

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

908 WRIT PETITION NO. 1439 OF 2018

NILABAI ALIAS LILABAI SOPANRAO BHISE

VERSUS

BABASAHEB BHAGWANRAO JARANGE

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Mr. V.M.Maney, Advocate for Petitioner.

Mr. N.K.Kakade, Advocate for Respondent.

Mr. V.S.Badakh, A.G.P.

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CORAM : V.L.ACHLIYA, J.

DATE : 27th APRIL, 2018

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ORAL ORDER :

1. The petitioner/original defendant has preferred this petition challenging the order dated 29/04/2017 passed by Civil Judge [J.D.], Paithan in MARJI No. 41/2011 and confirmed in Misc. Civil Appeal No. 101/2017 passed by District Judge - 13, Aurangabad. By the order dated 29/04/2017, trial Court has rejected the application moved under Order IX Rule 13 of C.P.C. to set aside the ex-parte Judgment and order passed in favour of respondent/defendant. The

petitioner/defendant preferred Appeal against said order before the District Court, Aurangabad which in turn dismissed Appeal and confirmed the order passed by the trial Court. Being aggrieved the petitioner – defendant has preferred this petition.

2. Heard learned counsel for the petitioner/original defendant and respondent/original plaintiff. Perused the orders passed by both the Courts below.

3. Before proceeding to appreciate the submissions advanced, it is useful to refer few facts leading to filing of the petition. The petitioner – defendant claims to be owner and in possession of land bearing G.No. 160 [subsequently numbered as G.No. 160/1] admeasuring 1 H. 47 R. situated at village Changetpuri, Taluka Paithan District Aurangabad [hereinafter referred to as 'suit land']. The respondent – plaintiff filed R.C.S. No. 259/2009 in the Court of Civil Judge [J.D.], Paithan, District Aurangabad seeking possession of the said land. The plaintiff has approached with the case that he has purchased suit land vide registered sale deed dated 27/03/2000 for sale consideration of Rs. 1 Lakh. On execution of sale deed, the petitioner – defendant handed over possession of suit land to the respondent – plaintiff. The mutation entry was also recorded in favour of the respondent – plaintiff. Although he was cultivating the land, the Talathi of the village refused

to record entry in that respect, therefore, he was required to make application before the Tahsildar, Paithan. Since he was not resident of said village and also doing cloth business, the land remain as barren land. In the year 2006, the defendant has illegally taken possession of the said land. The plaintiff requested the defendant to hand over the possession, but she refused. Therefore, the plaintiff has filed Suit seeking possession.

4. The Suit came to be filed in the year 2009. On receipt of the suit summons, the defendant appeared through her Advocate, but failed to file Written Statement. Hence, Suit proceeded 'without W.S.'. Since the defendant failed to appear, the trial Court proceeded with the Suit. By Judgment and Order dated 27/01/2011, the Suit came to be decreed in favour of the respondent – plaintiff. On receipt of information that Suit was decreed ex-parte against the petitioner – defendant, she filed application to set aside ex-parte decree. The application came to be registered as M.A.R.J.I. No. 41/2011. The applicant has putforth explanation that the applicant was ill, therefore, she could not attend the proceeding and file Written Statement. By order dated 29/04/2017, learned Civil Judge [J.D.], Paithan rejected the application. Being aggrieved, the petitioner preferred appeal before the District Court, Aurangabad as Misc. Civil Appeal No. 101/2017. By Judgment and Order

dated 20/11/2017, the appellate Court has rejected the Appeal. Being aggrieved the petitioner – defendant has preferred this Appeal.

5. Mr. V.M.Maney, learned counsel for the petitioner – defendant assailed the impugned order with contention that the order passed by the trial Court as well as appellate Court are not sustainable in law for the reason both the Courts below have taken hyper technical approach in dealing with application seeking setting aside the ex-parte decree. It is contended that the petitioner being poor and illeterate woman from the village back-ground, unaware of the legal procedure, the Court should have taken liberal approach in deciding the application. It is pointed out that application seeking setting aside the decree was filed immediately after she got knowledge of passing of decree in favour of the respondent. While considering the application seeking condonation of delay, the Court has taken into consideration the overall facts of the case, the illeteracy of the petitioner and cause assigned for condoning the delay. Although the liberal approach was adopted at the time of condoning the delay, the same Court has taken hyper technical approach while dealing with the application to set aside the ex-parte decree. It is contended that the petitioner has assigned sufficient cause to set aside the order. The trial Court as well as appellate Court have not properly appreciated the

cause assigned for setting aside ex-parte decree. By referring the facts of the case, learned counsel submits that though the plaintiff claims that sale deed was executed in the year 2000 and put in possession, the Suit seeking possession of the suit land has been filed in the year 2009 i.e. after the period of 9 – 10 years, which itself support the case of the petitioner. That the sale deed was executed as security for the loan advanced to the petitioner and no such transaction of sale has taken place. It is contended that though the petitioner has repaid the loan amount, the respondent – plaintiff has filed false Suit seeking possession of suit land on the basis of sham and bogus document of sale deed got executed as a security for the loan advanced to the petitioner. It is contended that the mutation entry as well as the crop statement stands in the name of petitioner. In this back-ground, learned counsel urge to set aside the impugned orders so as to allow the petitioner to resist the claim of the plaintiff on merit. In case the impugned orders are not set aside, it will result into serious mis-carriage of justice to petitioner. He submits that the land is irrigated land admeasuring about 1 H. and 4 r. It is contended that if ex-parte decree is set aside, no serious prejudice would cause to the respondent – plaintiff.

6. On the other hand, learned counsel representing the respondent – plaintiff supported the

orders passed by both the Courts below and submitted that there is absolutely no perversity to interfere with the orders passed by both the Courts below. It is contended that the petitioner was duly served with the suit summons and she engaged the services of Mr. S.L.Bhagwat, Advocate who in turn has recorded his appearance in the case. It is contended that though the petitioner claimed that due to illness she could not attend the Court, she has not produced a single document to support her contention. In the cross examination, the petitioner has admitted that the transportation facility is available from her village Changetpuri to reach Paithan. She has also admitted that her real brother is serving as Professor. In the light of material brought through the cross examination of the petitioner, learned counsel submits the reasons assigned to set aside the ex-parte decree are proved to be concocted and by way of after-thought. The defendant failed to file Written Statement, though the case was repeatedly adjourned by the trial Court. Ultimately trial Court proceeded with the case and pass the Judgment and order. In this back-ground, learned counsel submits that petition is devoid of merit and substance therein and liable to be dismissed.

7. On due consideration of the submissions advanced in the light of overall facts of the case, I am

of the view the trial Court as well as appellate Court have adopted hyper technical approach in dealing with the application to set aside ex-parte decree. It is apparent from the face of record that the petitioner is widow and coming from village back-ground. It is the case of the petitioner that the sale deed, as claimed by the respondent – plaintiff is a nominal document got executed as a security towards repayment of loan which the petitioner has secured from the respondent. The respondent is not resident of same village. He is shown to be resident of village Matoli, Taluka Shiruru, District Beed which is adjoining district. The respondent – plaintiff has stated in the plaint that respondent is resident of another village and also doing cloth business. He has also stated that he was not native of same village he could not cultivate suit land and, therefore, the land remain barren. He has also admitted that the crops statements are not in his name. Although the respondent claim that the possession was delivered immediately after the execution of the sale deed I.e.27/03/2000, the suit in respect of possession of the suit land came to be filed in the year 2009 which prima facie indicate that the possession of the suit land continued with the petitioner – defendant. The crop statements of the land also support the case of the petitioner that the possession of the land was never handed over to the plaintiff and the same was continued with her.

8. As per the case set up by the plaintiff the possession of the land was forcibly taken by the petitioner in the year 2006. The Suit came to be filed in the year 2009. Thus, the conduct of the plaintiff raises some doubt as to overall case of the respondent – plaintiff. In this back-ground, I am of the view there is a case in favour of the petitioner – defendant which needs to be decided on merit. If ex-parte decree is set aside and defendant is granted liberty to file Written Statement and the case is decided on merit, no serious prejudice would cause to the respondent – plaintiff as ultimately the case will be decided on its own merit.

9. Perusal of the order passed by the trial Court as well as appellate Court, reflects that both the Courts below have taken hyper technical approach in dealing with the application seeking setting aside the ex-parte decree. While dealing with the procedural matters like setting aside order to proceed 'without W.S.', condonation of delay, setting aside ex-parte Judgment and decree, etc., the Courts are expected to adopt liberal approach and endeavor should be made to decide the case on merit. In deciding such applications, the microscopic examination of the reasons and evidence, is not expected. The Court is expected to adopt broad and pragmatic approach. The provisions of C.P.C. being procedural in nature, same are to be interpreted in the manner to decide

the case on merit than on technical ground. Only for the reason the petitioner has not produced the document of medical treatment which she has undergone, inference can not be drawn that the reason putforth by her as false and concocted. So also the reason assigned by the trial Court that one of the brother of the petitioner is working as Professor is also not sufficient to turn down cause assigned by the petitioner in support of her application to set aside ex-parte decree. The fact that the petitioner being illeterate and poor woman, residing in a remote village and unaware of niceties of law, it is sufficient to consider the case for setting aside ex-parte decree and to decide the case on merit. While dealing with such application, the Courts are expected to keep in mind the ground realities and must take pragmatic approach. The reasons and findings recorded by the Courts below are too technical and unsustainable in the facts and circumstances of the case. In my view, the orders passed are perverse. Trial Court has refused to exercise the jurisdiction vested in it in favour of the petitioner to set aside ex-parte decree and to decide the case on merit by allowing the petitioner to file Written Statement.

10. It is quite settled that code of Civil Procedure is a procedural law and same is designed to facilitate justice and further its ends and not a penal enactment for punishment and penalties. In this

context, it is useful to refer the decision of Full Bench of this Court in the case of ***Hemendra Rasiklal Ghai Vs. Subodh Mody reported in 2008 (6) Mh.L.J. 886*** wherein the Court has observed in paragraph Nos. 52 and 53 as under :

" 52. The Code of Civil Procedure is a procedural law. It is "procedure", something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties; not a thing designed to trip people up too technical a construction of section that leaves no room for reasonable elasticity of interpretation should there be guarded against (provided always that justice is to "both" sides) lest the very means designed for the furtherance of justice be used to frustrate it.

53. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In

an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the Civil Procedure Code or any other procedural enactment ought not to be construed in manner which would leave the Court helpless to meet extraordinary situations in the ends of justice. "

11. In view of the conclusion to which arrived at that the Courts below have taken hyper technical approach in rejecting the application seeking ex-parte decree and refused to exercise the jurisdiction vested with the Court in favour of the petitioner, I am of the view the impugned orders deserve to be set aside. If the case is decided on merit, no serious prejudice would cause to the respondent - plaintiff. On the contrary, if the orders are not set aside, there is every likelihood that serious miscarriage of justice may cause to the petitioner. The inconvenience caused to the respondent – plaintiff can be compensated in terms of money. I am, therefore, inclined to allow the petition subject to cost of Rs. 25,000/- [Rupees Twenty Five Thousand] to be paid by the petitioner to the respondent. Accordingly, the petition is allowed in

terms of prayer clause 'c'. The impugned orders passed by the Courts below are set aside. The application filed by the applicant as M.A.R.J.I. No. 41/2011 is allowed. The ex-parte decree passed against the petitioner is set aside. The case is remanded back to the trial Court to decide the fresh by granting liberty to the petitioner to file Written Statement. The case to proceed from the stage of filing Written Statement. The parties are directed to appear before the trial Court on 27/06/2018. The cost be deposited in trial Court on and before 27/06/2018. Deposit of cost shall be condition precedent to file Written Statement.

12. Trial Court is directed to decide the case on merit as expeditiously as possible and preferably within six months from the date given for appearance of the parties.

13. It is clarified that the observations made as above are made for the limited purpose for deciding this petition and same shall not be construed as observations made as to the merit of the matter. Trial Court shall decide the case on its own merit without influence of observations made by this Court in the course of disposal of the case.

14. The petition stands disposed of in above terms with cost of Rs. 5,000/- [Rupees Five Thousand] to be

paid by the petitioner to the respondent as cost of this petition.

[V.L.ACHLIYA, J.]

KNP/W.P. 1439.2018