

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 109/2016

IN

MISC. APPEAL NO.5/2015

IN

MARJI APPLICATION NO.436/2014

IN

RAE SUIT NO.291/451/2007

M/s. Amratlal Dhirajlal & Co.

... Applicant

V/s.

Kamelsingh Harnamsingh Chowhan & Anr.

... Respondents

Mr. G. S. Godbole with Mr. Parag M. Tilak for the Applicant.

Mr. A. A. Kumbhakoni, Senior Advocate with Mr. Vivek Kantawala with Mr. Amey Patel with pari Mohan i/b. M/s. Vivek Kantala & Co. for the Respondent No.1.

CORAM: K.K. TATED, J.

DATED : APRIL 21, 2016

PC. :

1. Heard the learned counsel for the parties. By this Civil Revision Application, the applicant defendant No.2 challenges the concurrent findings of fact recorded by both the courts below rejecting the application made by the applicant under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside *ex parte* decree dated 26.02.2014 by which the court directed the applicant to hand over vacant and peaceful possession of the suit premises i.e. Room No.A-10 and A-11 on the first floor of Lalsing Mansing Building, Lohar Chawl, Mumbai – 400 002 to the plaintiff.

2. For the sake of brevity, the parties will be referred to as per their nomenclature in the suit being No.RAE Suit No.291/451/2007 i.e. the applicant as defendant No.2, respondent No.1 as original plaintiff and respondent No.2 original defendant No.1.

3. Few facts of the matter are, as under:

The plaintiff instituted RAE Suit No.291/451/2007 in the Court of Small Causes at Mumbai for an order of decree against the defendants to hand over vacant and peaceful possession of the suit premises to the plaintiff. The plaintiff's case was that the defendant No.1 partnership firm registered with the Registrar of Firms in the year 1951 being Firm No.40079 was monthly tenant of plaintiff in respect of the suit premises. Defendant No.2 was also a partnership firm registered with the Registrar of Firms in the year 1990 being No.BA-32596. The defendant No.1 sublet the suit premises to defendant No.2. The summonses were duly served on the defendants. The defendants filed written statement. On the basis of the pleadings, the trial court framed following issues for determination.

	ISSUES	FINDINGS
1	Does the plaintiff prove that defendant No.1 failed and neglected to pay monthly rent of the suit premises since 01.04.1998?	No
2	Does the plaintiff prove that defendant No.1 unlawfully sub-let the suit premises to defendant No.2?	Yes

3	Does the plaintiff prove that defendant No.2 carried out permanent additions and alterations in the suit premises illegally ?	Yes
4	Does the plaintiff prove that defendant No.2 committed acts of gross waste and damage to the suit premises ?	Yes
5	Does the plaintiff prove that defendant No.1 did not use the suit premises for the purpose for which they were let for six months immediately preceding the date of suit without reasonable cause ?	Yes
6	Does the plaintiff prove that defendant No.1 and 2 in collusion unlawfully sublet the suit premises to outsider and strangers habitually ?	Yes
7	Does the plaintiff prove that they are entitled to mesne profit @ Rs.80,000/-pm from the defendant ?	Yes
7a	Additional Issue : Does plaintiffs suit is barred due to non joinder/mis-joinder of the necessary parties ?	No
8	Whether the plaintiff is entitled for decree of eviction and possession ?	Yes
9	What order and decree ?	As per final order

4. Thereafter the plaintiff filed an affidavit of evidence. The advocate for defendant No.2 commenced cross-examination. After conducting cross-examination on some dates, none appeared on behalf of defendant No.2. Hence, the trial court, after following due process of law closed cross-examination and kept the matter for final arguments and passed decree dated 26.02.2014. Thereafter the plaintiff filed execution application. The Bailiff visited the suit premises on 24.07.2014. Then the defendant No.2 filed application

under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 25.07.2014 for setting aside *exparte* decree being MARJI application No.436/2014 which was dismissed by the trial court on 05.02.2014.

5. Being aggrieved by the said dismissal, defendant No.2 preferred Misc. Appeal No.5/2015 before the Appellate Bench of Small Causes Court, Mumbai which was also dismissed on 16.01.2016. Hence, the Civil Revision Application.

6. The learned counsel for defendant No.2 submits that both the courts below erred in coming to the conclusion that defendant No.2 failed to disclose sufficient cause for setting aside *exparte* decree dated 26.02.2014. He submits that defendant No.2 engaged Advocate Mr.Dhiren S. Shah (hereinafter referred to as the said Advocate) on behalf of him to defend the suit filed by the plaintiff against them. The said Advocate filed his vakalatnama as well as written statement. He submits that when the plaintiff filed affidavit of evidence, the said advocate partly cross-examined the plaintiff's witness on 20.02.2013. He submits that thereafter no one appeared on behalf of defendant No.2 before the trial court. He submits that in the meantime, the plaintiff being a senior citizen of 82 years old, was not keeping well. He was taking treatment from Dr. S. V. Khandilkar (Consultant Neurologist) in the month of July 2013 and thereafter. He submits that in the meanwhile, both sons of defendant No.2 retired from partnership firm and thereafter defendant No.2 admitted his daughters-in-law Mrs. Meera Haresh Parekh and Mrs. Parul Piyush Parekh as partners of the partnership firm by partnership deed dated 01.04.2013 in the following ratio:

Name	Share of Profit (%)	Share of Loss (%)
Mr.Kisanlal Maganlal Parekh	80	80
Mrs. Meera Haresh Parekh	10	10
Mrs. Parul Piyush Parekh	10	10

7. The learned counsel for defendant No.2 submits that because of his health problem and as both his sons were retired from partnership firm on 01.04.2013, the Manager of defendant No.2 used to attend the matter before the trial court. He submits that the Manager of defendant No.2 Mangesh B. Naigaonkar made applications dated 18.10.2013, 29.10.2013 and 16.01.2014 for adjournment of RAE Suit No.291/451/2007 on the ground that their advocate was not attending the matter and therefore defendant No.2 wanted to engage a new advocate. The counsel for the defendant No.2 submits that in those adjournment applications it was specifically stated that the said Advocate was not interested in continuing and conducting their matter and therefore, they want to engage another Advocate. He submits that as none appeared on behalf of defendant No.2, the trial court passed *exparte* decree on 26.02.2014.

8. The learned counsel for the defendant No.2 submits that they learnt about the *exparte* decree when the Bailiff from the Court of Small Causes visited the suit premises on 24.07.2014. Thereafter defendant No.2 immediately applied for certified copies and made an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 25.07.2014. He submits that because of old age and as defendant No.2 was not keeping well, it remained on the part of defendant No.2 to take

immediate steps for appointment of a new advocate. He submits that both the sons of defendant No.2 had resigned from the partnership firm from April 2013. Therefore, no one was there to look-after the present litigation. He submits that these facts were not considered by both the courts below and dismissed the application made by defendant No.2 for setting aside *exparte* decree. He submits that though the trial court held that the application made by defendant No.2 under Order IX Rule 13 of Code of Civil Procedure, 1908 for setting aside *exparte* decree was maintainable, the appellate court held that the trial court has passed decree after hearing both sides, hence, there is no question of *exparte* decree and therefore, the application under Order IX Rule 13 of Code of Civil Procedure, 1908 was not maintainable. He further submits that though the defendant No.2 made a specific prayer in his application under Order IX Rule 13 of Code of Civil Procedure, 1908 for condonation of delay, the appellate court erred in coming to the conclusion that a separate application was required to be made for condonation of delay and on that ground also the appellate court dismissed the appeal filed by them. He submits that in the interest of justice, this Hon'ble Court be pleased to condone the delay of 122 days in making the application for setting aside the *exparte* decree and allow the MARJI application of defendant No.2 being No. 436/2014 and set aside the *exparte* decree. He submits that if revision application is not allowed, irreparable loss will be caused to the applicant. He submits that if Civil Revision Application is not allowed, defendant No.2 may lose his possession over the suit premises. He submits that defendant No.2 has good chance of success in the present proceedings. Hence, in the interest of justice, this Hon'ble Court be pleased to allow the Civil

Revision Application by setting aside *exparte* decree and direct the trial court to decide the suit after hearing both sides on merits.

9. The learned counsel for the plaintiff submits that both the courts, after considering the evidence on record rightly held that defendant No.2 failed and neglected to make out sufficient cause for setting aside the *exparte* decree. He submits that the advocate for defendant No.2 partly cross-examined the plaintiff's witness and thereafter remained absent. He submits that the advocate for defendant No.2, by letter dated 18.03.2013 informed the advocate for the plaintiff that he is returning the papers and proceedings to his client i.e. defendant No.2 and hence all future correspondence be made directly to defendant No.2. He submits that a copy of the said letter was forwarded to defendant No.2 also. He submits that in spite of the said letter dated 18.03.2013, defendant No.2 failed and neglected to appoint a new advocate to protect his interest in the suit premises. He submits that after receipt of the advocate's letter dated 18.03.2013, defendant No.2 made applications on 18.10.2013, 29.10.2013 and 16.01.2014 before the trial court for adjournment for appointment of a new advocate. He submits that for more than 10 months, defendant No.2 failed and neglected to take appropriate steps for appointment of an advocate to protect his interest. He submits that the trial court, after following due process of law, passed decree on 26.02.2014. He submits that the roznama dated 26.02.2014 shows that the holding advocates on behalf of both the parties were present before the court. In spite of these facts, the defendant No.2 failed to take out an application for setting aside alleged *exparte* decree immediately.

10. The learned counsel for the plaintiff submits that the reason given by defendant No.2 for delay in making the application for setting aside *exparte* decree that his both sons had resigned from partnership firm, is also not correct. He submits that to gain favourable orders from the trial court, defendant No.2 made misleading statement in his affidavit. In his affidavit, defendant No.2 has stated that his both sons had resigned from partnership firm. Whereas, Mr. Piyush Parekh, son of defendant No.2 has verified an affidavit in another RAE Suit No.436/721/2000 as a partner of defendant No.2 firm. He submits that the said affidavit was duly affirmed on 16.07.2013. Hence, the statement made by defendant No.2 in his application for setting aside *exparte* decree that both the sons were retired from the partnership firm on 01.04.2013 is not correct. If a party makes an incorrect statement to gain orders from the court, then such an application be dismissed with costs.

11. The learned counsel for the plaintiff submits that the defendant No.2 has no merits in the suit instituted by the plaintiff for eviction. He submits that defendant No.1 was original tenant of the plaintiff who sublet the suit premises to defendant No.2 without obtaining any permission from the plaintiff. He submits that if the decree is passed against defendant No.2, the sub tenant has no right to challenge and defend the decree on merits. In support of this contention, he relies on the judgment of the Apex Court in the matter of ***Rupchand Gupta Vs. Raghuvanshi (Private) Ltd. AIR 1964 SC 1889 (V 51 C 267)***. He relies on paragraphs 10 to 12 thereof, which read thus:

“10. Thus the mere fact that the defendant agrees with the plaintiff that if a suit is brought he would not defend it, would not necessarily prove collusion. It is only if this agreement is done improperly in the sense that a dishonest purpose is intended to be achieved that they can be said to have colluded.

11. There is little doubt that in the present case Land and Bricks agreed with Raghuvanshi that the suit for ejectment would not be contested. When the suit was instituted Land and Bricks did not contest and the ex-parte decree was passed. Raghuvanshi did not implead this appellant in that suit. Can any of these acts, viz., Land and Bricks agreeing with Raghuvanshi that it would not contest the suit, the actual refraining by Land and Bricks from contesting the suit or the act of Raghuvanshi in not impleading the appellant, be an improper act or improper refraining from an act ? We do not see how any of these things can be said to be improper.

12. Taking the last action first, viz., Raghuvanshi's omission to implead the appellant, it is quite clear that the law does not require that the sub-lessee need be made a party. It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-lessee; but this is a position well understood by him when he took the sub-lease. The law allows this and so the omission cannot be said to be an improper act.

12. On the basis of these submissions, the learned counsel for the plaintiff submits that there is no substance in the Civil Revision Application. Same is liable to be dismissed with costs.

13. I Heard both sides at length, gone through the papers and proceedings placed on record.

14. The issue involved in the present Civil Revision Application is “whether defendant No.2 shown sufficient cause for setting aside *exparte* decree passed by the trial court on 26.02.2014?”

15. After service of summons, the advocate for defendant appeared, filed vakalatnama and written statement. Thereafter, the plaintiff filed his affidavit of evidence and the advocate for defendant No.2 started cross-examination. After cross-examination of the plaintiff's witness for some time, advocate for defendant No.2 remained absent thereafter. Hence, the trial court passed appropriate orders and decreed the suit.

16. The reason given by the defendant No.2 in his application for setting aside *exparte* decree under Order IX Rule 13 Code of Civil Procedure, 1908 cannot be termed as sufficient cause. Though both the sons of defendant No.2 resigned from partnership firm, defendant No.2 immediately impleaded his both daughters-in-law as partners. There is no averment in the said application for setting aside *exparte* decree about the steps taken by new partners to protect their interest.

17. Though the advocate for defendant No.2 Dinesh S. Shah wrote letter dated 18.03.2013 stating that he was returning papers and proceedings to his client i.e. defendant No.2, there is no iota of evidence and/or statement of defendant No.2 on record that the said advocate withdrew his appearance by following due process of law.

Apart from that, there is no evidence on record to show what steps or action was taken by the defendant No.2 against his earlier advocate for non appearance in the matter.

18. Though defendant No.2 stated in his application for setting aside *exparte* decree stated that because of ill health and resignation of his both sons from partnership firm, there was delay on his part to take appropriate steps for setting aside *exparte* decree, same cannot be considered as sufficient ground. There is evidence on record to show that the son of defendant No.2 affirmed an affidavit in another RAE Suit No.436/721/2000 showing himself as partner of partnership firm of defendant No.2. This itself shows that for obtaining favourable orders, defendant No.2 made an incorrect statement in his application under Order IX Rule 13 of the Code of Civil Procedure, 1908.

19. It is to be noted that, Order IX Rule 13 of the Code of Civil Procedure, 1908 provides for setting aside *exparte* decree. The court, in terms of the aforesaid provisions is entitled to exercise its jurisdiction subject to it being satisfied with (a) summons was not duly served or (b) the defendant was prevented by any sufficient cause from appearing when the suit was called for hearing.

20. There is no dispute that the summons was duly served on defendant No.2. From the above mentioned discussion, it is crystal clear that defendant No.2 failed to make out any case which prevented him from appearing before the court at the time of hearing. Considering the above mentioned facts and as the defendant No.2

failed to make out any case to interfere with the well reasoned order passed by both the courts below, I do not find any reason to allow the present Civil Revision Application.

21. Hence, following order is passed:

- a. Civil Revision Application stands rejected.
- b. At the request of the learned counsel for the applicant, the plaintiff is restrained from taking any coercive action against the defendant on the basis of the judgment and decree dated 26.02.2014 passed by the Trial Court till 17.06.2016, subject to the defendant filing an usual undertaking before this court with copy to other side within a week stating that they will not create any third party right, title and interest in respect of the suit premises.

(K.K. TATED, J.)