

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10488 OF 2014

Smt.Prabhawati Prabakar Kamerkar .. Applicant

vs.

Beharam Hemavand Irani (Namdarian)
deceased through his legal heirs and legal
representatives

Mrs.Homai Beharam Namdarian Irani and Ors. .. Respondents

Mr.A.A.Kumbhakoni Sr.Counsel with Mr.B.K.Raje for the petitioner

Mr.G.S.Godbole with Ms.J.P.Thakkar for the respondent no.1

CORAM : K. K. TATED, J.
DATE : APRIL 28, 2016

P.C.:

1 Heard the learned counsel for the parties.

2 By this petition, under Article 227 of the Constitution of India, petitioner defendant is challenging the order dated 9.9.2014 passed by the Appellate Bench of Small Causes Court in Misc.Appeal No.157 of 2013 in Marji Application No.614 of 2012 in R.A.E. & R. Suit No.782/1264 of 2011 by which the order passed by the Trial Court on defendant's application under Order IX Rule 13 of the Code of Civil Procedure, 1908 stand confirmed.

3 In the present proceeding, the respondent plaintiff filed R.A.E. & R. Suit No.782/1264 of 2011 against the defendant for vacant and peaceful possession of the suit premises, Room No.3, Ground Floor, 98, R.S.Nimkar Marg, Irani Chawl, Mumbai 400 008 on various grounds including carrying out addition, alteration of permanent nature. In that suit, summons was duly served on the defendant on 17.8.2011. Thereafter the defendant appeared and filed her appearance. As the defendant failed to file written statement, Trial Court passed order on 4.8.2011 for proceeding with the suit ex-parte. Thereafter the plaintiff on 29.11.2011 led his oral evidence and placed on record the documents. On the basis of oral evidence and documents the Trial Court passed decree on 6.1.2012.

4 Plaintiff preferred application under Order XXI Rule 22 of the Code of Civil Procedure, 1908. Notice in that application was duly served on the defendant on 27.2.2012. After following due process of law, plaintiff took possession of the suit premises through the bailiff on 6.8.2012.

5 The defendant filed her application under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 14.8.2012 for setting aside the ex-parte decree dated 6.1.2012 passed by Trial Court. That application was numbered as Misc. Application No.614 of 2012. Misc. Application decided by Trial Court by order dated 8.7.2013 and rejected the same.

6 Being aggrieved by the said order dated 8.7.2013 defendant preferred Misc. Appeal No.157 of 2013 before the Appellate Bench of

Small Causes Court. Appellate Bench of Small Causes Court on merits decided the said appeal and held that defendant failed to make out any case for setting aside the ex-parte decree. At the same time, appellate court in paragraph 14 held that application filed by the defendant for setting aside ex-parte decree under Order IX Rule 13 of the Code of Civil Procedure, 1908 was not maintainable in view of the decision of this court, in the matter of *Laxman Zingraji Adhau v. Sushila Zinguji Thakre & Ors., 1996(1) Mah L.J. 67*. Hence, the present petition under Article 227 of the Constitution of India.

7 The learned Senior counsel for the defendant submits that the appellate court failed to consider the fact that the application filed by the defendant under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside ex-parte decree is maintainable in law. He submits that in subsequent judgment, Division Bench of this court in the matter of *Dhanwantra R. Joshi and others vs. Satish J. Dave and others, 1998(3) Mh.L.J. 924* held that in such circumstances, the application under Order IX Rule 13 is maintainable. He relies on paragraph 12 to 15 of the said authority which reads thus:

“12. In our view, considering the scheme of Order VIII, Rule 5 or Rule 10, as well as Order IX, it is apparent that both operate in different fields.

Order VIII, Rule 5 specifically provides that if Defendant fails to file Written Statement as contemplated therein, the Court may pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability,

or the Court may in its discretion, require any such fact to be proved. If the judgment is pronounced on the basis of the facts contained in the plaint, decree is to be drawn in accordance with Order VIII, Rule 5(4). Similarly, if a party from whom Written Statement is required under Order VIII, Rule 10, fails to present the same within the time permitted or fixed by the Court, the Court is entitled to pronounce judgment against such party, or make such order in relation to the suit as it thinks fit. If the judgment is pronounced, the decree is required to be drawn up. Such decree pronounced on non filing of Written Statement cannot be considered to be an ex parte decree as contemplated under Order IX, Rule 6. These types of decrees are passed because of failure to file Written Statement. Further, in a case where Written Statement is not filed and at the time of hearing, even if the Defendant is present, the Court is entitled to pronounce the judgment and pass decree. If the Defendant is absent and the Written Statement as required is not filed, the Court is also entitled to pronounce judgment on the basis of the averments made in the plaint.”

“13. As against this, under Order IX, the Court is required to follow different procedure. Order IX, Rule 1 provides that on the day fixed in the summons for the Defendant to appear and answer, the parties shall be in attendance at the Court house and suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. This means that suit is fixed for hearing and on the date of hearing if neither parties appears then the suit may be dismissed as provided under Order IX, Rule 3. If the Defendant fails to appear on the date of hearing, the Court is required to pass an order that the suit be heard ex parte and to proceed further with the hearing of the suit. This requires

recording of evidence and to proceed with the matter. After recording evidence ex parte, the Court can pronounce judgment on the basis of the evidence which is brought by the Plaintiff. In such cases, the suit is not disposed of as provided under Order VIII, Rule 5 or Rule 10 on the basis of the averments made in the plaint.”

“14. Further, under Order IX, Rule 13, the Defendant is entitled to file application for setting aside ex parte decree on two grounds, namely (i) that the summons was not duly served and (ii) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. This also indicates that the suit is required to be fixed for hearing and on the date of hearing the defendant is absent.”

“15. In this view of the matter, in our view, application under Order IX, Rule 13 is not maintainable when the Court has passed a decree under Order VIII, Rule 5 or Rule 10 of the Civil Procedure Code. There is no provision in Order VIII for setting aside a decree passed under Rule 5 or 10 thereof for non-filing of Written Statement. The only remedy open in such cases is to file an appeal against such decree. Decree under Order VIII, Rule 5 or Rule 10 is passed because of the specific provisions under Order VIII that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the Defendant, then it shall be taken to be admitted except against a person under disability, and thereafter, there is a provision that the Court has discretion to pronounce judgment on the basis of the facts contained in the plaint. This scheme is totally different from the scheme of passing ex parte decree under Order IX.”

8 The learned Senior Counsel for the defendant further submits that both the courts failed to consider the fact that defendant showed sufficient cause for setting aside ex-parte decree. He submits that when the summons was duly served on defendant, the defendant immediately contacted her advocate and filed appearance. He submits that, the defendant contacted the son of the plaintiff for settlement. He submits that son of the plaintiff assured the defendant that he will try to settle the matter out of court. Therefore, the defendant has not taken any steps to defend the suit. He submits that though the notice in the application under Order XXI Rule 22 of the Code of Civil Procedure, 1908 was duly served on the defendant on 27.2.2012, defendant was under impression that son of the plaintiff will accept the rent and cost for settling the suit out of court. He submits that instead of settling the matter out of court, plaintiff executed the decree on 6.8.2012 and took possession of the suit premises. These facts were not considered by both the courts below at the time of deciding the application and appeal. Hence, in the interest of justice, this Hon'ble Court be pleased to set aside the orders passed by both the courts and application filed by the defendant under Order IX Rule 13 of the Code of Civil Procedure, 1908 be allowed. He submits that if the petition is not allowed, irreparable loss will be caused to the applicant.

9 On the other hand, the learned counsel for the respondent plaintiff vehemently opposed the present Writ Petition. He submits that in the present proceeding, decree was passed by the Trial Court on 6.1.2012. He submits that the defendant filed application under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 14.8.2012 without

making any application for condonation of delay. He submits that on this ground only, application filed by the defendant was not maintainable.

10 The learned counsel for the plaintiff further submits that the defendant made incorrect statement in her application for setting aside the ex-parte decree. He submits that the defendant in paragraph 9 of the said application stated that she learnt about the ex-parte decree only on 6.8.2012 when the bailiff took possession of the suit premises in Execution Application. He submits that the defendant further stated in paragraph 9 of the said application that thereafter, the defendant made application for certified copies of the plaint, ex-parte order and execution proceedings. He submits that actually in the present proceeding, after passing ex-parte decree on 6.11.2012 plaintiff filed application under Order XXI Rule 22 of the Code of Civil Procedure, 1908. In that proceeding, the notice issued by the court was duly served on defendant on 27.2.2012 and those facts were admitted by the defendant in her application under Order IX Rule 13 of the Code of Civil Procedure, 1908, particularly in paragraph 7. To get favourable order defendant made incorrect statement in paragraph 9 of the application. Hence, on this ground also application filed by the defendant was not maintainable. He submits that both the courts below considering the facts on record held that the defendant failed to show sufficient cause for setting aside ex-parte decree.

11 The learned counsel for the plaintiff submits that though the appellate bench of Small Causes Court in paragraph 14 of the

impugned order dated 9.9.2014 held that the application filed by the defendant under Order IX Rule 13 of the Code of Civil Procedure, 1908 was not maintainable for setting aside the ex-parte decree in view of the judgment of this court in the matter of ***Laxman Zingraji Adhau v. Sushila Zinguji Thakre & Ors.*** (Supra), that cannot be considered as a ground for either setting aside the impugned order or for remanding the matter for further hearing. He submits that at the time of deciding the appeal filed by the defendant, appellate court has considered merits of the matter and gave finding in paragraph 10 to 13. Hence, on this ground impugned order cannot be set aside. Hence, there is no substance in Writ Petition and same is required to be dismissed with cost.

12 I have heard both the sides at length. It is to be noted that in the present proceeding though ex-parte decree was passed by Trial Court on 6.1.2012 defendant filed their application under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 14.8.2012. In that application, the defendant made incorrect statement in paragraph 9 stating that she learnt about the passing of ex-parte decree on 6.8.2012, though the notice in the application under Order XXI Rule 22 of the Code of Civil Procedure, 1908 was duly served on her on 27.2.2012.

13 The Apex Court in the matter of ***Pundlik Jalam Patil (D) by Lrs. vs. Exe.Eng. Jalgaon Medium Project & Anr. (2008) 17 SCC 448 and MTNL vs. State of Maharashtra (2013) 9 SCC 92*** held that if incorrect statement is made in the application for condonation of delay, is itself sufficient to reject the application without any further inquiry as

to whether the averments made in the application reveal sufficient cause to condone the delay.

14 The observations made by the appellate court in paragraph 14 about maintainability of the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 cannot be considered either to set aside the impugned order or remand the matter to the appellate court for hearing in view of the subsequent judgments in the matter of ***Dhanwantraï R. Joshi and others vs. Satish J. Dave and others***, (Supra) because the appellate court at the time of deciding the appeal also decided the same on its own merits. Apart from that, the defendant lost possession of the suit premises on 6.8.2012.

15 Considering these facts, I do not find any reason to entertain the present Writ Petition under Article 227 of the Constitution of India. Hence, Writ Petition is rejected.

JUDGE