

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO. 988 OF 2018**

Mrs. Isabel D'Souza,  
Wife of Mr. Jofre D'Souza,  
Aged 51 years, housewife,  
Resident of H No. 153,  
Marna, Noronha Wado,  
Siolim.

..... Petitioner

V e r s u s

1. Shri Mangesh Mishal (since deceased)  
Represented through legal representatives  
a) Mr. Dinesh Mangesh Mishal,  
58 years of age, married,  
businessman and (Lrs a-j) and 2 others  
(amendment carried as per order dtd.  
29/1/2019 & 6/2/2019)

.... Respondents

Adv. Jagannath Jayant Mulgaonkar for the Petitioner.

Mr. S. Usgaonkar, Senior Advocate with Adv. Palyekar Vinita Vishram for  
Respondent no.2

**Coram:- C. V. BHADANG, J.**

**Date:- 11th February 2019.**

**Oral Order:**

By this petition, the petitioner is challenging the judgment and order dated 23/7/2018 passed by the learned District Court in Miscellaneous Civil Appeal No.112/2017. By the impugned judgment, the learned District Judge while dismissing the appeal, has confirmed the order dated 22/8/2017 passed by the learned Senior Civil Judge at Mapusa in Regular Civil Suit no.84/1994

dismissing an application for setting aside ex parte decree, filed by the petitioner.

2. The brief facts are that, the respondent nos.1 and 2 filed Regular Civil Suit no.84/1994 against the third respondent Smt. Henriqueta D'Souza (since deceased) for eviction, possession and for permanent injunction. The petitioner happens to be the daughter -in-law of Henriqueta. In the suit Henriqueta contended that she was residing in the suit house as a mundkar. The learned trial court framed issue no.4 about the mundkarial claim of Henriqueta which was referred to the Mamlatdar. The Mamlatdar by an order dated 31/8/1990 answered the issue in the negative, which order was confirmed by the Administrative Tribunal while dismissing the revision case against the said order on 7/1/2009.

3. It appears that in the meantime, the civil suit which was earlier kept on sine die list (on account of the mundkarial issue being referred to the Mamlatdar) was taken on board and the trial court decreed the suit ex parte against the petitioner and the respondent no.2a on 27/7/2010.

4. On 18/8/2010 the petitioner filed an application under Order IX Rule 13 of CPC for setting aside the ex parte decree which was dismissed by the

trial court on 22/8/2017, which order has been confirmed in appeal. Hence this petition.

5. I have heard Shri Mulgaonkar, the learned counsel for the petitioner and Shri Usgaonkar, the learned Senior Counsel for the respondent nos.1 and 2. Perused record.

6. It is contended by Shri Mulgaonkar, the learned counsel for the petitioner that the petitioner was not aware about the suit being taken on board after the Mamlatdar decided the mundkarial issue on 31/8/1990. It is submitted that the order of the Administrative Tribunal was challenged before this Court and the matter was remanded and after the remand, the Revision application was transferred to the Court of the learned District Judge-I at Panaji (as the concerned Presiding Officer of the Administrative Tribunal was unable to take up the revision application) and was registered as Revision Application no.1/2016. The learned District Judge dismissed the Revision application on 30/4/2016 which order has attained finality for want of any further challenge. It is submitted that during the pendency of none of these proceedings the respondent nos.1 and 2/plaintiffs pointed out that the suit was taken up on board and was being proceeded with. It is submitted that therefore, the petitioner had no knowledge about the fact that the suit was

taken on board after the reference was decided by the Mamlatdar. It is submitted that even assuming that the petitioner had such knowledge, the petitioner as a party cannot be made to suffer on account of the lapse of the advocate. Except these, there are no other contentions raised.

7. Mr. Usgaonkar, the learned Senior Counsel for the respondent nos.1 and 2 has referred to the contents of the application filed by the petitioner under Order IX Rule 13 of C.P.C. , in order to contend that the petitioner was aware that the suit was being proceeded with after the reference was decided by the Mamlatdar. It is submitted that the respondents are trying to execute the decree obtained in the year 2010 in a suit of the year 1994 and the present attempt by the petitioner is only to delay the execution of the decree.

8. I have considered the submissions made. The contention that the petitioner was not aware about the suit being taken up on board and being proceeded with, cannot be accepted. The petitioner cannot be heard to say that the respondent nos.1 and 2 failed to point out that suit was being proceeded with, as it is for the party to be diligent in prosecuting its claim or defendant the suit. That apart, a bare perusal of para 9 of the application filed by the petitioner would show that the suit was kept on sine die list and was taken up for hearing on 27/3/2010. From the further paras of the application

it also appears that the petitioner had delivered a copy of the summons to Advocate Mr. Narulkar with instructions to represent her. It can thus be clearly seen that the petitioner was aware that the suit was taken up on board and was proceeded with, the concerned advocate was representing the petitioner till 13/7/2010.

9. The contention that for the fault of the advocate a party should not be made to suffer also cannot be accepted in the present case in view of the specific recitals in para 17 of the application, that inspite of efforts, Advocate Mr. Narulkar could not succeed in contacting the petitioner in the absence of address or phone number and therefore, had no alternative but to stop appearing in the matter from 13/7/2010 for want of a vakalatnama. It can thus clearly be seen that it was on account of the lapse of the petitioner that the suit was not contested and ultimately was decreed ex parte.

10. The learned District Judge has also held that after the mundkarial issue was answered in favour of the petitioner which order has attained finality there was no defence left in the suit, in view of the fact that the monetary claim for compensation of the respondent nos.1 and 2 has not been granted. Be that as it may, under Order IX Rule 13 of C.P.C., the Court can set aside the ex parte decree if (i) the party concerned satisfies the Court that

the summons was not duly served or that (ii) the party was prevented by any sufficient cause from appearing, when the suit was called on for hearing. Apparently the case made out by the petitioner does fall under the first part. In so far as the second part is concerned, the petitioner has failed to make out a sufficient cause by which she was prevented from appearing in the suit and much to the contrary, the circumstances on record indicate that the petitioner was not at all diligent in defending the suit. Thus no case for interference is made out. The petition is without any merit and is accordingly dismissed with no order as to costs.

11. At this stage Mr. Mulgaonkar, the learned counsel for the petitioner seeks stay of the impugned order. In my considered view an order dismissing the application for setting aside ex parte decree is not an order which is amenable to be stayed. Admittedly no interim relief was operating in favour of the petitioner at any time, right from the date on which the application for setting aside ex parte order was made or even before the appellate court and in the present petition. The respondent is trying to execute a decree obtained in the year 2010 in a suit of the year 1994. Considering the overall circumstances, I find that no case for grant of any interim relief is made out. The prayer accordingly stands rejected.

**C. V. BHADANG, J.**

**ap/-**