

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Civil Revision Application NO. 486 OF 2016

Raphael @ Ralphy Ezekiel Jhirad ...Applicant

Versus

ORT India and others. ...Respondents

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Mr.Rajiv Chavan, Senior Advocate a/w. Chandrakant N. Chavan,
for the Applicant.

Ms.Ranjana Parikh, Advocate for the Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 04th OCTOBER, 2016

P.C.

1. Heard Mr. Rajiv Chavan, learned Senior Counsel for the applicant and Ms.Ranjana Parikh, learned Counsel for the respondents, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant hereinafter referred to as the 'defendant', has challenged the judgment and order dated 23.8.2013 passed by the learned Judge, presiding over Court Room No.8 of the Court of Small Causes at Bombay in Marji Application No.365/2012 as also the judgment and order dated 8.7.2016 passed by the Appellate Bench of Small Causes Court at Bombay in Misc. Appeal No.218/2013. By these orders, the Courts below rejected the application made by the defendant under Order IX Rule 13 of C.P.C. for setting

aside exparte decree dated 17.3.2012 passed by the learned trial Judge in L.E. & C. Suit No.132/149 of 2004.

3. In support of this application, Mr. Chavan submitted that the defendant has engaged the services of M/s. Shah & Legal for representing him in the Suit. In particular Mr.Sukesh Shah of M/s. Shah & Legal was representing him in the suit. On 7.3.2005, the defendant has filed written statement resisting the claim of the plaintiffs. The issues were framed on 13.3.2009. The plaintiffs led their evidence. He submitted that the plaintiffs filed application Exhibit-11 for direction to the defendant to deposit interim *mesne* profits till the disposal of the suit. By order dated 2.2.2009, the learned trial Judge allowed that application and directed the defendant to deposit amount of Rs.50,000/- per month. Aggrieved by that order, the defendant preferred Revision Application No.373/2010. The Appellate Court allowed Revision Application on 15.11.2010 and directed the defendant to deposit amount of Rs.25,000/- per month towards the interim *mesne* profits. Aggrieved by that order, Writ Petition No.554/2011 was instituted in this Court. The Petition was dismissed on 5.4.2011 thereby upholding the order passed in Revision Application and the trial Court was directed to dispose of the suit within one year.

4. Mr. Chavan submitted that the plaintiffs filed

application Exhibit-27 for striking out the defence on the ground that the defendant did not comply the order dated 2.2.2009 passed below Exhibit-11 directing him to deposit Rs.50,000/- per month. Though, the trial Court was informed about pendency of Revision Application No.373/2010 challenging the order dated 2.2.2009, on 25.10.2010 the learned trial Judge allowed the application Exhibit-27 and struck out the defence of the defendant. He submitted that aggrieved by order dated 25.10.2010, the defendant instituted Writ Petition No.8020/2015 in this Court. This Court gave liberty to the defendant to challenge the order in the substantive appeal upon the principles analogous to those set out in Section 105 of C.P.C. Accordingly the defendant amended the appeal memo and challenged the order dated 25.10.2010.

5. Mr. Chavan submitted that the Advocate representing the defendant did not appear at the time of hearing of applications Exhibits-11 and 27. He has taken me through the application under Order IX Rule 13 of C.P.C. to contend that the Advocate representing the defendant was irresponsible and in fact was negligent in protecting/securing the defendant's interest. In fact on 16.3.2012 that is to say just before a day of pronouncement of the judgment in the Suit, his Advocate sought discharge from the trial Court and the learned trial Judge gave discharge to Mr.Sukesh Shah, Advocate on 16.3.2012. On

17.3.2012, the learned trial Judge decreed the suit exparte. In other words, because of the negligence on the part of Advocate of the defendant, he was not given sufficient opportunity to present his case. Because of the negligence of his Advocate, the defendant should not suffer. He submitted that the exparte decree may be set aside and the suit may be restored permitting the defendant to cross-examine the plaintiffs witness and permitting the defendant to lead his evidence. He submitted that in pursuance of the orders passed in the proceedings, the defendant has deposited Rs.34 Lacs in the Court of Small Causes.

6. During the course of hearing, Mr. Chavan has also suggested two options for settling the entire dispute between the parties. Those options are as under:

OPTION 1:

1. Withdrawal of L & C Suit No.132/149 of 2004 unconditionally by ORT India and refund of mesne profit deposited thereof;
2. To allow a period of 90 days from the date of order till handing over of the premises;
3. Once above option is accepted then ensure that points as per above are included then obtain clarity that for the period until handing over the possession;
4. Ralphy Jhirad – Appellant/Defendant will not claim/file a recovery suit for the outstanding dues against ORT INDIA.

OPTION 2:

1. Setting aside the exparte order dated 17.3.2012 should be heard on merits and restoration of the suit/defense

thereof against handing over premises and thereby giving Ralphy Jhirad the opportunity to examine PW1 & PW2 and for submitting his defense as well.

2. To allow a stay for 90 days from the date of order till handing over the premises;
3. To continue to deposit @ Rs.25,000/- towards mesne profit for the month of September and during the period till handing over the premises.
4. Liberty to file a recovery suit for the outstanding dues against ORT INDIA and WORLD ORT LONDON in appropriate courts and tribunals.

7. On the other hand, Ms.Parikh, upon taking instructions from Mr. Victor Sasson (respondent No.2), Mr. Benjamin Issac (respondent No.3), Mr. T.S. Solomon and Mr. Meyer Moles, all members of the respondent No.1, submitted that they do not accept any of the options. Ms.Parikh has taken me through the impugned orders and submitted that the Advocate of the defendant was all along participating in the trial. She submitted that the defendant did not give instructions to him. The defendant was also not present on certain occasions. As the defendant was himself was not giving instructions to his Advocate, he was left with no alternative to seek for discharge which was given by the learned trial Judge. She submitted that the contention that the defendant's Advocate was negligent is not borne out from record. She submitted that out of Rs.34 Lacs deposited by the defendant, Rs.22 Lacs were towards *mesne* profits as by order dated 6.2.2014, Appellate Court

granted stay to eviction decree only. Remaining amount of Rs.12 Lacs was deposited by the defendant in pursuance of that order. She submitted that as of today the mesne profits to the tune of Rs.89 Lacs are due and payable by the defendant. In short, she submitted that no case is made out for interfering with the impugned orders in exercise of powers under Section 115 of C.P.C.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The short question is whether the defendant has made out a case for setting aside the ex parte decree passed on 17.3.2012. Order IX Rule 13 reads thus :

“ **ORDER IX**
APPEARANCE OF PARTIES AND
CONSEQUENCE OF NON-APPEARANCE

13. Setting aside decree ex parte against defendant.-- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, **or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing**, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against

such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]

[Explanation.--Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]”

[Emphasis supplied]

9. It is not in dispute that in the present case the defendant was duly served with the suit summons and in fact has filed written statement resisting the suit on 7.3.2005. Therefore, one has to find out whether the defendant has made out a case that he was prevented by any sufficient cause from appearing when the suit was called on for hearing as contemplated by the later part of Order IX Rule 13 of C.P.C.

10. Perusal of the impugned orders shows that the Courts below have considered this aspect in great detail. As far as the trial Court is concerned, the learned trial Judge has considered whether the defendant has made out a sufficient cause from paragraph-28 onwards. In paragraph-28, the learned trial Judge has referred to the appearance

of the defendant's Advocate on various dates. In fact the defendant's same Advocate had instituted Writ Petition No.554/2011 in this Court challenging the order passed by the Revisional Court directing the defendant to deposit Rs.25,000/- per month as interim mesne profits. The learned trial Judge also observed that on 26.7.2011, Advocate for the defendant was present and filed application at Exhibit-22 for setting aside 'No-Cross' order passed against the defendant. It revealed that on most of the dates of the suit, the defendant himself remained absent, but the Advocate engaged by him was present. Rozanama of 16.1.2012 shows that the defendant was not present before the Court thereafter till delivery of the judgment. In paragraph-29, the learned trial Judge noted that before withdrawing appearance, the defendant's Advocate had sent email through yahoo.mail. This was received by the defendant and he gave reply on 9.3.2011. Advocate Sukesh Shah informed the defendant the next date of hearing was 14.9.2011. Thus, the defendant's Advocate has tried his level best to inform the defendant to remain present in the suit.

11. In paragraph-30, the learned trial Judge noted that the defendant is well educated and high profile person. He is working as a Director of the plaintiffs Company. The defendant is not a layman or illiterate litigant. The learned trial Judge, therefore, held that the defendant did not make

out sufficient cause that prevented him from appearing at the time of hearing of the suit. As noted earlier, ultimately on 16.3.2012, the defendant's Advocate withdrew his appearance and obtained discharge. Thus, despite being informed as early as on 9.3.2011 of the next date of hearing of suit, defendant neither made alternate arrangement nor attended the suit himself. At the same time, he did not give instructions to his Advocate.

12. As far as the Appellate Court is concerned, the Appellate Court has considered this aspect from paragraph-20 onwards. After considering the material on record, the Appellate Court concurred with the trial Court's order.

13. For the reasons recorded by the trial Court in paragraphs-28 to 30 and by the Appellate Court in paragraphs-20 to 29, I do not find that the defendant has made out any sufficient cause for setting aside the exparte decree. For the reasons recorded in paragraph-28 onwards of the trial Court's judgment and in paragraph-20 onwards of the Appellate Court's judgment, no case is made out by the defendant for setting aside exparte decree.

14. The defendant was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to evidence on record. The defendant was not in a position to demonstrate that no reasonable person would have arrived

at the conclusions other than arrived by the Courts below. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

15. Mr.Chavan has invited my attention to the affidavit of plaintiff No.3 dated 29.6.2012 filed in Marji Application No.365/2012. In paragraph-20 of that affidavit, plaintiff No.3 stated that during the course of hearing of injunction notice at Exhibit-11, he was personally present in the Court. He orally agreed to pay the amount of gratuity and other dues legally due and payable to the defendant. Mr. Chavan therefore submits that liberty may be reserved to the defendant to adopt appropriate proceedings for recovery of gratuity and other dues legally payable to the defendant.

16. Ms.Parikh submits that in case the Court is inclined to grant such a liberty, all contentions of the plaintiffs in that regard may be expressly kept open.

17. In view thereof, liberty as prayed for is granted. Grant of liberty shall not be construed as an expression on merits either way. All contentions of the parties in that regard are expressly kept open.

18. At this stage, Ms. Parikh submits that the plaintiffs may be permitted to withdraw the amount deposited by the defendant towards the mesne profits as also towards the

amount deposited in pursuance of stay granted by the Appellate Court. She further states that in case the defendant succeeds in the proceedings for recovery of gratuity and other dues, subject to the right of the plaintiffs to challenge that order, the plaintiffs will abide by the order passed in those proceedings. Statements, on instructions, are recorded. In view thereof, the plaintiffs are permitted to withdraw the amount deposited by the defendant towards mesne profits as also towards the condition for stay of the eviction decree.

19. At this stage, Mr. Chavan orally applies for stay of eviction decree for a period of eight weeks from today. Mr. Chavan states that the applicant is in possession and he has neither created third party interest nor parted with the possession. He will hereafter neither create third party interest nor part with the possession. He further states that the applicant and all adult family members residing with them are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondents opposes said prayer.

20. Having regard to the fact that applicant desires to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying operation of this order as also by staying eviction decree for a period of eight weeks from today subject to the applicant and all adult

members residing with him giving usual undertaking to this Court within two weeks from today incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that in case the applicants are unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondents.

21. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of 08 weeks from today, subject to the applicant filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case the applicant does not file undertaking in the above terms within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)