

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3805 OF 2013

Shaikh Akhtar Abdul Gani and others ... Petitioners
Vs.
Nandkumar Laxman Sade and others ... Respondents

Mr. Ram U. Singh for Petitioners.
Mr. Nandkumar Laxman Sade, Respondent No.2 and Constituted Attorney of
Respondents No.3 to 6 present in person.

CORAM : R. G. KETKAR, J.
DATE : JULY 25, 2016

P.C. :

Heard Mr. Ram Singh, learned Counsel for petitioners and Mr. Nandkumar Laxman Sade, respondent No.2 in person at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 16/17.12.2009 passed by the learned Judge presiding over Court Room No.33 of the Court of Small Causes at Bombay (Bandra Branch) in Miscellaneous Application No.232 of 2009 in R.A.E.&R. Suit No.1597/4654 of 1989 as also the judgment and order 30.03.2013 passed by the Appellate Bench of the Small Causes Court in Appeal No.28 of 2010. By these orders, the Courts below dismissed the Application taken out by the petitioners, hereinafter referred to as 'defendants', under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for setting aside the ex-parte decree dated 28.03.2007 after condoning the delay of about 1 year and 11 months.

3. In support of this Petition, Mr. Singh strenuously contended that original defendant No.1 Kulsumbi had filed written statement dated 11.01.2000, which was verified by her on 28.09.1999. Defendant No.1 Kulsumbi died leaving behind present defendants. Defendants No.1 to 3

were served with the suit summons / amended plaint on 28.06.2001. He submitted that none of the defendants are educated and were not aware of the service of the summons and also were not aware of consequences of non-appearance. Due to the death of the original defendant Kulsumbi and because of bad financial condition of the family, they were not in a position to engage Advocate. In fact during her lifetime, defendant No1 had contacted her previous Advocate, who informed her that as the written statement is already on record, her legal representatives need not file any written statement. He further submitted that husband of defendant No.1 was attending the Court proceedings and defendant No.2 was not aware of filing of the Suit. He further submitted that as the previous Advocate of defendant No.1 had assured, defendant No.1 did not take any steps in the matter.

4. He further submitted that the learned trial Judge was also not justified in passing order to proceed ex-parte on 03.09.2001 as written statement of original defendant No.1 was already on record. He, therefore, submitted that the Courts below committed serious error in rejecting the application.

5. Mr. Singh relied upon decision of this Court in the case of ***Laxman Piraji Kumbhar Vs. Rahnabai Shaikh Farid*, 1991 (1) AIR CJ 57** to contend that the Courts below should not have passed ex-parte decree and should have given opportunity to the tenant to resist the Suit. Assuming that the defendants were guilty of negligence in not participating in the proceedings but the negligence should not be visited with such a heavy penalty of decree of eviction.

6. On the other hand, respondent No.2 supported the impugned orders. He has taken me through the impugned orders and submitted that after the death of original defendant No.1 Kulsumbi, her legal

representatives were brought on record. They were also served with the amended plaint on 28.06.2001 and the said fact is admitted by them. Defendants No.1 to 3 thereafter did not participate in the Suit and therefore, the learned trial Judge was fully justified in ordering Suit to proceed ex-parte. He submitted that the appellate Court has considered decision of **Laxman Piraji Kumbhar** (*supra*) in paragraph 33 of the impugned order. The appellate Court held that the said decision is not applicable in the facts of the present case as defendants though filed written statement were negligent throughout in prosecuting the Suit. Defendants have unnecessarily blamed their Advocate without disclosing his name. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by the parties. I have also perused the material on record. It is not in dispute that suit summons was duly served on original defendant No.1 Kulsumbi. It is also not in dispute and is matter of record that she had filed written statement on 11.01.2000 which was verified by her on 28.09.1999. It is also not in dispute that after her death, defendants No.1 to 3 were brought on record. Defendants No.1 to 3 were duly served with the amended plaint on 28.06.2001. In fact in Miscellaneous Notice No.232 of 2009, and in particular paragraph 4, defendants admitted that they were served with the summons of the amended copy of the plaint on 28.06.2001. Despite service as defendants No.1 to 3 did not participate in the trial, on 03.09.2001, the learned trial Judge passed order in the Suit to proceed ex-parte against defendants No.1 to 3. The matter was thereafter fixed on 25.10.2001. Thereafter, it was kept on 19.12.2002. Rojnama dated 18.09.2006 discloses that plaintiffs and defendants were present in the Court and the matter was adjourned to 28.09.2006. The Courts therefore, held that defendants had knowledge of the pendency of the Suit and the date of hearing fixed in the Suit. Rojnama further

discloses that after proceeding ex-parte against defendants, the learned trial Judge heard the plaintiffs' evidence, decided admissibility of documents and thereafter passed ex-parte decree on 28.03.2007. The Application under Order IX, Rule 13 of C.P.C. is filed on 24.02.2009.

8. Thus, in the present case, defendants were aware of pendency of the Suit. Article 123 of the Limitation Act, 1963 reads thus,

<i>Description of application</i>		<i>Period of limitation</i>	<i>Time from which period begins to run</i>
123	To set aside a decree passed in ex-parte or to re-hear an appeal decreed or heard ex-parte. Explanation - For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly serve, when the applicant had knowledge of the decree.

9. Perusal of Article 123 shows that period of 30 days is prescribed for setting aside ex-parte decree from the date of decree or where the summons or notice was not duly served when the applicant had knowledge of the decree. In the present case, the period of limitation of 30 days will commence from the date of passing of the decree on 28.03.2007 as defendants were fully aware of pendency of the Suit and admittedly, the suit summons were served on them.

10. Mr. Singh upon decision of this Court in the case of **Laxman Piraji Kumbhar** (*supra*). In that case, petitioner-defendant had filed written statement but did not remain present on the date of hearing. The trial Court passed ex-parte decree. The tenant carried appeal before the District Court. In paragraph 2, this Court noted that the Additional

District Judge did not seriously apply his mind to the appeal and dismissed the same in an extremely casual manner. The judgment of the lower appellate Court made sad reading. The lower appellate Court should have remembered that the Appeal Court is a final Court of facts and the judgment must reflect application of mind to all the facts and it is not the function of the appeal Court merely to confirm the decree passed by the trial Court and write few lines which do not make sense. The issue of default was disposed of in two lines by observing: “The point of default is not very much pressed. Hence, it is to be confirmed.” In view of the peculiar facts and circumstances obtaining in that case, the learned Single Judge observed that though the tenant was guilty of negligence in not remaining present but the negligence should not be visited with such a heavy penalty of decree of eviction. In view thereof, the decision in the case of **Laxman Piraji Kumbhar** (*supra*) does not advance the case of the defendants.

11. In the case of **Salil Dutta vs T.M. and M.C. Private Ltd., 1993 SCC (2) 185**, the Apex Court has observed that no advocate worth his salt would give such advice to his client not to participate in the proceedings. The explanation given to that effect in paragraph 4 cannot be accepted. In paragraph 8, the Apex Court has observed thus,

“8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is not such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult.”

12. Applying the tests laid down to the facts of the present case, I do not find that the defendants have made out a case for setting aside the

ex-parte decree. After considering the material on record, the Courts below have rejected the application made by the defendants under Order IX, Rule 13 of C.P.C. I find no good reason to take a different view. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab