

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

CIVIL REVISION APPLICATION NO. 719 OF 2014

A.D.Irani	 Applicant.
V/s.	
Bomanji Dhunjibhoy Pvt. Ltd. & Ors.	... Respondents.

Mr. Vikas Singh i/b Lambay & Co. for the Applicant.
Mr. P.S. Dani, Senior Counsel i/b Anil Rao for the Respondent.

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

P.C.:

. Heard learned Counsel Mr. Vikas Singh for the applicant and Senior Counsel Mr. P.S. Dani for the Respondent.

2 By this Revision Application, Defendant No.1 challenges the order dated 12.02.2013 passed by the Small Causes Court at Mumbai in Marji Application No. 841 of 2012 under Order 9 Rule 13 of Code of Civil Procedure, 1908 and judgment and decree dated 11.04.2014 passed by the Appellate Bench of the Small Causes Court in 2b(iv) Misc. Appeal No. 78 of 2013 by which the applicant's application for setting aside the *ex-parte* decree stands rejected.

3 For the sake of convenience hereinafter the nomenclature of the parties will be referred as stated in the plaint i.e. Applicant as Defendant No.1 and Respondent No.1 as Plaintiff, Respondent No.2 as Defendant No.2.

4 The Plaintiff filed R.A.E. Suit No. 775/1415 of 2004 in the Court of Small Causes Court at Mumbai against defendant for recovery of possession of the suit premises namely Flat No.6, on the first floor of Bomanji Bhunjibhoy building, 22-C, Sakerwadi Estate, Nawab Tank Road, Mazgaon, Mumbai – 400 010 on the ground that defendant kept the suit premises locked and unused for continuous period of more than 6 month preceding the date of the suit without reasonable cause.

5 In that suit, the suit summons was served on the defendant No.1 on 10.12.2004. Thereafter, the defendant No.1 appeared and filed his appearance as well as written statement. The trial court framed issues and issued judgment on 21.08.2006. The plaintiff filed affidavit of examination-in-chief. The defendant no.1 did not attend the proceeding and the *ex-parte* decree came to be passed on 19.10.2007. Thereafter, the plaintiffs have put the decree in execution by filing execution application no. 350 of 2008. But the said execution application was dismissed for default. Thereafter, the plaintiffs have filed Misc. Application No. 63 of 2009 for restoration of Misc. Notice no. 350 of 2008. On 22.11.2011, the Misc. Application No. 63 of 2009 was allowed and the execution Application filed by the defendant was restored on record.

6 Thereafter, the Defendant No.1 filed Marji Application No. 841 of 2012 on 31.10.2012 under Order 9 Rule 13 of Code of Civil Procedure, 1908 for setting aside *ex-parte* decree dated 19.10.2007. That application rejected by trial court by oral order dated 12.02.2013. The defendant no.1 preferred Appeal before the Appellate Bench of Small Causes Court. The Appellate Court also rejected the Appeal. Hence, the present Civil Revision Application.

7 The learned counsel for the defendant No.1 submits that both the courts below erred in coming to the conclusion that the defendant No.1 failed and neglected to show sufficient cause for condonation of delay in preferring the application under Order 9 Rule 13 of Code of Civil Procedure, 1908 and for setting aside *ex-parte* decree. He submits that the defendant no.1 being a prudent man has appointed the Advocate to protect his interest in the present proceeding. He submits that defendants' Advocate filed written statement. Thereafter, defendants' Advocate informed him that it is not necessary for him to remain present on each and every dates. Defendants' Advocate assured him that he will take care in the present litigation. He submits that after sometime, the defendant's advocate who filed his appearance in trial court informed defendants that suit stands dismissed. Hence, the defendant no.1 stopped attending the court.

8 The learned counsel for the defendant no.1 submits that defendant no.1 is suffering from various elements such as high blood pressure, diabetes, vertigo since 2007, due to which the defendant no.1 could not attend the court proceeding. In support of this contention, the defendant no.1 placed on record the medical certificate issued by Dr. (Miss) A.D. Shah dated 08.10.2012 certifying that the defendant no.1 was suffering from various ailments. He submits that the defendant was under impression that matter was disposed of on merits, as intimated by his Advocate to him. Hence, no one remained present on behalf of defendant when the matter proceeded before the Trial Court. He submits that these facts are also supported by the Advocate who appeared on behalf of him. He submits that the concerned

Advocate Shri. Kaikhushroo Irani filed his affidavit dated 31.10.2012 in support of defendant's contentions for setting aside the *ex-parte* decree. He submits that both the courts failed to consider the defendant's illness as well as affidavit of Advocate Irani.

9 The learned Counsel for the defendant no.1 submits that if the impugned orders passed by both the courts below dismissing the defendant's application under Order 9 Rule 13 of Code of Civil Procedure, 1908 is not set aside and if defendant's application is not allowed, irreparable loss and injury will be caused to the defendant No.1. He submits that as on today the defendant No.1 is in possession of the suit premises. He submits that defendant No.1 has good chance of success in the present proceeding. Hence, in the interest of justice, this Hon'ble Court be pleased to set aside both the orders passed by the Trial Court as well as Appellate Court and allow the defendant No.1's application for setting aside *ex-parte* decree and allow the defendant No.1 to contest the matter on its own merits.

10 On the other hand, learned Senior Counsel Mr. P.S.Dani appearing on behalf of plaintiffs vehemently opposed the present Civil Revision Application. He submits that there is concurrent findings of facts recorded by both the courts below. He submits that defendant No.1 has not pointed out any irregularities committed by both the Courts below. Hence, there is no question of entertaining the present Civil Revision Application. He submits that in the present proceeding, the defendant No.1 was duly served with the summons. Defendant No.1 filed his written statement. Thereafter the Trial Court framed

issues. The plaintiffs filed their affidavit of examination-in-chief. Thereafter, the matter was kept for cross examination of P.W.1. As no one appeared on behalf of defendant no.1 on several occasions, the Trial Court closed the cross examination and placed the matter for defendant's evidence. In spite of the no one appeared on behalf of defendant No.1 and hence, the Trial Court passed *ex-parte* decree dated 19.10.2007.

11 The learned Senior Counsel for the plaintiffs submits that defendant in his application stated that defendant No.1 was suffering from various ailments such as high blood pressure, diabetes, vertigo since 2007. He submits that defendant No.1 also placed on record medical certificate issued by Doctor dated 08.10.2012. He submits that bare reading of medical certificate issued by Doctor shows that Doctor never advised the defendant No.1 to take bed rest. He further submits that the ailments shown by the defendant no.1 in his application are not of such serious nature that it was not possible for the defendant no.1 to attend the court.

12 The learned Senior Counsel for the plaintiffs submits that bare reading of application filed by the defendant no.1 under order 9 Rule 13 of Code of Civil Procedure, 1908 shows that the defendant no.1 failed to make out any sufficient ground for condonation of near about 5 years delay. He submits that in the entire application, the defendant no.1 failed and neglected to disclose the date and/or month when he learnt *ex-parte* decree passed by the Trial Court. This itself shows that the defendant no.1 want to prolong the litigation on one and other

count.

13 The learned Senior Counsel for the plaintiffs submits that plaintiffs filed the suit on the ground of non user. He submits that defendant no.1 already acquired his own premises at 3, Happy Home, First Floor, Gowalia Tank, Mumbai – 400 010. He further submits that these facts were also considered by the Trial Court in paragraph 7 at the time of passing oral judgment dated 19.10.2007. He submits that both the courts below considered all these facts on its own merits and dismissed the defendant's application under Order 9 Rule 13 of Code of Civil Procedure, 1908. Hence, there is no question of entertaining the present Civil Revision Application.

14 I heard both the sides at length. I have gone through the record and proceeding placed on record by both the parties. The main point involved in the present Civil Revision Application is “Whether the defendant made out sufficient cause for setting aside *ex-parte* decree dated 19.10.2007 under Order 9 Rule 13 of Civil Procedure Code, 1908?”

15 There is no dispute that the defendant no.1 was duly served. Thereafter, he appeared through his Advocate and filed written statement. Trial Court framed issues and thereafter, the plaintiffs filed their affidavit of evidence. Though the matter was adjourned from time to time, the defendant no.1 as well as his Advocate failed and neglected to attend the court thereafter. The reason given by the defendant no.1 about his health is very difficulty to accept as a sufficient cause for not attending the matter. The defendant no.1 stated that he was suffering

from various ailments such as high blood pressure, diabetes, vertigo since 2007. It is common that because of these ailments, it is not necessary for patient to take bed rest and that also for more than 5 years. Even the medical certificate dated 08.10.2012 placed on record by defendant no.1 did not disclose that Doctor advised the defendant to take bed rest and that also for more than 5 years.

16 The reason given by the defendant no.1 that his Advocate informed him that the suit is already dismissed and therefore, he stopped attending the matter, is not acceptable. The defendant no.1 nowhere stated in his application that his Advocate provided him copy of order. This shows that the defendant no.1 has created this ground for setting aside the *ex-parte* decree.

17 Apart from that in the entire application under order 9 Rule 13 of Civil Procedure Code, 1908 nowhere defendant no.1 has disclosed the date or month, which he learnt about the *ex-parte* decree passed by the Trial Court. There is no explanation for delay for 5 years in filing the application for setting aside the *ex-parte* decree. If the applicant failed to show sufficient cause for condonation of delay, then the applicant is not entitled to any relief from the court.

18 Bare reading of orders passed by both the courts shows that both the courts have considered all materials on record as well as judgments passed by the Apex Court on the point of delay as well as setting aside the *ex-parte* decree. The defendant no.1 failed to point out any grave error committed by both the courts below in dismissing the defendant's application under Order 9 R.13 of Civil Procedure Code, 1908 for

setting aside the *ex-parte* decree dated 19.10.2007. Hence, I do not find any substance in the present Civil Revision Application.

19 Civil Revision Application stands rejected.

20 At this stage, the learned Counsel for the defendant no.1 submits that this order be stayed for some time. Considering the fact that the *ex-parte* decree passed by the Court in 2007 and the present Civil Revision Application reached for hearing in 2016 and during this period the defendant no.1 is occupying the suit premises on one or other ground.

21 Oral application made by the learned Counsel for the defendant no.1 for stay of this order stands rejected.

(K.K.TATED, J.)