

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 160 OF 2014

Dattatray Laxmaseth Dahiwal

@ Dahiwad, Age : 58 Yrs.,

Occ.: Business, R/o : Kokamthan,

Tq. Kopargaon, Dist. Ahmednagar.

..... APPLICANT/

[ORI. PLAINTIFF]

V E R S U S

Ramesh Chandrakant Dahiwal

@ Dahiwad, Age : 50 Years.,

Occ.: Labour, R/o : Panmala,

Nagrewasti, Shirdi, Tq. Rahata,

Dist. Ahmednagar.

..... RESPONDENT/

[ORI. DEFENDANT]

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Mr. D.M.Mane h/f Mr. Milind Patil, Advocate
for Applicant.

Mr. P.P.Mandlik h/f Mr. A.S.Gandhi, Advocate
for Respondent.

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CORAM : SUNIL P. DESHMUKH, J.

DATE OF JUDGMENT : 25th JANUARY, 2017

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ORAL JUDGMENT :

1. **'Rule'**. Rule made returnable forthwith.

2. Heard the learned counsel for the parties by consent finally.

3. Civil Revision Application has been moved by original plaintiff in R.C.S. No. 50/2005 instituted by the applicant seeking specific performance of contract. The suit came to be decreed under judgment and decree dated 31/01/2008. The respondent/defendant had moved the court under an application dated 29/02/2008 for setting aside the judgment and decree passed in his absence invoking Order IX, Rule 13 of the Code of Civil Procedure. The trial court had rejected the same and as such the respondent/defendant had been in Miscellaneous Appeal 40/2013 before the District Court, Kopergaon. Said appeal has been allowed by the District Court under judgment and order dated 25/08/2014.

4. Mr. Mane, learned counsel vehemently submits that the movement purporting to invoke Order IX, Rule 13 of the Code of Civil Procedure would not be available to be prosecuted by the applicant/defendant, having regard to that the rule, as may be available for the decrees passed ex-parte. In the present case, he contends that the applicant/defendant pursuant to suit summons had not

only appeared, but had filed Written Statement, issues were framed and evidence was being led. However, with a view to prolong the matter, the defendant had been incessantly seeking adjournments in the matter. He contends that in the circumstances the decree passed would not be an ex-parte decree and the proceeding purporting to be of the nature under Order IX, Rule 13 of the Code of Civil Procedure, would not be possible. He further contends that on merits of the application, the trial court, in the face of admissions as are appearing in the cross examination, dismissed it. He submits it was the contention of the respondent/defendant that he had been ill and would adduce the evidence of Doctor, however, he had not only failed to lend credence to his submissions by producing any evidence but also there had been failure even to produce Doctor before the court.

5. According to him, the appellate court, however has cursorily reversed the decision of the trial court by its order in Miscellaneous Application No. 13/2008, without application of mind to the contentions of the applicant/plaintiff in respect of the cross examination of the respondent/defendant. He submits that the appellate court appears to have gone on equities more

rather than the reasons given and the provisions applicable. He, therefore, submits that the order dated 25/08/2014 passed in Miscellaneous Appeal No. 40/2013 be set aside and order of the trial court dated 04/07/2013 be restored.

6. Mr. Mandlik, learned counsel for the respondent submits that the appellate court had taken over-all view of the matter and has aptly adjudged the same. He submits that the contention of the respondent/defendant that him being indisposed could not be met with by the applicant/plaintiff and did not prove his version respondent being not indisposed by placing any material on record. He submits that even otherwise by deliberately non causing appearance any benefit can be said to have been derived looking at the contention of the other side that the matter has been stretched far to long by seeking adjournments. The respondent was hardly to gain any advantage. He submits that more than couple remedies would be available for the defendant against the decree passed by the trial court. He opted to prosecute remedy pursuant to Order IX, Rule 13 of the Code of Civil Procedure, since it provides that in the case where the defendant is in a position to show that he has been

prevented from appearing before the court while the suit was called on by sufficient reason, the decree is liable to be set aside. He submits that the appreciation of the evidence as has been made by the appellate court in respect of the evidence adduced by him has been proper and apt. Learned counsel goes on to submit that going by the tenor of the cross examination, it would emerge appreciation by the trial court, has been mis-placed and deflected. He submits that the evidence by him in the examination-in-chief about him being indisposed can hardly be said to have been dislodged in his cross examination by the plaintiff. In-fact, he had never stated that he had been ailing from Jaundice. Without considering it, he submits that, it is not appropriate by trial court to consider that he was not ill. He, therefore, submits that taking over-all view of the matter, the appellate court has approached the proceedings as would be required and as such the order impugned does not deserve to be interfered with. He further points out that the appeal has been allowed subject to costs of ₹ 2,000/- [Rupees Two Thousand] as also ₹ 350/- [Rupees Three Hundred Fifty] as imposed in the Suit.

7. Having regard to aforesaid submissions, it appears that the trial court had rather cursorily appreciated the evidence adduced on behalf of the defendant/respondent. It appears that rather than the reason given for non appearance on the concerned date, the court had been overwhelmed by the earlier adjournments on behalf of the defendant. It further appears that what would be germane to consider in the matter is as to whether there had been sufficient reason for the party when suit had been called on, which had prevented him from appearance. It appears that the evidence would generally show that there has been sufficient reason pur-forth by the defendant explaining his non appearance when the suit had been called on. The appellate court, in the circumstances, appears to have approached the matter accordingly. It had observed that there are no circumstances which are placed before the court to disbelieve the version of the defendant. The District Court has also referred to the decisions relied on by the plaintiff and had considered that those have been with reference to the facts in that case. In the circumstances, the decision rendered by the appellate court does not appear amenable for interception.

8. Since the matter has been delayed for quite a long time, the circumstances may warrant alteration in the imposition of the costs by the District Court. As such, the Civil Revision Application is considered only to the extent of enhancement in the costs awarded by the District Court. Miscellaneous Appeal No. 40/2013 filed by the defendant/respondent, in the circumstances, stands allowed with the modification that costs as imposed by the appellate court would stand enhanced to ₹ 5,000/- [Rupees Five Thousand] apart from ₹ 350/- [Rupees Three Hundred Fifty] payable by way of costs by the defendant/respondent as per trial court's order. In view of modification in respect of costs imposed by the District Court, Civil Revision Application stands partly allowed to that extent. Rest of the Revision, however, stands rejected.

9. Having regard to long pendency of the suit, it would be expedient that the suit, from the stage at which it had reached up to 08/01/2008, should be taken forward and should be disposed of as early as possible and preferably within four months from date of receipt of the order. The enhanced costs would be paid within two

months of the receipt of this order.

[SUNIL P. DESHMUKH, J.]

KNP/C.R.A. 160.2014 - [J]