

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

WRIT PETITION NO.10876 OF 2015

Mohan Shankarrao Deshmukh	.. Petitioner
Vs.	
Salim Abbas Khatib	.. Respondent

Mr.Anant Vadgaonkar for the petitioner.

Mr.Rupesh Lanjekar i/by Mr.Murlidhar Patil for the respondent.

CORAM : R.D. DHANUKA, J.

DATE : 5th September 2018

P.C.:

1. By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 13th July 2015 passed by the learned Civil Judge, Junior Division, Atpadi in Regular Civil Suit No.184 of 2012 thereby allowing the application filed by the respondent (original defendant) under Order IX Rule 7 of the Code of Civil Procedure, 1908 (for short “the said Code”) and setting aside the order dated 7th January 2015 by which the learned trial Judge had directed to proceed with the suit ex parte against the original defendant.

2. Learned counsel for the petitioner invited my attention to the roznama in the said civil suit filed by his client against the defendant and would submit that the trial Court was satisfied that the defendant had

been duly served within the writ of summons. In spite of service of writ of summons, no written statement was filed with the time prescribed and thus the order was rightly passed for proceeding with the suit *ex parte* against the defendant on 7th January 2014. He submits that the matter thereafter appeared before the trial Court on several dates. On 18th February 2015, the petitioner (original plaintiff) filed affidavit of evidence. The defendant did not appear even at that stage. The matter thereafter appeared on 9th March 2015. On that date, the learned trial Court heard the arguments of the petitioner and rejected the application for adjournment at that stage filed by the defendant and adjourned the matter for pronouncement of judgment. However, on 4th April 2015, the learned trial Judge was on leave and thus the judgment could not be pronounced.

3. On 10th April 2015, the respondent (original defendant) filed an application under Order IX Rule 7 of the said Code *inter alia* praying for setting aside the order dated 7th January 2015 directing to proceed the suit *ex parte* against the defendant. The learned trial Judge heard the said application filed by the defendant and passed an order recalling the order dated 7th January 2015 on the ground that though there was an inordinate delay in filing of the application under Order IX Rule 7 of

the said Code by the defendant and no proper reasons were given with a view to decide the matter on merit and to give equal opportunity to both the sides, the application filed by the defendant was allowed on payment of cost of Rs.300/-.

4. Learned counsel for the petitioner invited my attention to the roznama and more particularly an order dated 7th January 2015 and would submit that since the arguments were already concluded by his client before the learned trial Judge on 9th March 2015 and the matter was adjourned for pronouncement of judgment, the defendant could not have filed any application under Order IX Rule 7 of the said Code for the purpose of recalling the order dated 7th January 2015. In support of this submission, the learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Arjun Singh Vs. Mohindra Kumar & Ors., AIR 1964 SC 993** and in particular paragraph 17 thereof.

5. It is submitted by the learned counsel that the application, if any, under Order IX Rule 7 of the said Code ought to have been made before conclusion of the arguments of the petitioner and not thereafter. Learned counsel for the petitioner then submits that the remedy, if any, of

the defendant would not be to file an application for setting aside the ex parte decree if passed against the petitioner under Order IX Rule 13 of the said Code.

6. Learned counsel appearing for the original defendant, on the other hand, submits that the writ of summons was duly served as contemplated under Order V Rule 17 of the said Code. No report was submitted by bailiff showing that the copy of summons was affixed on the door of the defendant and thus the defendant was justified in filing the application under Order IX Rule 7 of the said Code.

7. It is submitted by the learned counsel that on 9th March 2015, the defendant had appeared before the trial Court and applied for adjournment which application was rejected. Before judgment was pronounced, the application was already made by the defendant on 10th April 2015. Learned counsel placed reliance on paragraph 14 of the judgment of the Supreme Court in the case of **Arjun Singh Vs. Mohindra Kumar & Ors. (supra)** and would submit that since in the said judgment before the Supreme Court relied upon by the learned counsel for the petitioner, writ of summons were duly served, the Hon'ble Supreme Court took a view that after effecting the service, an application

under Order IX Rule 7 was not maintainable after closing of arguments whereas in this case, writ of summons was not served upon the defendant.

8. It is lastly submitted by the learned counsel that the defendant had already filed written statement pursuant to the order passed by the learned trial Judge and thus at this stage, this Court shall not interfere in the impugned order dated 13th July 2015.

9. A perusal of the record clearly indicates that on 18th February 2015, the petitioner had already filed affidavit of evidence and had made an application that the matter may be closed for pronouncement of judgment. On 9th March 2015, the argument of the petitioner was heard by the learned trial Judge. On 9th March 2015, the defendant had appeared through his advocate before the learned trial Judge and appears to have applied for adjournment. Learned trial Judge after hearing the argument of the petitioner, closed the argument and directed that the matter be placed for pronouncement of judgment. On 4th April 2015, the learned trial Judge was on leave and thus the judgment could not be pronounced. On 10th April 2015, the defendant had made an application under under Order IX Rule 7 of the said Code inter alia praying for setting aside the order dated 7th January 2015.

10. A perusal of the record referred to aforesaid clearly indicates that the arguments of the petitioner were already concluded on 9th March 2015 and the matter was directed to be placed for pronouncement of judgment. It is clear that the defendant did not apply for setting aside the order dated 7th January 2015 passed by the trial Court before conclusion of the arguments of the petitioner.

11. The Hon'ble Supreme Court in the case of **Arjun Singh Vs. Mohindra Kumar & Ors. (supra)** has considered under Order IX Rule 7 of the said Code in great detail and has held that if the entirety of the "hearing" of a suit has been completed and the Court being competent to pronounce judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under Order XX, Rule 1 of the said Code, there is clearly no adjournment of "the hearing" of the suit as there is nothing more to be heard in the suit. It is accordingly held that if the hearing was completed and the suit was not "adjourned for hearing", Order IX, Rule 7 could have no application. At that stage, the only provision would be applicable under Order IX, Rule 13 for making an application for setting aside the ex parte decree.

12. In this case also, the arguments of the petitioner were already concluded on 9th March 2015 and the matter was not adjourned for further argument but for pronouncement of judgment. The principles of law laid down by the Supreme Court in the case of **Arjun Singh Vs. Mohindra Kumar & Ors. (supra)** squarely applies to the facts of this case. I am respectfully bound by the said judgment.

13. In so far as the submission of the learned counsel for the respondent that the defendant was not served with writ of summons as contemplated under Order V Rule 17 is concerned, I do not propose to deal with this issue at this stage. If any application for setting aside the ex parte decree is filed before the learned trial Judge, the learned trial Judge shall consider the said issue at that stage.

14. In my view, since the arguments of the petitioner were already concluded and the matter was adjourned only for pronouncement of judgment, the application under Order IX Rule 7 of the said Code was not maintainable and thus the trial Court could not have allowed the said application merely on the ground that the equal opportunity is required to be given to both the parties for the purpose of deciding the matter on merits. In my view, the order dated 13th July 2015

is ex facie contrary to the principles of law laid down by the Hon'ble Supreme Court in the case of *Arjun Singh Vs. Mohindra Kumar & Ors.* (*supra*) construing the provisions of the Order IX Rule 7 of the said code and is accordingly set aside. Writ petition is allowed in aforesaid terms. Application filed by the respondent under Order IX Rule is dismissed.

15. It is made clear that if any decree is passed in favour of the petitioner by the trial Court, the respondent would be at liberty to make an application under Order IX Rule 13 of the said Code. If any application is filed by the respondent, the learned trial Judge shall decide the said application on its own merits and shall also decide whether the defendant was duly served with writ of summons or not.

R.D. DHANUKA, J.