

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

**APPEAL NO.364 OF 2019
WITH
NOTICE OF MOTION NO.670 OF 2019
WITH
LEAVE PETITION NO.117 OF 2019
IN
NOTICE OF MOTION NO.2512 OF 2012
IN
SUIT NO.2180 OF 1997**

Hardik Rajendra Panjwani

... Appellant

Vs

Jagdish Vamanrao Rane,
since deceased, through:
Amey Jagdish Rane & ors.

... Respondents

**WITH
APPEAL NO.363 OF 2019
WITH
NOTICE OF MOTION NO.671 OF 2019
WITH
LEAVE PETITION NO.118 OF 2019
IN
NOTICE OF MOTION NO.1429 OF 2013
IN
NOTICE OF MOTION NO.2512 OF 2012
IN
SUIT NO.2180 OF 1997**

Hardik Rajendra Panjwani

... Appellant

Vs

Jagdish Vamanrao Rane,
since deceased, through:
Amey Jagdish Rane & ors.

... Respondents

Mr.Aditya Thakkar with Mr.Deepak Shukla i/b M/s.Vinod Mistry for the Appellant

Mr.Mayur Khandeparkar i/b Mr.Chetan R. for Respondent No.5

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

DATED: AUGUST 27, 2019

P.C.:

1. These Appeals are filed challenging the judgment of the learned Single Judge dated 13.3.2019 in Notice of Motion No.2512 of 2012 filed by the present appellant. By the impugned judgment, the learned Single Judge dismissed the said Notice of Motion, in which the prayer was for setting aside the decree dated 6.7.2009 passed in Suit No.2180 of 1997.

2. The facts are as under:

Respondent No.1 herein was the original plaintiff of the said Suit No.2180 of 1997. He had sought a decree of specific performance of an agreement of sale dated 21.8.1991 in connection with the suit land. The suit came to be decreed by judgment dated 6.7.2009. A perusal of the judgment would show

that it was an ex-parte decree and none of the defendants had appeared before the Court.

3. The case of the present appellant is that he is the minor son of the deceased Rajendra Panjwani, who was a co-owner and one of the signatories in the agreement of sale dated 21.8.1997. Rajendra Panjwani expired on 27.12.1996 leaving behind his widow Aruna Panjwani and the present appellant, Hardik Panjwani, the son who was minor at the relevant time. The appellant would point out that the plaintiff, despite knowing that the deceased had left behind the widow and his minor son as his legal heirs, in the suit that he filed after the death of Rajendra Panjwani, chose to join only his widow, a co-defendant and that too, by making a false declaration that to his knowledge, Rajendra Panjwani had left behind only one legal heir. The appellant when came to know about the passing of the decree, applied to the learned Single Judge by filing appropriate Notice of Motion to set aside the said ex-parte decree. This Motion came to be dismissed by the impugned judgement and hence, this appeal. The present appellant had also filed Notice of Motion No.1429 of 2013 in which he had prayed for appointment of Court Receiver and injunction

against the respondents in respect of the suit land. As a consequence of his main prayer in the Notice of Motion No.2512 of 2012 being dismissed, these ancillary applications also came to be dismissed by the same order. He has, therefore, filed separate Appeal No.363 of 2019.

4. The learned Single Judge dismissed the Notice of Motion primarily on three grounds. Firstly, that the appellant Hardik Panjwani was not a signatory to the agreement. He, therefore, could not claim to be arrayed as one of the defendants. Secondly, that the decree was passed in the year 2009. The appellant was residing with his mother. There was no reason for him to be unaware of the proceedings. In the meantime, the property was fully developed and third party rights were also created. The third ground was that in terms of Order IX Rule 13 of Code of Civil Procedure, as a person alien to the suit, the appellant could not seek setting aside of an ex-parte decree.

5. Appearing for the appellant, the learned Counsel submitted that -

- (i) The appellant was minor at the time when the suit was filed. He was the son of the deceased Rajendra Panjwani.

The plaintiff knew about the fact that the deceased had left behind a son besides the widow. He filed suit without joining the appellant as a defendant. The suit thus, proceeded in absence of a necessary party.

(ii) The appellant was not aware about the pending proceedings. He submitted that the appellant was residing abroad. The mother, being a housewife, the suit was defended by the brothers of the deceased. She had not informed about such proceedings to the appellant. The appellant approached the Court as soon as he came to know about the ex-parte decree having been passed.

(iii) The Counsel submitted that Order IX Rule 13 of the Code of Civil Procedure would permit even a person who is not one of the defendants to seek setting aside the ex-parte decree if it can be shown that the decree had been obtained by playing fraud and the applicant before the Court is a person aggrieved. In this context, the Counsel relied on certain decisions reference to which would be made later.

6. On the other hand, the Counsel for the original plaintiff – respondent herein, opposed the appeals contending that the property was a Hindu Undivided Family (HUF) property. The plaintiff held a bonafide belief that the mother would sufficiently represent the interest of the minor. He was, therefore, not separately joined in the suit. In any case, it is not possible to believe that the appellant was not aware about the pending proceedings. He became major in the year 2002. No steps were taken by him for nearly 10 years after he became major. He would point out that the decree was passed wayback in 2009. In the meantime, the plaintiff assigned all his rights to a developer, third party rights are created and no effective relief can, therefore, be granted in any case.

7. The Counsel for Respondent No.5 in Notice of Motion No.671 of 2019 in Appeal No.363 of 2019, the Developer, submitted that the application of the appellant itself was not maintainable. Order IX Rule 13 of Code of Civil Procedure prohibits any such application from a person who is a non-defendant in the suit. He has not challenged the original decree. His challenge to the order of the learned Single Judge, therefore,

must fail on the basis of limited applicability of Order IX Rule 13. Alternatively, he contended that in the meantime, the property is fully developed. The land was declared a slum area. Third party rights are created.

8. Having heard the learned Counsel and having perused the documents on record, we may recall that the appellant claims interest in the suit as a son of the deceased Rajendra Panjwani, who was one of the signatories to the agreement to sale which was the subject matter of the suit for specific performance. His mother, who was the only other heir of the deceased, was joined as a defendant. According to the plaintiff, such devolution of rights in the heirs of the deceased Rajendra Panjwani, being in the nature of joint family property, the mother sufficiently represented the interest of the minor and it was, therefore, not necessary to join the minor in his independent capacity in the suit. Whatever be the validity of this contention, one cannot lose sight of the facts that the suit was filed in 1997; the appellant attained majority in 2002; the suit was decreed in 2009; the first Motion made by the appellant to agitate his rights happened when in 2012, he filed Motion for setting aside the ex-parte decree. In this context, the

applicability of Order IX Rule 13 of the Code of Civil Procedure shall have to be tested. The Rule was amended by the State of Maharashtra, which provides that 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 there was sufficient cause for his failure to appear 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. In plain terms, thus, a right under Order IX Rule 13 is granted in favour of a person who is a defendant. We are not oblivious to certain judicial decisions expanding such right in favour of non-defendant also. As pointed out by the learned Counsel for the appellant, a learned Single Judge of Allahabad High Court in the case of **Surajdeo vs. Board of Revenue, U.P. Allahabad & Ors.**¹ had taken a view that the petitioner in that case was vitally interested in the decree passed in favour of the contesting parties which he wanted to be vacated. It was held that if the decrees in favour of the contesting opposite parties remain intact, the petitioner's right of irrigating his

¹ AIR 1982 ALL 23

fields from the disputed land shall be vitally affected. In such circumstances, it was held that even if the petitioner is assumed to have no locus standi to move an application for setting aside the ex-parte decrees in favour of the contesting opposite parties, it cannot be said that the trial court had no jurisdiction to set aside the ex parte decrees which were against the provisions of law and were as the result of collusion and fraud practised by the plaintiff and the defendants. Thus, this decision rested on special facts, namely, the petitioner before the Court who had applied to the civil Court for setting aside ex-parte decree though not being a defendant, was affected by the decree which was obtained by the plaintiff through fraud and in collusion with the defendants.

9. The learned Single Judge of this Court, taking note of the decision of the Allahabad High Court in the case of **Surajdeo** (supra), allowed the non-defendant to seek setting aside of ex-parte decree when it was found that the suit property was subjected to sub-lease and the suit for eviction against the head tenant, would result in a situation where the decree even if granted, cannot be executed against the sub-tenant.

10. The Supreme Court in the case of **Ram Prakash Agarwal and another vs. Gopi Krishan (dead through Lrs) & Ors.**² referred to the decision of the Allahabad High Court in the case of **Surajdeo** (supra) and in the context of scope of Order IX Rule 13, culled out the following principles:

“28. In view of the above, the legal issues involved herein, can be summarised as under:

28.1. An application under Order 9 Rule 13 CPC cannot be filed by a person who was not initially a party to the proceedings;

28.2. Inherent powers under Section 151 CPC can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under CPC;

28.3. In the event that an order has been obtained from the court by playing fraud upon it, it is always open to the court to recall the said order on the application of the person aggrieved, and such power can also be exercised by the appellate court;

28.4. Where the fraud has been committed upon a party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit.

28.5. A person aggrieved may maintain an application before the Land Acquisition Collector for reference under Section 18 or 30 of the 1894 Act, but cannot make an application for impleadment or apportionment before the Reference Court.”

2 (2013) 11 SCC 296

11. The thrust of the conclusions summarised by the Supreme Court in the said judgment relevant for our purpose would be that in the event an order has been obtained from the Court by playing fraud upon it, it is always open for the Court to recall the order on the application of the person aggrieved and such power can also be exercised by the appellate Court. Twin conditions required for exercising powers under Order IX Rule 13 at the hands of non-defendant would, therefore, be that the order has been obtained from the Court by playing fraud upon it and that the application is moved by the person aggrieved.

12. In the present case, we have perused the application filed before the learned Single Judge seeking setting aside the ex-parte decree. The applicant has of course averred that the suit was filed by making a false declaration. Nevertheless, the grounds of fraud are not even pleaded. There is no allegation that the plaintiff had colluded with the mother of the applicant or any other defendant. We have noted the stand of the plaintiff through his Counsel about the reason for not joining the appellant in the suit at the outset. No case of fraud is thus made out. Coupled with gross delay and inaction on the part of the appellant, the intervening events such

as development of the land and creation of third party rights would persuade us to confirm the decision of the learned Single Judge.

13. Therefore, the appeals are dismissed alongwith all connected Motions and Leave Petitions.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)