

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

CIVIL REVISION APPLICATION NO. 206 OF 2014

Mr. Ramesh Govind Shirgonkar	... Applicant
V/s.	
Narvada Prashad S. Mishra	... Respondent

Mr. Surel Shah i/b Ashish Dubey for the Applicant.
Mr. Rajesh Singh for the Respondent.

**CORAM : K. K. TATED, J.
DATED : 02/05/2016**

P.C.:

. Heard learned Counsel for the parties.

2 By this Revision Application, defendant challenges the concurrent findings of facts recorded by both the courts below rejecting the defendant's application under Order 9 Rule 13 of Code of Civil Procedure, 1908 for setting aside *ex-parte* decree dated 27.02.2013.

3 In the present proceeding, the respondent plaintiff filed RAE & R Suit No. 1096/1074 of 2005 before the Small Causes Court, Mumbai against the defendant for vacant and peaceful possession of suit premises i.e. Room No. 11, Narmada Krishna Bhavan (earlier known as D'Souza Chawl) Mohili Village, Sakinaka, Mumbai 400 072. The summons were duly served on the defendant on 01.12.2005. As the defendant failed and neglected to file written statement within stipulated time, the Trial Court passed no written statement order.

4 Thereafter, the defendant filed application below Exh.8 on 16.02.2008 for condonation of delay in filing the written statement. That application was rejected by the Trial Court. Thereafter, the defendant preferred another application below Exh.13 for condonation of delay in filing written statement. That application was also rejected by the Trial Court by order dated 27.01.2009. Being aggrieved by the said order, the defendant has filed Revision Application No. 123 of 2009 before the Small Causes Court. The same was dismissed by the Small Causes Court for default on 10.06.2010.

5 Thereafter, no one appeared on behalf of defendant in suit. Hence, the Small Causes Court by order dated 14.10.2010 placed the matter for *ex-parte*. The Small Causes Court passed *ex-parte* decree on 27.02.2013.

6 Thereafter, the plaintiff preferred execution application. In that execution application, the Trial Court issued warrant of possession on 05.08.2013. In execution proceeding, the bailiff visited to the suit premises on 21.08.2013. On the same day, defendant preferred Marji Application No. 574 of 2013 under Order 9 Rule 13 of Code of Civil Procedure, 1908 for setting aside *ex-parte* decree and for condonation of 112 days delay. That application was rejected by the Trial Court on 22.11.2013. Thereafter, the defendant preferred Appeal No. 228 of 2013. The same was rejected by the Appellate Bench of the Small Causes Court. Hence, the present Civil Revision Application.

7 The learned Counsel Mr. Surel Shah appearing on behalf of the defendant submits that both the courts below failed to consider that the

defendant has shown sufficient cause for condonation of 112 days to file an application for setting aside *ex-parte* decree. He submits that defendant as layman instructed his Advocate to protect his interest in the litigation. He submits that because of Advocate's mistake/default, the defendant should not be suffered. He further submits that during that period, defendant was not keeping well. Hence, there was delay on his part to take appropriate steps for setting aside *ex-parte* decree.

8 The learned Counsel for the defendant submits that both the courts below instead of deciding the application for setting aside the *ex-parte* decree under Order 9 Rule 13 on its own merits, the same was decided on the merits of plaint/plaintiff's case. He further submits that Trial Court failed to consider the fact that the defendant placed on record rent receipts, showing the suit premises stands in his wife name. Not only that, the Trial Court also recorded in paragraph 3 of the order that some of the rent receipts show Room no.11 and some of show Shop no.11. Only on these grounds, the Trial Court rejected defendant's application under Order 9 Rule 13 of the Code of Civil Procedure, 1908. He further submits that the Trial Court also failed to consider the reason disclosed by the defendant for condonation of delay in preferring application for setting aside the *ex-parte* decree. Hence, both the orders passed by the Courts below be set aside and application filed by the defendant under Order 9 Rule 13 of Code of Civil Procedure, 1908 be allowed by setting aside the *ex-parte* decree dated 27.02.2013. He submits that if the Revision Application is not allowed, irreparable loss and injury will be caused to the defendant. He further submits that they have good chance of success in the suit.

9 On the other hand, the learned Counsel Mr. Rajesh Singh appearing on behalf of the plaintiff vehemently opposed the present Civil Revision Application. He submits that there is concurrent findings of facts recorded by both the Courts below. Hence, there is no question of entertaining the present Civil Revision Application. He submits that though the defendant was duly served with the summons in the year 2005 itself, the defendant failed and neglected to file his written statement in time. He further submits that defendant preferred application for condonation of delay in filing written statement that application was dismissed for non prosecution. Thereafter, the defendant preferred another application. Another application was also dismissed by the Trial Court on its own merits. He submits that the defendant preferred Revision Application No. 123 of 2009 before the Appellate Bench of Small Causes Court. The same was dismissed for default on 10.06.2010. He submits that this itself shows that the defendant with intention to prolong the litigation, failed to file his written statement within time and thereafter, he preferred an application that also after three years for setting aside, no written statement order.

10 The learned Counsel for the plaintiff submits that though the Trial Court passed *ex-parte* decree on 27.02.2013, the defendant filed application under Order 9 Rule 13 of Code of Civil Procedure, 1908 on 21.08.2013 without disclosing the sufficient cause for condonation of delay. He submits that the defendant in his application specifically admitted that he learnt about the *ex-parte* decree on 09.04.2013 itself. In spite of that, the defendant failed to take out appropriate application

for setting aside *ex-parte* decree immediately. He submits that when the Trial Court issued the possession warrant and when the bailiff tried to execute the same, at that time the defendant filed the application for setting aside the *ex-parte* decree. This itself shows that defendant wanted to prolong the litigation, so that he can remain in possession. He submits that the Appellate Court in paragraph 11, considering the reasons disclosed by the defendant in his application for setting aside *ex-parte* decree decided the Appeal on its own merits. Hence, there is no question of entertaining the present Civil Revision Application and same to be dismissed with costs.

11 I heard both the sides at length. In the present proceeding, the Advocate appearing on behalf of plaintiff filed list of dates and events, which read thus:

LIST OF DATES OF EVENTS

SR. NO.	DATES	EVENTS
1.	Suit Premises	<i>The Applicant is in use, occupation and possession of the suit premises i.e. Room No. 11, Narmada Krishna Bhavan (earlier known as D'Souza Chawl), Mohili Village, Sakinaka, Mumbai 400072.</i>
2.	Suit Property	<i>The Respondent is owner and landlord of the suit property i.e. Narmada Krishna Bhavan (earlier known as D'Souza Chawl), Sakinaka, Mumbai 400072 lying being and situated at Survey No. 30, Hissa No. 1, C.T.S. No. 82(pt), Village – Mohili, Taluka Kurla, Mumbai Suburban District.</i>
3.	08/12/2004	<i>The Respondent has acquired the suit property from Miss. Rosy John Pereira & Ors. vide registered Deed of Conveyance, dated 08/12/2004</i>

		<i>bearing its No. BDR/3/11217/2004 duly registered with Sub-Registrar of Assurance, Kurla-I, M.S.D.</i>
4.	14/12/2004	<i>The Applicant was tenant of the original owners in respect of the suit premises. That after acquiring the suit property, the Original Owner has issued "Letter of Attornment" dated 14/12/2004 in favour of the Respondent, which was duly received by the Applicant, but till date the no objection is raised by the Applicant about the title of the Respondent in the suit property.</i>
5.	07/01/2005	<i>In spite of receiving the said Letter of Attornment, the Applicant has failed and neglected to pay the contractual monthly rent of the suit premises to the Respondent. Hence vide Letter dated 07/01/2005 the Respondent has issued Notice to the Applicant, thereby demanding the arrears of rent. However the Applicant has neither replied nor complied with the request made in the aforesaid notice.</i>
6.	2005	<i>The Applicant has thereafter carried out the unauthorised construction, addition and alteration of permanent nature in the suit premises.</i>
7.	2005	<i>The Applicant has also changed the user of the suit premises by converting it from residential to commercial.</i>
8.	2005	<i>The Applicant has thereafter sublet the suit premises to some third person, who is running the business under the name and style of M/s. Gayatri Milk Centre.</i>
9.	2005	<i>The said proprietor of M/s. Gayatri Milk Centre is causing nuisance to the other tenants of the Respondent residing in the suit chawl.</i>
10.	07/05/2005 And 21/05/2005	<i>For the aforesaid illegal act, the Respondent has lodged his complaints with the B.M.C. as well as local police station, but in vain.</i>
11.	05/08/2005	<i>Due to aforesaid illegal act and omission, on the</i>

		part of the Applicant, the Respondent has issued statutory Notice, dated 05/08/2005 to the Applicant thereby terminated his tenancy in respect of the suit premises. Though the said statutory notice was duly received by the Applicant however he has neither replied nor complied with the request made there under.
12.	28/11/2005	Based on the aforesaid grounds, the Respondent has filed R.A.E. & R. Suit No. 1096/1074 of 2005 before the Hon'ble Small Causes Court at Mumbai, against the Applicant herein, praying therein recovery of the possession as well as rent.
13.	01/12/2005	The Writ of Summons of the aforesaid suit was duly served upon the Applicant on 01/12/2005, and thereafter the Applicant has appeared in the aforesaid suit through his Advocate, who has filed his Vakalatnama on behalf of the Applicant however failed to file his Written Statement.
14.	2005	The Applicant has filed his Affidavit in Reply to the Injunction Application taken out by the Respondent. That after considering the merit of the said Application, it was allowed by the Hon'ble Small Causes Court.
15.	16/02/2008	The Applicant has filed an Application at "Exhibit – 8" for condonation of delay in filing his Written Statement, however the same was dismissed for default by the Hon'ble Small Causes Court vide its order dated 16/02/2008.
16.	03/09/2008 And 27/01/2009	That again on 03/02/2008 the Applicant has filed similar Application at "Exhibit – 13" for condonation of delay in filing his Written Statement. However vide order dated 27/01/2009 the said Application has been rejected by the Hon'ble Small Causes Court.
17.	10/06/2010	Being aggrieved by the order dated 27/01/2009, the Applicant has filed Revision Application No. 123 of 2009 before the Hon'ble Small Causes Court, however the same was dismissed for default

		<i>on 10/06/2010.</i>
18.	14/10/2010	<i>Since then the Applicant was not appearing in the aforesaid suit, due to which vide order dated 14/10/2010 the Hon'ble Small Causes Court has fixed the same for exparte hearing.</i>
19.	27/02/2013	<i>Vide its Judgment and Order dated 27/02/2013, the Hon'ble Small Causes Court has pleased to decree the aforesaid suit.</i>
20.	09/04/2013	<i>As per the version of the Applicant, he got the knowledge of passing of the aforesaid Decree in the aforesaid suit, but admittedly no steps were taken.</i>
21.	05/08/2013	<i>The Hon'ble Trial Court in Execution proceeding has pleased to issue Warrant of Possession vide its Order dated 05/08/2013.</i>
22.	21/08/2013	<i>In Execution proceeding, the Bailiff went to the suit premises for execution of the Decree.</i>
23.	21/08/2013	<i>On the same date, the Applicant has taken out the Marji Application No. 574 of 2013 under Order 9 Rule 13 of the C.P.C. That as per the version of Applicant, even for taking out in the said Application there was delay of 112 days.</i>
24.	22/11/2013	<i>That after appreciating the facts and circumstances, as well as merit of the said Application, vide its order dated 22/11/2013 the Hon'ble Trial Court has pleased to reject the said Marji Application.</i>
25.	17/12/2013	<i>Being aggrieved by the said Order dated 22/11/2013, the Applicant has preferred the Appeal No. 228 of 2013 before the Hon'ble Appellate Bench of the Small Causes Court at Mumbai.</i>
26.	05/02/2014	<i>After appreciating the merit of the said Appeal No. 228 of 2014, the Hon'ble Appellate Bench of Small Causes Court vide its order dated 05/02/2014 has pleased to dismiss the said Appeal.</i>
27.	21/02/2014	<i>Being aggrieved by the said Order dated</i>

		<i>05/02/2014, the Applicant has preferred the present Civil Revision Application No. 206 of 2014 before this Hon'ble Court.</i>
28.	27/02/2014	<i>Without service of the notice of this Application, the Applicant has sought production of the aforesaid matter, and obtained the ex-parte stay order dated 27/02/2014 from this Hon'ble Court, and since then avoiding the hearing of the present Application.</i>

12 Initially, the defendant failed to file his written statement for more than 3 years. His application for condonation of delay stands rejected. Thereafter, the defendant preferred Revision Application. That application stands dismissed for default. Thereafter, the Trial Court passed *ex-parte* decree on 27.02.2013. Though, the defendant admitted in his application that he learnt about the *ex-parte* decree on 09.04.2013, he failed and neglected to file application under Order 9 Rule 13 of Code of Civil Procedure, 1908 immediately. He filed that application on 21.08.2013 i.e. after more than 4 months, when the plaintiff filed execution application and Trial Court issued the warrant of possession. This itself shows that defendant on one and other count want to prolong the litigation to retain the tenanted premises with him. Though, the defendant has stated in his application about his illness, he failed to produce any documentary evidence to show the same. The defendant failed and neglected to point out the sufficient cause for condonation of delay to set aside *ex-parte* decree. As there is concurrent findings of fact recorded by both the courts below, I do not find any substance in Civil Revision Application.

13 Hence, Civil Revision Application stands rejected.

14 At this stage, the learned Counsel for the applicant defendant seeks stay of this order for some period.

15 Considering the fact that the defendant failed and neglected to file his written statement for more than 3 years and thereafter, he has filed application for setting aside *ex-parte* decree with delay of more than 4 months, I do not find any reason to stay this order.

16 Hence, his oral request is rejected.

(K.K.TATED, J.)