

IN THE HIGH COURT OF BOMBAY AT GOA.

Civil Application(Review) No.7 of 2018.

IN

WRIT PETITION NO.83 of 2013.

Minguel Caetano Lobo (Dec)
Through his Lrs.,
Rep. By POA Xavier Lobo.

.... Applicants.

Versus

Luis Rudolf Fialho (Deceased
through Lrs.)

.... Respondents.

Shri R. J. Pinto, Advocate for the Applicant.

Mr. E. Dias, Advocate for the Respondent nos.1 to 6.

Coram:-PRITHVIRAJ K. CHAVAN,J.

Reserved on:12th April, 2018.

Pronounced on:-23rd April,2018.

ORDER:

The applicants/original petitioners sought review of the Judgment of this Court dated 8.2.2018 by which Writ Petition No.83 of 2013 came to be dismissed.

2. On the date of dismissal of the Writ Petition a request was made by the learned Counsel for the Petitioners for extending the stay of Execution Application no.18/2008/B pending on the file of Civil Judge Senior Division, Mapusa, as the petitioners seek to challenge the order before the Supreme Court. This Court,

therefore, extended the stay to the execution for a period of seven weeks. However, instead of approaching the Supreme Court, a review is sought.

3. Be that as it may. I heard Shri R. Pinto, learned Counsel for the applicants/petitioners as well as Shri E. Dias, learned Counsel for the respondents. As a matter of fact despite making it clear to the learned Counsel for the petitioners that the scope of review as per Order 47 of CPC is very limited in the sense that unless there is discovery of new and important evidence which after exercise of due diligence was not within their knowledge or could not be produced by the petitioners or if there is some error apparent on the face of the record, review cannot be permitted, the learned Counsel re-argued the case and tried to bring forth the material on record about which the arguments had already been heard by me.

4. It is evident from the review application itself that the applicants have tried to expand the scope of review which is not permitted in law.

5. The jurisdiction and the scope of this Court under Article 227 of the Constitution of India has been settled by a catena of decisions which need not be reiterated again while

entertaining review application. The learned Counsel for the applicants however placed reliance upon Judgment of Hon'ble Supreme Court in the case of ***Baby Vs Travancore Devaswom Board and Ors. reported in 1998(8) SCC 310.***

6. It is argued by the learned Counsel for the applicants that the applicants and their attorney were lay persons who were not conversant with the procedural aspect of law and acted in bonafide belief of their Advocate by keeping blind faith and took his advice that the proceedings has come to an end after passing the order dated 30.11.2001. It is argued by the learned Counsel that the Advocate on record did not appear in the matter thereafter and pursuant to the advice given by the Advocate the power of attorney also did not appear believing that the matter has come to an end which was in fact ill-advice given by their Advocate. That being so, what action has been initiated against the so called erring Advocate is not clear. Even otherwise, such stand is unacceptable and untenable in the light of the fact that original matter was never "Ex-parte" in the trial Court for which the learned Counsel for the Respondents rightly placed reliance on the judgment of this Court in the case of ***Himachal Pradesh Co-operative Marketing and Development Federation Limited Vs M/s MAFCO Limited, 1994(4) ALL MR 516,*** the relevant paragraphs 10 and 11 can be quoted for advantage which reads thus:-

“10. It is evident from the reading of the judgment that the learned IVth Joint Civil Judge, Senior Division, Pune, had taken into consideration the contentions raised by the defendants/petitioners in their Written Statement. The learned Judge then framed issues and after examining the plaintiff's witness Mr. K. V. Patil and after discussing the contentions raised by the defendants in their written statement, gave finding against each and every issue and then decreed the suit on merits. In my opinion, therefore, the said judgment is a judgment given on merits of the case and it cannot be said that the decree was passed ex-parte.

11. The same situation can be visualized from another angle. After the Examination-in-Chief of the plaintiffs' witness is over, the defendant may decline to cross-examine the plaintiffs' witness. He also may choose not to enter the Witness Box or to examine any other witness on his behalf. He might be present in the Court but still might opt to do either of these things. In such a situation, can it be said that the judgment and decree passed by the Court in such circumstances, is an ex-parte decree” in my opinion, the answer will have to be given in the negative. The judgment, under these circumstances, will be a judgment on merits and the

decree cannot be called an ex-parte decree. Any application, therefore, under Order 9 Rule 13 of the Code of Civil Procedure, 1908, will not lie to set aside such a decree. For that purpose, a regular substantive appeal will have to be filed.”

7. As far as the scope and ambit of Order IX Rule 13 of CPC is concerned, the learned Counsel for the Respondents pressed into service ruling of the Supreme Court in the case of ***Parimal Vs. Veena @ Bharti reported in 2001(1) Supreme 731***, the relevant paragraphs are G, 7,8 and 9.

(G) The respondent, after the expiry of 4 years of the passing of the ex-parte decree of divorce dated 28.11.1989, moved an application dated 17.12.1993 for setting aside the same basically on the grounds that ex-parte decree had been obtained by fraud and collusion with the postman etc., to get the report of refusal and on the ground that she had not been served notice even by substituted service and also on the ground that even subsequent to obtaining decree of divorce the appellant did not disclose the fact of grant of divorce to her during the proceedings of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) The said 3 application under Order IX, Rule 13 CPC was also accompanied by an application under Section 5 of the Indian Limitation Act, 1963, for condonation of delay.

7. Order IX, R.13 CPC:

The aforesaid provisions read as under:

"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;

xx xx xx

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 plaintiff's claim.

xx xx xx"

(Emphasis added)

8. *It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the Court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.*

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the

court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

9. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: [Ramlal & Ors. v. Rewa Coalfields Ltd.](#), AIR 1962 SC 361; [Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr.](#), AIR 1968 SC 222; [Surinder Singh Sibia v. Vijay Kumar Sood](#), AIR 1992 SC 1540; and [Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another](#), (2010) 5 SCC 459)

8. On behalf of the respondents an affidavit of Mr.

Desmond Desiderio Fialho has been filed. It is stated in the affidavit in reply that under the pretext of review it is apparent from the tenor of the application that the applicants wants to re-argue the matter which is not permissible in law. It is contended that after filing the Written statement by the applicants the issue of jurisdiction was also raised and, therefore, there was no question of filing application under Order IX Rule 13 of CPC. It is contended that after due service upon the applicants they appeared before the trial Court and have filed written statement and also reply to the application for injunction which came to be dismissed. The applicants, thereafter did not take part in the proceedings.

9. It is further stated in the affidavit that decree includes payment of money as mense profits which are granted @ ₹10,000/- per month from 1983 till December, 2017 which works out to 35 years amounting to ₹42,00,000/- It is contended that the applicants did not file regular appeal deliberately as they would have to deposit the amount and therefore, they opted for channel of Order IX Rule 13 malafidely to circumvent the payment/deposit of decreetal amount. The respondents, therefore, prayed for rejection of the review application.

10. There can be no quarrel as regards the power of the High Court under Article 227 of the Constitution of India to quash

the orders passed by the Tribunal, if the findings on fact are arrived at by non consideration of the relevant and material documents, consideration of which could have led to opposite conclusion.

11. I have already discussed the scope of Article 227. There was absolutely no reason to exercise extra ordinary jurisdiction to interfere with the impugned order of the trial Court. Neither there was flagrant abuse of fundamental principles of law and justice nor the trial court had exceeded in its jurisdiction. I, therefore, find no substance in the review application which needs to be rejected. Hence, it stands rejected with no order as to costs.

PRITHVIRAJ K. CHAVAN,J.

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