

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 10579 OF 2018

Late Balkrishna Bhaurao Kakade
(since deceased through L.Rs.)
1A. Smt. Sindhubai Balkrishna Kakade
(since deceased) and others.

...Petitioners

Versus

Jehangir Dinshaw Irani
And another

...Respondents

....

Mr. Abhishk Pungliya, Advocate for the Petitioners.
Mr. S.M. Gorwadkar, Senior Advocate i/b. Gaurav Gangal i/b. Sujay
Hemant Gangal, Advoate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 5th OCTOBER, 2018

P.C.

1. Heard Mr.Abhishek Pungliya, learned Counsel for the petitioners and Mr.S.M. Gorwadkar, learned Senior Counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the judgment and order dated 25.11.2015 passed by the learned 6th Additional Judge, Small Causes Court, Pune in Misc. Application No.83/2014 as also the judgment and order dated 7.9.2018 passed by the learned District Judge-15, Pune in Misc. Civil Appeal

No.500/2015. By these orders, the Courts below dismissed the application made by the defendants under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for setting aside *exparte* decree dated 11.6.2014 passed by the learned 2nd Additional Judge, Small Causes Court at Pune in Civil Suit No.72/2010. By that order, the learned trial Judge decreed the suit instituted by the first respondent, hereinafter referred to as the 'plaintiff', and directed the defendants to handover vacant and peaceful possession of the open plot admeasuring 19500 sq. ft. bearing Survey No.82/A/1, Hissa No.2, Bhavani Peth, Pune, more particular described in paragraph-1 of the plaint (for short, 'suit property') to the plaintiff, amongst other directions.

3. The plaintiff had instituted the suit against the defendants *inter alia* contending that the defendants are the willful defaulters as contemplated by Section 15 and are not using the suit property for more than six months immediately preceding the date of filing of the suit as contemplated by Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). After service of the suit summons, the defendants filed their written statement vide Exhibit-21. During pendency of the suit, defendant No.1A Smt. Sindhubai died. Her L.Rs were brought on record. On the basis of the pleadings of the parties, the learned trial Judge framed issues vide Exhibit 24-A and the parties

proceeded with the trial.

4. It appears that the defendants had filed application on 20.9.2011 under Section 10 of C.P.C. for staying the present suit on the ground that the plaintiff and his three predecessors in title have filed various suits for recovery of possession of the suit property on various grounds. Reference was made to Civil Suit Nos.1640/1985, 648/1994 and 392/2000 filed in the Small Causes Court. By order dated 20.3.2013, the learned trial Judge rejected the application.

5. In support of the plaintiff's claim, the plaintiff Jehangir Irani examined himself as PW-1 at Exhibit-26 and closed his evidence vide pursis Exhibit-52. It appears that despite giving several opportunities to the defendants, they failed to adduce evidence and, therefore, by order dated 10.4.2014 their evidence was closed. The matter was kept for arguments. At the time of arguments, the Counsel for the plaintiff appeared and was heard. Nobody appeared on behalf of the defendants to argue the matter. After considering the evidence on record, by order dated 11.6.2014 the learned trial Judge decreed the suit.

6. The defendants filed application on 14.7.2014 under Order IX Rule 13 of C.P.C. for setting aside *exparte* decree dated 11.6.2014. The plaintiff filed reply at Exhibit-14 denying the assertions made in the application. By order dated 25.11.2015, the learned trial Judge rejected

the application. Aggrieved by this decision, the defendants preferred Misc. Civil Appeal. That appeal was also dismissed on 7.9.2018. It is against these orders, the defendants have instituted present petition.

7. In support of this Petition, Mr. Pungliya strenuously contended that the suit was decreed *exparte* on 11.6.2014 and immediately within the prescribed period the defendants filed application on 14.7.2014 for setting aside the *exparte* decree. He has taken me through the application made by the defendants and submitted that because of the negligence on the part of the Advocates *exparte* decree came to be passed. He submitted that because of negligence of the Advocate, the party should not suffer. In support of his submissions, he relied upon following decisions :

- i. **Rafiq and another Vs. Munshilal and another, AIR 1981 SC 1400;**
- ii. **Savithri Amma Seethamma Vs. Aratha Karthy and others, AIR 1983 SC 318;**
- iii. **Malkiat Singh and another Vs. Joginder Singh and others, AIR 1998 SC 258;**
- iv. **G.P. Srivastava Vs. R.K. Raizada and others, AIR 2000 SC 1221.**

8. Mr. Pungliya submitted that as in the present case, the defendants have immediately approached the Court within the stipulated time specified, the discretion has to be exercised in their

favour. The absence of the defendants is neither malafide nor intentional. The absence of the defendants can be compensated by imposing appropriate costs and the suit may be decided on merits instead on the technical grounds. He, therefore, submitted that the impugned order deserves to be set aside thereby restoring the suit for deciding the same afresh from the stage of adducing evidence.

9. On the other hand, Mr. Gorwadkar supported the impugned orders. He relied upon the decision of Apex Court in the case of **Salil Dutta Vs. T.M. and M.C. Private Limited, (1993) 2 SCC 185.**

10. I have considered the submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier it is not in dispute that the defendants filed written statement at Exhibit-21. On the basis of the pleadings of the parties, the issues were framed vide Exhibit 24-A. In order to prove his case, the plaintiff examined himself as PW-1 at Exhibit-26 and closed his evidence vide pursis Exhibit-52. In paragraph-10, the learned trial Judge observed that inspite of sufficient opportunity given to the defendants, they failed to adduce any evidence.

11. It is in that context material to note that the plaintiff had filed affidavit of evidence on 9.6.2011. The Advocate for the defendants did not cross-examine said witness and was remaining absent consistently

On 27.6.2013, 'no-cross' order was passed against the defendants i.e. to say after rejection of their application under Section 10 of C.P.C. on 20.3.2013. The defendants filed application dated 1.8.2013 for setting aside 'no-cross order'. On 2.12.2013 that application was allowed and 'no-cross' order was set aside. Even thereafter the Advocate for the defendants and the defendants remained absent. On 10.3.2014 again 'no-cross' order was passed against the defendants and their evidence was closed. The matter was kept for arguments. That time also neither the defendants nor their Advocate were present.

12. A perusal of the application filed by the defendants under Order IX Rule 13 of C.P.C. shows that the defendants have blamed Junior Advocate Ms. Hemlata Singh on the ground that she was entrusted with many briefs by her Senior Ranjit Srinivasan, which included the present case also. It was her responsibility to attend the matters and inform her Senior about the stages of the said matters. For the reasons best known to her, Ms. Hemlata Singh did not attend many matters and also did not inform about the stages of the suits. She thereafter abruptly left the chamber of Advocate Ranjit Srinivasan. After Ms. Hemlata Singh left the chambers, the matters were handed over to Ms. Sheetal Dhage. She realized that *ex parte* decree was passed on 11.6.2014, whereupon she immediately informed her Senior.

13. In paragraph-7 of the application, it is contended that due to the above unavoidable and unfortunate incident, the defendants did not remain present when the matter was fixed for hearing. In paragraph-8, it is contended that the defendants were never negligent and they have been defending the suit diligently.

14. The learned trial Judge dealt with this aspect from paragraph-9 onwards. Insofar as the case of the defendants that the matter was entrusted to Junior Advocate Ms. Hemlata Singh is concerned, the learned trial Judge observed that no oral or documentary evidence was adduced. The learned trial Judge also noted that even if the Advocate for the defendants did not remain present, the defendants did not come out with the case that they were present on the dates fixed by the trial Court. In the reply filed by the plaintiff he has given stages of the suit and the opportunities given to the defendants on various occasions. The contentions raised in the reply of the plaintiff were not controverted by the defendants.

15. In paragraph-13, the learned trial Judge referred to the decision in **Malkiat Singh (supra)**. The learned trial Judge discussed this decision in paragraph-14. In paragraph-15, the learned trial Judge recorded that though the party has engaged Advocate at the same time it is the responsibility of the litigant to attend the court proceedings and

has to make enquiries as regards pendency of the case in the Court. In that regard no case is made out as also no material is produced on record. The only ground given in the application was negligence on the part of Junior Advocate.

16. Insofar as the District Court is concerned, this aspect is considered by the learned District Judge from paragraph-8 onwards. In paragraph-11, the learned District Judge noted that the matter was kept for cross-examination of PW-1 on 10.4.2014, 15.4.2014, 9.6.2014 and 11.6.2014. Mr. Pungliya submitted that though the learned District Judge has referred to the decision relied upon by the defendants in paragraph-8, he merely observed that the decisions relied upon by the defendants were in respect of negligence of the Counsel of the party. In short he submitted that the learned District Judge did not satisfactorily deal with the judgments relied upon by the defendants. I do not find any merit in this submission. The learned District Judge observed that the defendants were well aware about the stages of the suit but deliberately failed to appear and cross-examine PW-1. They also failed to file their evidence despite giving opportunity to them. Not only that their Advocate also did not remain present at the time when the suit was fixed for arguments.

17. After perusing the material on record, I do not find that the

Courts below committed any error in passing the impugned orders. Basically no explanation worth the name is given by the defendants as to why they did not make any enquiries with their Advocate as also they did not attend the proceedings after their application for staying the suit was rejected as far back as on 20.3.2013.

18. Mr. Pungliya relied upon the decision **Rafiq** (supra). A perusal of that decision shows that the appellant was not present at the time of hearing of the appeal. It is in that context in paragraph-3, the Apex Court observed that in our present adversary legal system, the parties generally appear through their Advocates, the obligation of the parties is to select his Advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The personal appearance of the party is not only not required but hardly useful at the time of hearing of the appeal.

19. In the case of **Savithri Amma Seethamma** (supra), the Advocate for the appellant before the Apex Court did not remain present when Revision Application was decided by the learned Single Judge of the High Court.

20. Mr. Pungliya also relied upon the decision in **Malkiat Singh's** case (supra). In that case, the Counsel for the defendants reported no instructions. He, however, did not intimate said fact to the defendants

nor the Court issued notice to the defendants.

21. In the case of **G.P. Srivastava** (supra), nephew of the Counsel died in road accident on the date of hearing. The appellant was sick and not in town. In my opinion, none of these decisions advance the case of the defendants.

22. Mr. Gorwadkar relied upon the decision in **Salil Dutta's** case (supra). The Apex Court considered the earlier decision in **Rafiq** (supra) in paragraph-6 and in paragraph-7 it was observed thus:

“7. The question is whether the principle of the said decision comes to the rescue of the defendant respondent herein. Firstly, in the case before us it was not an appeal preferred by an outstation litigant but a suit which was posted for final hearing sever years after the institution of the suit. The defendant is a private limited company having its registered office at Calcutta itself. The persons incharge of the defendant-company are not rustic villagers nor they are innocent illiterates unaware of Court procedures. Prior to the suit coming up for final hearing on 9th June, 1988 the defendant had filed two applications whereupon the Court ordered that they will be considered at the time of the final hearing of the suit. The plaintiff's case no doubt is that the said applications were part of delaying tactics being adopted by the defendant-tenants with a view to protract the suit. Be that as it may, the defendant thereafter refused to appear before the court. According to the defendant, their advocate advised them that until the interlocutory applications filed by them are disposed of, the defendant need not appear before the Court which means that the defendants need not appear at the final hearing of the suit. It may be remembered that the Court proposed to consider the said interlocutory applications at the final hearing of the suit. It is difficult to believe that the defendants

implicitly believed their advocate's advice. Being educated businessmen they would have known that non-participation at the final hearing of the suit would necessarily result in an adverse decision. Indeed we are not prepared to believe that such an advice was in fact tendered by the advocate. No advocate worth his salt would give such advice to his client. Secondly, the several contradictions in his deposition which are pointed out by the Division Bench in the impugned order go to show that the whole story is a later fabrication. The following are the observations made in the Judgment of the Division Bench with respect to the conduct of the said advocate: "we found that the said learned advocate conducted the proceedings in a most improper manner and that his absence on 10th June, 1988 and on subsequent date was not only discourteous but possibly a dereliction of duty to his client...the learned advocate had forgotten his professional duty in not making inquiry to the Court as to what happened on 10th, 11th and 13th June, 1988...the learned advocate acted in a most perfunctory manner in the matter and the learned advocate dealt with the matter in a most unusual manner. We have also found that the said learned advocate had made serious contradiction in the deposition before the court below. The learned advocate in his deposition stated that he did not file an application for adjournment on 9th June, 1988. But from the record it was evident that it was on the basis of the application filed on 9th June, 1988, the case was adjourned for cross-examination of the witnesses whose examination was called on the next date." The above facts stated in the deposition of the advocate show that he indeed made an application for adjournment on the 9th June, 1988 to enable him to cross examine the witnesses on the next date. Therefore, his present stand that he advised his client not to participate in the trial from and including 9th June, 1988 onwards is evidently untrue. We are, therefore, of the opinion that the story set up by the defendant in his application under Order 9 Rule 13 is an after-thought and ought not to have been accepted by the Division Bench in its order dated 3rd March, 1992 - more particularly when it had rejected the very case in its earlier Judgment dated 8.7.1991."

23. In paragraph-8, the Apex Court observed that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in **Rafiq** (supra) must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition.

24. In the present case, some of the defendants are businessmen. During the course of hearing, I have suggested to Mr.Pungliya that if the defendants are ready and willing to hand over possession of the suit property to the plaintiff subject to the plaintiff filing undertaking to the effect that after receipt of possession they will neither create third party interest nor part with the possession and will abide by the outcome of the suit, subject to their right to challenge the order if it is adverse to them, I was inclined to set aside the impugned orders and permit the defendants to cross-examine the plaintiff's witness and also adduce evidence in support of their case. The matter was adjourned so as to

enable Mr. Pungliya to take instructions. Mr. Pungliya submitted that the defendants are not agreeable to this suggestion. In view thereof and for the reasons recorded hereinabove, I do not find that any case is made out for interfering with the impugned orders.

25. The defendants are not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The defendants are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Article 227 of the Constitution of India. Hence, Writ Petition fails and the same is dismissed with no order as to costs.

26. At this stage, Mr. Pungliya orally applies for extension of ad-interim order for a period of four weeks from today. Mr. Pungliya states that the petitioners are in possession and they have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with the possession. He further states that the petitioners and all adult family members residing with them are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

27. Having regard to the fact that petitioners desire to challenge this order before the Apex Court, in my opinion, ends of justice would be met by continuing ad-interim order for a period of four weeks from today subject to the petitioners and all adult members using the suit property giving usual undertaking to this Court within two weeks from today incorporating therein:

- (i) that they are in actual possession of the suit property and nobody else is in possession of the property;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit property;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit property;
- (iv) that they will pay the arrears of rent, if any, to the respondent within two weeks from today; and
- (v) that in case the petitioners are unable to obtain suitable orders within four weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit property to the respondent.

28. In view thereof, notwithstanding dismissal of writ Petition, ad-interim order dated 18.9.2018 shall remain stayed for a period of four weeks from today, subject to the petitioners filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. It is made clear that if the undertaking is not filed or the petitioners commit breach of any of the clauses of the undertaking, ad-interim order shall stand vacated without further reference to the Court. List the Petition for reporting compliance on 24.10.2018. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)