

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION application NO.317/2014

IN

MISCE. APPEAL NO.29/2013

IN

ORDER BELOW EXHIBIT 1

IN

MISC. application NO.140/2011

IN

RAE & R SUIT NO.35/70/1999

Smt. Jasumati Jamandas Lathigra

... Applicant

V/s.

Vinay Kumar P. Sadh

... Respondent

Mr. Ranjit Dharmadhikari i/b. Rahul Kulkarni for the Applicant

Mr. G. S. Godbole, i/b. Keren S. Thorat for the Respondent.

CORAM: K.K. TATED, J.

DATED : MARCH 18, 2016

PC. :

1. Heard the learned counsel for the parties. This Civil Revision Application is made by the defendant challenging the orders passed by both the courts below dismissing the defendant's application under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside *ex parte* decree dated 04.05.2002.

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

The respondent - plaintiff filed RAE & R Suit No.35/70/1999 in the Court of Small Causes for decree of possession in respect of the suit

premises i.e. Room No.37, Building 19-C, Kusum Villa (Bengali Chawl), 1st Kol Dongri Lane Sahar Road, Andheri (East), Mumbai-400069 (suit premises) on the ground of defendant's default in payment of rent in respect of the suit premises, structural changes of permanent nature in the suit premises. The suit summons was served on the defendant on 10.03.1999. The defendant instructed her Advocate Mr. J. P. Ahdharia to file vakalatnama. The defendant further instructed their Advocate to file written statement and take appropriate steps for defending the suit. The defendant learnt about *ex parte* decree when she received a notice in Execution application No.25/2011. Then she tried to contact her advocate for taking appropriate steps. At that time, the defendant learnt that her advocate Mr. J. P. Ahdharia expired on 06.01.2008. Thereafter the defendant made an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 in August 2011, which was rejected by the Trial Court on 01.03.2013. Thereafter the defendant preferred Misc. Appeal No.29/2013 which was also dismissed by the Appellate Bench of the Small Causes Court by judgment dated 27.02.2014. Hence, the present Civil Revision application.

3. The learned counsel for the defendant submits that immediately after the receipt of the summons on 01.03.1999 the defendant contacted her advocate along with her son and handed over vakalatnama to him. At that time the defendant also instructed her advocate to file written statement and other proceedings to protect her interest in the matter. The learned counsel for the defendant submits that the advocate assured her that the matter would take at least 10-15 years and he would take care of it.

4. The learned counsel for the defendant submits that her advocate prepared written statement as per her instructions in presence of herself and her son and obtained thumb impression on various papers. Therefore, the defendant was under an impression that the written statement was filed by her advocate in the court.

5. The learned counsel for the defendant submits that the defendant received notice on 13.05.2010 in the execution application filed by plaintiff. At that time, the defendant learnt that *exparte* decree was passed in the suit filed by the plaintiff on 04.05.2002. Hence, the defendant immediately tried to contact her Advocate Mr. J. P. Andharia. At that time, the defendant learnt that Adv. Mr. J. P. Andharia expired on 06.01.2008. The family members of her advocate informed the defendant that they already handed over all the papers to their respective clients after death of Mr. J. P. Andharia, Advocate. He submits that thereafter the defendant collected all the papers and filed an application for setting aside *exparte* decree under Order IX Rule 13 of the Code of Civil Procedure, 1908 in the month of August 2011.

6. The learned counsel for the defendant submits that the defendant has good chance of success in the proceedings filed by the plaintiff. He submits that the plaintiff issued notice dated 14.12.1998 for arrears of rent. He submits that immediately thereafter the defendant paid entire arrears on 18.03.1999. In support of this contention, the advocate for the defendant relies on rent receipts issued by the plaintiff which are on page No.42 to 46 of the Civil Revision

application. He submits that the plaintiff suppressed these facts in the plaint and obtained *exparte* decree against the defendants.

7. The learned counsel for the defendant further submits that though the plaintiff made averments in the plaint about structural alteration in the suit premises, the same was not proved by the plaintiff. Hence, the defendant has good chance in the suit filed by the plaintiff. He submits that the suit property is situated in a slum, declared by the authority. In support of this contention, the learned counsel for the defendant relies on letter issued by Raj Builders. These facts are not considered by the courts below at the time of considering the application filed by the defendant under order IX Rule 13 of the Code of Civil Procedure, 1908.

8. In support of this contention, he relies on the judgment of the Apex Court in the matter of ***Shantilal Gulabchand Mutha Vs. Tata Engineering & Locomotive Co. Ltd. & Anr. 2013(4) SCC 396***. He submits that in this authority, the Apex Court held that at the time of passing *exparte* decree, the court should consider whether the plaintiff has made out any case on merits. He relies on part of the paragraph 4 which reads thus;

4.....

*“Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds *exparte* and is ultimately decided as an *exparte* case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved.”*

9. The learned counsel for the defendant also relies on the judgment of the Apex Court in the matter of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & Ors. 2013(11) SCALE 418***. He submits that in this authority, the Apex Court held that the term “*sufficient cause*” should be understood in their proper spirit. He relies on para 15(ii) and (x), which read thus:

“15(ii) The term “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact situation.

15(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.”

10. On the basis of these submissions, the learned counsel for the defendant submits that in the interest of justice, this Hon'ble Court be pleased to set aside the orders passed by both the courts below and allow the defendant's application under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside *exparte* decree dated 04.05.2002 and allow the defendant to file their written statement and defend the suit on its own merits. He submits that if the Civil Revision application is not allowed, irreparable loss will be caused to the defendant.

11. On the other hand, the learned counsel for the plaintiff vehemently opposed the Civil Revision application. He submits that the defendant has not shown sufficient cause for setting aside the *exparte* decree. He submits that the reason given by the defendant in their

application for setting aside *exparte* decree under Order IX Rule 13 of the Code of Civil Procedure, 1908 does not disclose sufficient cause. He submits that though the summons was duly served on the defendant on 10.03.1999, the defendant has not taken any steps to file their written statement till passing the *exparte* decree on 04.05.2002. He submits that though the defendant in their application for setting aside *exparte* decree, in paragraph 4 stated that their advocate prepared written statement and obtained the defendant's thumb impression, a copy of the same was not placed on record. This itself shows that the defendant made incorrect statement in paragraph 4 of their application. He submits that if an incorrect statement is made for obtaining favourable orders then the court should not entertain such type of application.

12. The learned counsel for the Plaintiff submits that the Trial Court passed *exparte* decree on 04.05.2002 considering the merits of the matter. He submits that even paragraph 4 of the Trial Court records that the Plaintiff proved that the defendant carried out addition and alteration of permanent nature by enclosing veranda by constructing a WC and loft and by the raising height of the suit premises and has also caused damage to the side walls.

13. The learned counsel for the plaintiff submits that bare reading of *exparte* decree shows that, the Trial Court has considered the merits of the matter and passed *exparte* decree. He submits that if *exparte* decree is passed on merits, an alternative remedy is available to the defendant to file an appeal. Hence, there is no explanation in entertaining the

application, where the defendant failed to prove sufficient cause. Hence, there is no substance in the Civil Revision application and same be dismissed with costs.

14. Heard both sides at length. There is no dispute that in the present proceedings, the summons was duly served on the defendant on 10.03.1999. Thereafter the defendant engaged the Advocate Mr. J. P. Andharia. Though the defendant in her application for setting aside *exparte* decree, in paragraph 4 stated that the written statement was prepared by her advocate and obtained her thumb impression, neither a copy of the same is placed on record nor the defendant's son who accompanied the defendant in the office of the Advocate at the time of preparing written statement, filed his separate affidavit stating those facts on solemn affirmation. They did not even enter into witness box to justify the fact that her advocate had drafted written statement as per their instructions and failed to file the same in court. The other objection raised by the defendant in her application about payment of rent within stipulated time cannot be considered for setting aside *exparte* decree under Order IX Rule 13 of the Code of Civil Procedure, 1908. Bare reading of the *exparte* decree passed by the Trial Court shows that same was passed after considering the merits of the matter.

15. Even the reasons recorded by the trial court in order dated 01.03.2013 at the time of deciding Exhibit- 1 application i.e. an application for setting aside *exparte* decree, shows that, the trial court has considered all the facts and recorded the same by relying on the case laws. Even the Appellate Bench of Small Causes Court decided the

said appeal stating that the defendant failed to make out sufficient cause for setting aside *exparte* decree.

16. The authorities relied on by the defendant in the matter of Shantilal Mutha (Supra) and Esha Bhattacharjee (supra) cannot be applicable in the facts and circumstance of the present case. In the case of Shantilal Mutha (supra) the Apex Court held that at the time of passing an *exparte* decree, the court has to consider the merits of the matter. In the case in hand, bare reading of *exparte* decree dated 04.05.2002 shows that the court has considered the merits of the matter and passed the *exparte* decree. In the matter of Esha Bhattacharjee (supra), the Apex Court has stated that if sufficient cause is shown, then the court has to consider and condone the delay in making the application. That is not the case in hand. In the present case, the defendant has made incorrect statement in paragraph 4 of the application stating that her Advocate prepared written statement and obtained her thumb impression on that. To justify these facts, neither the defendant entered into witness box nor her son who was present at the time of preparing written statement as stated in paragraph 4 of their application under Order IX Rule 13 of the Code of Civil Procedure, 1908. The Apex Court in the matter of ***Pundlik Jalam Patil (D) by Lrs. Vs. Executive Engineer, Jalgaon Medium Project and Anr. 2008 (6) ALL MR 954*** held that a party taking a false stand to get rid off the bar of limitation should not be encouraged to get any premium on the falsehood on his part by condoning delay.

17. The Apex Court, in the matter of Dilip Singh Vs. State of U.P. & Ors. 2010(2) SCC 114 dismissed the appeal only on the ground that the Appellants did not state correct facts in their application before the prescribed Authority for setting aside *exparte* order and also did not approach the High Court with clean hands.

18. Considering these facts, I do not find any substance in the present Civil Revision application to interfere with the concurrent findings of facts recorded by both the courts below. Hence, the Civil Revision application stands rejected.

19. At this stage, the learned counsel for the defendant seeks stay of this order for 4 weeks. He submits that earlier, this court granted ad-interim relief in their favour.

20. Considering the facts and circumstances of the present case, the operation and implementation of this order is stayed for a period of 4 weeks on condition that the applicant defendant and all adult members of her family those who are in possession of the suit premises to file an usual undertaking stating that they will not create any third party right in suit premises, in the Registry of this court with a copy to other side within 2 weeks from today, failing which the protection shall stand vacated without further reference to the court.

(K.K. TATED, J.)