under Section 5 of the Limitation Act, as delay was unintentional even if same is of the length of three years and six months. According to him, suit summons was not properly served on the Petitioner. His next contention is, in view of ill-health of the Petitioner, there was sufficient cause which prevented the Petitioner from appearing in the suit as Respondent No.6 misrepresented the Petitioner that he will take care of the interest of the Petitioner. As such, Mr. Shah would urge that it is necessary to condone the delay and set aside ex parte decree, so that parties hereto can contest the proceedings on merit.

5] Counsel for Respondent No.2/decreed holder would oppose the

prayer, as it is claimed that apart from concurrent findings, there is no error of law in the judgment impugned which warrants consideration of the claim of the Petitioner.

6] I have appreciated the aforesaid submissions.

7] From record, it is apparent that decree against the Petitioner came to be passed on 09/07/2010. Petitioner has personally accepted writ of summons through bailiff on 15/06/2006 and ought to have appeared on 19/07/2006 which he has failed to. As a sequel of above, suit to proceed ex parte order was passed on 09/01/2007. After a lapse of more than three years thereafter suit came to be decreed against the Petitioner on 09/07/2010. Both the Courts below have held that Petitioner has not only failed to demonstrate that there was sufficient cause which prevented him from appearing before the Court below but have also noticed that the Petitioner has failed to explain inordinate delay of more than three years in approaching the Court below under Order 9 Rule 13 for setting aside ex parte decree. The Appellate Court after having regard to the record and proceedings

of the Trial Court when the decree was passed has noticed that two to three attempts were made by the Bailiff to serve the Petitioner during the suit proceedings and substituted service by RPAD under certificate of posting and by pasting of suit summons on conspicuous part of the suit premises was sought. Rather, Petitioner has raised a ground that after order of service of summons by substituted mode, Bailiff had no occasion to serve the Petitioner directly and as such personal service on the Petitioner by Bailiff of the suit summons is bad in law, sufficiently establishes the fact that the Petitioner was having knowledge about the suit proceedings. Small Causes Court, so also Appellate Court has gone in complete detail as regards conduct of the Petitioner post service of summons on him on 15/06/2006.

8] Claim of the Petitioner that he has paid an amount of Rs 10 lakhs to Respondent No.6 for transferring and assigning tenancy right of suit premises in his favour sufficiently establishes the fact on his own admission about sub-tenancy. Apart from above, claim of the Petitioner that Respondent No.6 who misrepresented the petitioner in the matter is also not established, particularly when the Petitioner has

asserted such claim. Both the Courts below were justified in noting that to the agreement of sub-tenancy executed in between the Petitioner and Respondent No.6 Plaintiffs are not at all parties and the claim that such agreement is binding on the Plaintiffs i.e. Respondent Nos. 1 to 5 cannot be accepted.

9] In the aforesaid backdrop, concurrent findings recorded by both the Courts below are based on proper appreciation of evidence and pleadings.

10] In this background, in my opinion, no case for interference under Article 227 of the Constitution of India is made out. Petition as such fails and same stands dismissed.

(NITIN W. SAMBRE, J.)