

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

WRIT PETITION NO.11947 OF 2024

Silina Bahadur Thakur

....Petitioner

V/S

The State of Maharashtra & Anr.

....Respondents

Mr. A.A. Siddiqui *for the Petitioners.*

Mr. Hamid Mulla, AGP *for Respondent No.1/State.*

Mr. Viraj Parikh *i/b Mr. Dharmesh S. Jain for Respondent No.2.*

CORAM: SANDEEP V. MARNE, J.

DATE : 26 AUGUST 2024.

P.C.:

1 This Petition is filed challenging the decree passed by the Appellate Bench of the Small Causes Court on 18 July 2024 dismissing Execution Appeal No.8 of 2024.

2 I have heard Mr. Siddiqui, the learned counsel appearing for Petitioner and Mr. Parikh, the learned counsel appearing for Respondent No.2/original Plaintiff.

3 After having considered the submissions canvassed by the learned counsel appearing for parties, it appears that a confusion prevailed in the mind

of the Petitioner/original Defendant while filing Appeal which ultimately came to be numbered as Execution Appeal No.8 of 2024. I have gone through the Appeal Memo in which the Petitioner also desired to challenge the substantive decree dated 25 January 2023. Paragraph 7 of the Appeal Memo reads thus:

“7 The appellant states that, in view of the above facts and being aggrieved and dissatisfied by the findings given by the Ld. Trial Judge dated 25.01.2023, appellant prefers this appeal on the following among other grounds:”

4 Even the prayer in the Appeal shows that the Appellant prayed for calling record and proceedings of RAE & R Suit No.395 of 2019 in addition to calling record and proceedings of Execution Application No.70 of 2023 while setting up challenge to the orders passed therein. In fact prayer clause (b) in the Appeal Memo leaves no manner of doubt the Appellant in fact intended to file Appeal against the substantive decree dated 25 January 2023. Prayer clause (d) in the Appeal Memo reads thus:

“(b) Pending the hearing and final disposal of this appeal, the execution proceeding viz. possession warrant dated 11.01.2024 passed by the Ld. Trial Court be stayed.”

5 However there was on obvious error on the part of the Appellant in drafting the Appeal Memo. He unnecessarily mixed the orders passed in the Execution Proceedings on 11 January 2024 in the Appeal Memo which ought to have been restricted only to the substantive decree dated 25 January 2023. This prompted the Registry to treat and number the Appeal as if the same was restricted only against order dated 11 January 2024 passed in Execution Application No.70 of 2023. Accordingly, the Appellate Bench has considered the Appeal and has determined correctness of the order dated 11 January 2024

passed in Execution Application No. 70 of 2023. On this count, the decree dated 25 January 2023 has remained unchallenged. In my view, considering this confusion which got created while drafting the Appeal Memo, the Appellant deserves to be granted an opportunity to file a substantive Appeal challenging the decree dated 25 January 2023 in RAE & R Suit No.395 of 2019.

6 The next issue that is about permissibility to execute the decree dated 25 January 2023. It appears that the decree is sought to be executed and order dated 11 January 2024 was passed for execution of the decree. If the decree is executed, the substantive Appeal, for which permission is being granted by this order, would be rendered infructuous. There are variety of reasons why execution of the decree deserves to be stayed still the Petitioner prefers a substantive Appeal against the decree dated 25 January 2023. The same are as under:

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(i) Plaintiff initially tried his luck by filing LC Suit No.206 of 2007 in the City Civil Court, Mumbai, seeking recovery of possession of the suit premises by branding the Defendants therein as trespassers. Perusal of the plaint filed in LC Suit No.206 of 2007 would clearly indicate that the Defendants therein were treated as trespassers. The relevant averments in paragraph 3 of the plaint in LC Suit No.206 of 2007 read thus:

“3. The Plaintiff says that the Defendant nos.1 and 2 herein, who are husband and wife to each other, have recently trespassed into the suit premises and they have staked cement, sand and stone in order to construct the storied building thereon”

(ii) L.C. Suit No.206 of 2007 came to be dismissed by the City Civil Court by decree dated 19 December 2014 interalia by holding that the Plaintiff failed to establish his exclusive claim in respect of suit premises and that he further failed to establish that the Defendant Nos.1 and 2 therein had recently encroached upon the suit room. This is how LC Suit No.206 of 2007 came to be dismissed on 19 December 2014.

(iii) Having taken a specific stand that the Defendants in LC Suit No.206 of 2007 were trespassers, Plaintiff filed one more suit bearing RAE & R. Suit No.395 of 2019, this time before the Court of Small Causes at Bandra against Mrs. Salina Bahadur Thakur seeking recovery of possession under provisions of sections 15 and 16 of the Maharashtra Rent Control Act, 1999. In the entire plaint filed in RAE & R Suit No.395 of 2019, Plaintiff suppressed the fact that LC Suit No.206 of 2007 was filed by him describing the Defendant therein as trespasser. Far from making a specific averment that the Defendant in RAE & R Suit No.395 of 2019 was inducted as a tenant, Plaintiff contended in paragraph 8 of the plaint as follows:

“8. The Plaintiff states that after the demise of said Filomina, the Defendant is illegally occupying the suit premises.”

(iv) It therefore becomes questionable as to whether Small Causes Court would have jurisdiction to entertain RAE & R Suit No.395 of 2019 both on account of specific assertion of the Plaintiff in LC Suit No.206 of 2007 that the Defendant was trespasser as well as specific averment in RAE & R Suit No.395 of 2019 that the Defendant is an illegal occupant.

(v) Another factor which needs to be taken note of is Plaintiff's pleading in paragraphs 2 to 4 of the plaint in RAE & R Suit No.395 of 2019 wherein he relied upon probate granted in his favour by this Court in Petition No.973 of 2016 with a view to assert his right, title and interest in respect of the suit premises. The learned counsel appearing for Petitioner has invited my attention to the order dated 10 September 2018 passed by this Court in Miscellaneous Petition No.169 of 2017 by which this Court suspended the probate granted in favour of the Plaintiff. According to the learned counsel, though the suspension of the probate occurred on 10 September 2018, Plaintiff did not think it appropriate to disclose the same in plaint filed in RAE & R Suit No.395 of 2019 and on the contrary he falsely relied upon the suspended probate.

7 In my view on account of the above circumstances, it would not be prudent to execute the decree at this stage when the Petitioner is being granted an opportunity to file a substantive Appeal challenging the decree dated 25 January 2023 passed in RAE & R Suit No.395 of 2019.

8 Accordingly I proceed to pass the following order:

- i) Petitioner is permitted to file a substantive Appeal against decree dated 25 January 2023 passed in RAE & R Suit No.395 of 2019 within a period of three weeks from today; The Appeal so filed shall not be rejected only on the ground of few references to the decree dated 25 January 2023 in Appeal No.8 of 2024.

- ii) The Application for condonation of delay filed alongwith the substantive Appeal shall be decided by the Appellate Bench of Small Causes Court having regard to the findings recorded in the order;
- iii) For a period of four months from today, the execution of decree dated 25 January 2023 passed in RAE & R Suit No.395 of 2019 shall remain suspended, during which time, the Appellate Bench shall decide the application for stay of the decree dated 25 January 2023;

9 All questions on merits of the decree are left open to be agitated before the Appellate Bench of Small Causes Court. Nothing observed in the order shall effect the decision of the substantive Appeal except on the issue of maintainability, if and when filed by the Petitioner challenging the decree dated 25 January 2023.

10 With the above directions, the Writ Petition is **disposed of**.

(SANDEEP V. MARNE, J.)

Digitally signed
by
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