

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

WRIT PETITION NO. 9229 OF 2016

Shri Shivprakash Dwarkaprasad
Pardeshi

..Petitioner.

Vs

Smt. Tarkeshwari Rajpal yadav,
through L. Rs Rajpal M. Yadav
and Ors.

.. Respondents

Mr. S.D. Patil, Advocate for Petitioner.

Mr. Vinay K. Bajpai, Advocate for Respondent no.1.

Mr.Sachin Kankal, A.G.P for Respondent no.3.

**CORAM : R.G.KETKAR,J.
DATE : 02/02/2017**

PC:

1. Heard Mr. S.D. Patil, learned counsel for the petitioner, Mr. Vinay Bajpai, learned counsel for respondent no.1 and Mr.Sachin Kankal, learned A.G.P for respondent no. 3 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff', has challenged the Judgment and order dated 11.3.2014 passed by the learned 5th Jt. Civil judge, Senior Division, Pune in Misc. Application No.1224 of 2013. By that order, the learned trial Judge allowed the application and set aside exparte decree dated 11.4.2012 only against defendant no.1A passed in Special Civil Suit No.1406 of 1990.

3. In support of this petition, Mr. Patil submitted that the application filed by respondent no.1 itself was not maintainable,

as basically the decree was not passed ex-parte. He submitted that the decree was passed under Order VIII, Rule 10 of C.P.C. Respondent no.1, therefore, should have filed substantive appeal against that decree. The application made by respondent no.1 under Order IX, Rule 13 of C.P.C. is not maintainable.

4. He further submitted that assuming for the sake of argument without conceding that the decree was passed exparte and the application under Order IX, Rule 13 is maintainable, nonetheless, no case is made out for allowing the application. He submitted that the suit was instituted in the year 1990. During the pendency of the suit, original defendant Rajpal Yadav died on 13.1.2002. His Legal Representatives, being respondent no.1 and her son Umesh, were brought on record. They were represented by Advocate. During the pendency of the suit, son of respondent no.1 also expired on 18.10.2007. He submitted that the exparte decree was passed on 11.4.2012. As respondent no.1 was represented by Advocate, there is no explanation as to what steps she had taken between 2007 and 2012 when the exparte decree was passed. As no explanation is given for this period, the learned trial Judge was not justified in allowing the application.

5. On the other hand, Mr. Bajpai supported the impugned order. He submitted that defendant no.1 had filed written statement. Though defendant no.2 was served, he did not file written statement. Defendant no.1 did not cross examine the

plaintiff's witness. He submitted that basically the decree was exparte and, therefore, the application under Order IX, Rule 13 is maintainable.

6. As far as merits are concerned, he submitted that the plaintiffs have filed first affidavit of examination-in-chief at Exhibit-97 on 8.4.2004. The plaintiff did not take any steps thereafter till filing of second affidavit of examination-in-chief on 27.1.2012 at Exhibit-130. On the second affidavit, no cross order was passed on 15.2.2012 and exparte decree was passed on 11.4.2012. He submitted that the plaintiff himself waited for more than 22 years for filing second affidavit. Having regard to the developments that took place pending the suit as also having regard to the fact that the case made out by respondent no. 1 was not contradicted during her cross examination, he submitted that no case is made out for interfering with the impugned order. He also invited my attention to paragraph 9 of the impugned order. In that paragraph, the learned trial Judge referred to plaintiff's cross examination in paragraph 3 where he admitted that the suit was not prosecuted from 8.4.2004 to 27.4.2012. For all these reasons, he submitted that the petition deserves to be dismissed.

7. I have considered the submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Following facts are not in dispute:

1. Plaintiff has instituted suit on 29.11.1990. During the pendency of the suit, original defendant Rajpal died on 13.1.2002. His legal representatives, namely, respondent no.1 and her son Umesh were brought on record. The plaintiff had filed first claim affidavit on 8.4.2004 at exhibit 97.

2. Umesh, son of respondent no.1, died on 18.10.2007.

3. The plaintiff filed second affidavit on 27.1.2012 at Exhibit 130.

4. No cross order was passed on 15.2.2012 and the suit was decreed on 11.4.2012.

8. Perusal of the trial Court's order dated 11.4.2012 shows that defendant no.1 filed written statement. Defendant no.2 did not file written statement and the suit proceeded without written statement. Though defendant no.1 filed written statement, defendant no.1A and 1B, viz. Respondent no.1 and her son, as also defendant no.2 did not cross examine the plaintiff on his affidavit of examination-in-chief at Exh.97. As far as second affidavit of examination-in-chief filed on 27.1.2012 is concerned, no cross order was passed on 15.2.2012 and immediately thereafter decree was passed on 11.4.2012.

9. In my opinion, the submission of Mr Patil that it was decreed under Order VIII, Rule 10 of C.P.C. is concerned, I do not find any merit in this submission. The learned trial Judge has rightly held that the decree that was passed against the

defendant was exparte and the application under Order IX, Rule 13 of C.P.C is maintainable.

10. Having regard to the fact that the plaintiff himself was idolent in prosecuting the suit as he filed second affidavit after 22 years, viz. 27.1.2012, and also further due regard to the fact that while considering the application for condonation of delay the plaintiff himself admitted in paragraph 3 of the cross examination, that he did not pursue the suit from 8.4.2002 to 22.4.2012, I do not find that the learned trial Judge has committed any error in allowing the application. It is not in dispute that during pendency of the suit, respondent no.1 lost her husband as also her son.

11. In view thereof, in my opinion, this is not a fit case for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. Liberty is reserved to the plaintiff to apply for disposing of the suit in time bound manner. If such application is made, the learned trial Judge will pass appropriate order thereon. Order accordingly.

(R.G.KETKAR, J.)