

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

WRIT PETITION NO.4788 OF 2024

Heena Majid Oomerbhoy

....Petitioner

V/S

A.E Irani

Since deceased & Ors.

....Respondents

Mr. Cherag Balsara i/b Ms. Kanchan Pandare *for the Petitioner.*

Mr. V.R. Dhond, Senior Advocate with Mr. Prateek Pansare, Ms. Shlesha Sheth, Ms. Kalyani Deshmukh & Ms. Rupa Shaw i/b M/s. FZB & Associates *for Respondent Nos.3, 5 and 7.*

Mr. Ganesh Ambekar i/b M/s. Jariwala Associates *for Respondent No.23.*

Ms. Charushila M. Vaidya, 2nd Assistant to Court Receiver, present in Court.

CORAM: SANDEEP V. MARNE, J.

DATE : 16 JULY 2024.

P.C.:

1 Petitioner has filed this Petition challenging the order dated 29 November 2023 passed by Appellate Bench of Small Causes Court at Bombay by which MARJI Application No.244 of 2022 filed by the Petitioner for restoration of the Appeal, which is dismissed for non-prosecution, has been rejected.

2 It must be observed at the outset that the Court Receiver is unnecessarily impleaded as Respondent No.26 in the present Petition.

Respondent No.26 is accordingly directed to be deleted. Necessary amendment to be carried out within a period of two weeks from today.

3 Plaintiffs/Landlords had filed R.A.E. Suit No.809/3046 of 1982 against the original Defendant No.1 seeking decree of eviction against Mr. Afzal Abdul Sattar and two others on the grounds of (i) sub-letting of premises to Mr. Satish Goel (Defendant No.2) and Brigadier B.M. Chakravarti (Defendant No.3) and (ii) making additions and alterations. During pendency of the suit, additional ground of availability of alternate premises to Defendant No.1-Afzal Abdul Sattar was added in the amended Plaint. Defendant No.1-Afzal Abdul Sattar claimed that the tenancy was for use of his firm M/s. Bombay Soap Factory and its allied concerns. Therefore Plaintiffs amended the suit to join Oomerbhoy, who were other partners of M/s. Bombay Soap Factory and its allied concerns. Mr. Majid Oomerbhoy was impleaded as Defendant No.7. On death of Mr. Majid Oomerbhoy, his heirs viz. wife Nargis, son Nadeem and daughter Heena were brought on record as Defendant Nos.7A, 7B and 7C. A common Written Statement was filed by Defendant Nos.7A, 7B and 7C. It appears that during the course of trial, Defendant No.7A Nargis and Defendant No.7C Heena were represented by same advocate whereas Defendant No.7B Nadeem decided to appear in person. The suit was decreed by judgment and order dated 19 August 2015. The decree was put in execution and possession of the suit premises was secured in February 2016.

4 After execution of the decree and recovery of possession, Defendant Nos.7A, 7B and 7C filed three separate Appeals bearing Appeal No.253 of 2017 (Nargis), Appeal No.24 of 2018 (Nadeem) and Appeal No.252 of 2017 (Heena).

5 Appeal No.252 of 2017 filed by Petitioner-Heena came to be dismissed for non-prosecution by the Appellate Bench of the Small Causes Court by order dated 15 March 2022. Similarly Appeal No.253 of 2017 filed by mother Nargis has also been dismissed for non-prosecution.

6 It appears that Petitioner-Heena filed MARJI Application No.244 of 2022 seeking restoration of the Appeal. By impugned order dated 29 November 2023, MARJI Application No.244 of 2022 filed by Petitioner-Heena has been rejected by the Appellate Bench and accordingly the present Petition is filed challenging the order dated 29 November 2023. It appears that during pendency of the present Petition, Appeal No.24 of 2018 filed by Nadeem came to be decided on merits and was dismissed by the Appellate Bench vide judgment and order dated 7 February 2024.

7 I have heard Mr. Balsara, the learned counsel appearing for Petitioner and Mr. Dhond, the learned senior advocate appearing for original Plaintiffs.

8 After having considered the submissions canvassed by the learned counsel appearing for the parties, it is seen that Nargis, Nadeem and Heena

were brought on record essentially as legal heirs of deceased Defendant No.7 Majid Oomerbhoy. Therefore ideally they ought to have common interest in defending the suit as heirs of Majid Oomerbhoy. However three separate Appeals are filed by Nargis, Nadeem and Heena challenging the decree dated 19 August 2015 after loss of possession in execution proceedings. It appears that all the three appeals filed by Nargis, Nadeem and Heena were being tagged together by the Appellate Bench since all the Appeals challenged decree dated 19 August 2015.

9 It appears that Nadeem had raised a grievance about the learned Judges of the Appellate Bench and had filed Writ Petition No.3473 of 2022 inter alia seeking to transfer his Appeal. By the interim order dated 28 March 2022, this Court wondered as to why Nadeem was seeking to delay decision of his own Appeal. Since Nadeem himself was not interested in expeditious decision of Appeal, this Court stayed proceedings of Appeal No.24 of 2018 by order dated 28 March 2022. However, no stay was granted qua Appeal Nos.253 of 2017 filed by Nargis and Appeal No.252 of 2017 filed by Petitioner Heena.

10 It appears that while Nadeem attempted to delay decision of his own Appeal by filing Writ Petition No.3473 of 2022, Petitioner-Heena did not file any proceedings and on the contrary, she, alongwith her mother Nargis, gave written instructions to their advocate vide letter dated 3 March 2022 not to proceed with hearing of the Appeal as both of them were intending to file Writ Petition for transfer of both the Appeals from Court Room No.3. It appears

that on account of this specific instruction issued by Petitioner-Heena and her mother Nargis to their advocate not to proceed with hearing of the Appeal, the Appeal was not argued by the advocate despite same being repeatedly listed before the Appellate Bench on 5 January 2022, 17 January 2022, 2 February 2022, 10 February 2022, 18 February 2022 and 3 March 2022. Though the advocate was instructed about proposed filing of Writ Petition (on lines of Writ Petition filed by Nadeem), no such Petition was filed by Petitioner-Heena and her mother Nargis. However repeated adjournments were sought when Appeal No.252 of 2017 filed by Petitioner-Heena was listed. This left no alternative for the Small Causes Court to dismiss the Appeal No.252 of 2017 filed by Petitioner Heena for non-prosecution.

11 In my view therefore no sufficient cause is made out for restoration of the Appeal, which has rightly been dismissed on account of disinclination shown by the Petitioner to argue the Appeal since the year 2019. Therefore no error can be traced in the order passed by the Appellate Bench on 29 November 2023 rejecting the Application for restoration of the Appeal.

12 This Court cannot turn blind eye to splitting of three heirs of one deceased Defendant for multiplying proceedings. If at this stage, the Appeal of Petitioner-Heena is restored, the same would cause severe prejudice to Plaintiffs as the Decree of Small Causes Court has already been upheld on merits in Appeal filed by Nadeem.

13 It must be borne in mind that Petitioner-Heena was Respondent No.11B in Appeal No.24 of 2018 filed by Nadeem which has been dismissed by the Appellate Bench on 7 February 2024. It appears that Petitioner-Heena participated in hearing of the Appeal filed by Nadeem through common advocate engaged by Petitioner and mother Nargis who argued Appeal No.24 of 2018 on behalf of Respondent No.11A and Respondent No.11B without prejudice to challenge two orders passed by Appellate Bench refusing to restore their own Appeals. The interest of Nadeem in the proceedings are common as that of Petitioner-Heena and mother Nargis. On 8 April 2024 this Court was informed that Nadeem was in the process of filing Civil Revision Application challenging the decree of the Appellate Bench dated 7 February 2024. Though no such Civil Revision Application is filed by Nadeem till date, as and when Nadeem files his own Civil Revision Application, Petitioner-Heena and her mother Nargis would also be impleaded in such Civil Revision Application. In case Nadeem, Petitioner-Heena and her mother Nargis are successful in reversing the decree for eviction in the Civil Revision Application filed by Nadeem, the outcome of the said Civil Revision Application would enure to the benefit of Petitioner-Heena as well. In that view of the matter it cannot be said that any serious prejudice is caused to Petitioner-Heena on account of non-restoration of her Appeal which has been dismissed after noticing repeated defaults and disinclination to argue the Appeal on her part.

14 In my view therefore no case is made out for interference in the impugned order dated 29 November 2023 passed by the Appellate Bench.

Writ Petition must fail. Writ Petition is accordingly **dismissed** without any orders as to costs.

(SANDEEP V. MARNE, J.)

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by
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RAJALINGAM
KATKAM
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