

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.523 OF 2010

1. Shri Sanjay Vithal Porob Dessai
s/o, Vithal Narayan Prabhu Dessai,
aged 50 years,
married, occupation
service and his wife
2. Smt. Vanita Sanjay Prabhu Desai,
Aged 47 years, occupation service
Both residing at Rivona Taluka ... Petitioners

V e r s u s

1. Shri Subray Narayan Prabhu Dessai,
s/o late Shri Narayan Ram Prabhu Desai,
headmaster, aged 57 years,
landlord, married and his wife;
2. Smt. Lalita Subray Prabhu Desai,
Housewife, aged 52 years,
Both residing at Madicotto
Cuncolim, Salcete, Goa.
3. Shri Ranganath R. P. Desai,]
s/o. Late Shri Ramrai Prabhu Desai,]
Aged 58 years, married,]
Agriculturist and his wife;]
]
4. Smt. Indumati alias Indi Ranganath]
P. Desai, aged 55 years, housewife](Deleted as per
Both residing at Voilo wado, Ruivona,]order dated
Rivona of Sanguem Taluka.]21.02.2013)
]
5. Pandharinath Vithal Prabhu Desai]
s/o Vithal Narayan Prabhu Desai]
aged 45 years, married,]
business and his wife;]
6. Smt. Ranjan Pandharinath Prabhu Desai,
Aged 40 years, housewife
Both residing at Shanta Durga Temple,
Colomb of Sanguem Taluka,
Sanguem, Goa. ... Respondents

Coram :- C. V. BHADANG, J.
Reserved for Judgment on: 20th September, 2019
Judgment Pronounced on : 24th September, 2019.

JUDGMENT

1. The challenge in this petition is to the judgment and order dated 30.12.2009 passed by the learned Adhoc District judge at Margao in Misc. Civil Appeal No.19/2009. By the impugned judgment, the learned District Judge while dismissing the appeal filed by the petitioners herein has confirmed the order dated 28.01.2003 passed by the learned Civil Judge, Junior Division, Sanguem in CMA No.3/2007 thereby refusing to set aside an exparte judgment and decree dated 26.04.2007 passed in Regular Civil Suit No.38/1992.

2. The petitioners are the original defendant nos.5 and 6 in the aforesaid suit which was instituted by the respondent nos.1 and 2 in which the present respondent nos.3 to 6 were defendant nos.1 to 4. The respondent nos.3, 4 and 5 (original defendant nos.1, 2 and 3), have since been deleted as having expired during the pendency of the suit). The suit came to be decreed exparte against the petitioners on 26.04.2007. It is a matter of record that the petitioners had appeared in the suit and had engaged the services of Advocate Shri D. R. Duple

and till 20.04.2006, the petitioners were indeed represented by Advocate Mr. D. Katekar along with Mr. D. R. Dukle. However, from 06.07.2006, there was no appearance on behalf of the petitioners in the suit as a result of which it proceeded exparte and subsequently the suit came to be decreed on 26.04.2007.

3. The petitioners filed Civil Misc. Application No.3/07 under Order IX Rule 13 of the Code of Civil Procedure (CPC, for short), for setting aside the exparte judgment and decree on the ground that the petitioner no.1 (defendant no.5) fell ill somewhere in the month of October 2005 on account of a heart ailment and was under treatment and was required to undergo a by-pass surgery and, therefore, could not attend the proceedings in the suit. It was also contended that the Advocate had instructed the petitioners that they will inform whenever their presence is necessary and accordingly the petitioner no.1 would attend the proceedings in the suit whenever instructed by the Advocate. After regaining health, the petitioners inquired with the Advocate about the status of the suit when they were informed to approach the Court and find the status. After this, an inquiry was made in the Court in 01.10.2007 when it was learnt that the suit had already been decreed exparte. The petitioners applied for a certified copy of

the judgment and decree on the same day which was delivered on 04.10.2007 after which the application for setting aside exparte decree came to be filed on 29.10.2007.

4. The application was opposed on behalf of the respondent nos.1 and 2.

5. The learned Trial Court conducted inquiry in the matter in which the petitioner no.1 examined himself as Aw.1. The respondent nos.1 and 2 did not lead any evidence.

6. The learned Trial Court after taking note of the provisions of Order IX Rule 13 of the CPC, came to the conclusion that the petitioners have failed to establish that they were prevented by any sufficient cause from appearing in the suit. In particular, the learned Trial Court has noticed that the petitioner no.1 had joined service after regaining health somewhere in April 2006 and even thereafter failed to attend the hearing in the suit. In that view of the matter, the Court declined to set aside the exparte decree which order has been confirmed in appeal.

7. I have heard Mr. C. A. Coutinho, the learned Counsel for the petitioners. None appears for the respondent nos.1 and 2.

With the assistance of the learned Counsel for the petitioners, I have gone through the record and the order passed by the learned Trial Court as well as the judgment in the appeal.

8. Mr. Coutinho, the learned Counsel for the petitioners, submitted that the petitioner no.1 who was looking after the case was suffering from heart ailment from October 2005 and was required to undergo a by-pass surgery and it was on this count that he was unable to remain personally present in Court. It is submitted that at no point of time, the Advocate appearing for the petitioners, had instructed them to appear in the matter. It is submitted that the Courts below failed to see that the petitioner no.1 was indeed on leave from 06.02.2006 to 06.04.2006 and the certificate exhibit C-8 to that effect was produced on record. It is submitted that the petitioners did not stand to gain by remaining absent and, in the interest of justice, the petitioners ought to be given an opportunity to contest the suit after setting aside the *exparte* judgment and decree.

9. Insofar as the reliance placed by the learned Trial Court on the decision of the Supreme Court in the case of **Salil Dutta vs. T. M. and M. C. Private Ltd. 1993 2 SCC 185** and **Vijaykumar Durgaprasad Gajbi & Ors. vs. Kamlabai &**

Ors. 1995 6 SCC 148, it is submitted that the aforesaid decisions turned on their own facts. It is submitted that the petitioners cannot be made to suffer on account of the lapse on their Advocate to remain present in the suit.

10. I have carefully considered the submissions made on behalf of the petitioners. Order IX Rule 13 of CPC can be read in two parts. The first part refers where the party satisfies the Court that the summons was not duly served, which is not the case presently made out. In the later part, a party requiring the Court to set aside the judgment and decree is obliged to satisfy the Court that it was prevented by any sufficient cause from appearing in the suit. The present case falls in the later part of Order IX Rule 13 of CPC inasmuch as the petitioners were served and had entered appearance in the suit and had also filed written statement and were represented by Advocate Shri Dukle. The record also shows that Advocate Shri Dukle remained present in the suit till 20.04.2006 and thereafter there was no appearance on behalf of the petitioners. The ground in support of the absence is the medical ground of the petitioner no.1 when he said that he was suffering from heart ailment. However, it has come on record that the petitioner no.1, who was serving as a teacher, had joined his service and was attending to his work on and after June 2006 and was

visiting GMC, Bambolim and Victor Apollo Hospital, Margao for follow up treatment. The Trial Court has noted the various dates which were fixed in the suit on which date there was no appearance on behalf of the petitioners. In particular, the Trial Court has noted that there were about 19 hearings in the suit after the petitioner no.1 was discharged from the hospital. The Trial Court has even noted that after the expiry of the leave period of the petitioner no.1, i.e. 06.04.2006, the Advocate for the petitioners was representing them before the Court on 20.04.2006. It is in these circumstances that the Trial Court has refused to accept the medical ground for the absence of the petitioner no.1 which has been confirmed by the learned District Judge. The learned District Judge has considered all the three grounds which have been made out namely, the claim that the Advocate had told the petitioners that they need not appear on the date of hearing and they will be informed whenever required, secondly, about the medical ground of the petitioner no.1 and thirdly that the Advocate having retired without giving them any notice. Insofar as the claim that the Advocate had told the petitioner that they need not appear, the Appellate Court has placed reliance in the decision of the Supreme Court in the case of **Salil Duitta** (supra), wherein a similar contention by an educated litigant was not accepted as a ground for setting aside exparte

judgment and decree. Even so far as the claim that the Advocate had retired without issuing notice, the Appellate Court has noted the decision of the Supreme Court in the case of **Vijaykumar Durgaprasad Gajbi & Ors. vs. Kamlabai & Ors. 1995 6 SCC 148**, to hold that the failure of the Advocate to appear is no ground to set aside the ex parte judgment and decree under Order IX Rule 13 of the Civil Procedure Code.

11. In para 8 of the Judgment in the case of **Salil Dutta** (supra), the Hon'ble Supreme Court has held that although in certain situations, the Court may, in the interest of justice, set side 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.

12. In the present case, although the petitioner was on leave from 06.02.2006 to 06.04.2006, had even thereafter failed to attend the suit which both the Courts have concurrently held to be without sufficient cause. In my considered view, no

interference is called for in the concurrent finding and facts so recorded which is based on the evidence on record.

13. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

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