

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 40 OF 2016**

1. Smt. Pranoti Sudesh Dalvi,
major of age, married, business
and her husband,

2. Shri Sudesh Heramb Dalvi,
(Since deceased)
maior of age, business,
both r/o 'Sanchayani',
5th Floor, near Mahalaxmi Temple,
Dada Vaidya Road,
Panaji-Goa.
Through Legal Representatives

(i) Ms. Shravani Sudesh Dalvi (Daughter)
aged 24 years,
r/o "Sanchayani" 5th Floor,
Near Mahalaxmi Temple,
Dada Vaidya Road,
Panaji-Goa.

(ii) Ms. Shivani Sudesh Dalvi (Daughter)
aged 21 years,
r/o "Sanchayani" 5th Floor,
Near Mahalaxmi Temple,
Dada Vaidya Road,
Panaji-Goa.

(iii) Ms. Salonee Sudesh Dalvi (Daughter)
aged 21 years,
r/o "Sanchayani" 5th Floor,
Near Mahalaxmi Temple,
Dada Vaidya Road,
Panaji-Goa.

.. Appellants

Versus

1. Shri Suresh Raghuvir Priolkar,
major of age, landlord.
and his wife,

2. Smt. Vassanti Suresh Priolkar,
(Since deceased)
major of age, housewife,
both r/o H.No. 179/5,
presently residing at Flat No. F3/F4,
Adolf Apartments,
Near Bank of Maharashtra,
Ponda-Goa.
through Legal Representatives

(i) Mr. Darshan S. Sinai Priolkar (Son)
major in age,
H.No. A-502, 5th Floor,
Rajdeep Galleria,
Near Municipal Garden,
Ponda-Goa.

(ii) Ms. Priya Darshan Sinai Priolkar
(Daughter-in-law)
major in age,
H.No. A-502, 5th Floor,
Rajdeep Galleria,
Near Municipal Garden,
Ponda-Goa.

... Respondents

Mr. Yogesh V. Nadkarni, Advocate for the Appellants.

Mr. J. J. Mulgaonkar, Advocate for the Respondents.

Coram:- M. S. SONAK, J.

Date:- 4th December, 2020

ORAL JUDGMENT

Heard Mr. Y. Nadkarni, learned counsel for the Appellants and Mr. J. J. Mulgaonkar, learned counsel for the Respondents.

2. The Appellants are the original defendants and the Respondents are the original plaintiffs in Special Civil Suit No.20/2005/A instituted in the Court of Civil Judge Senior Division, Ponda. For sake of convenience, the parties will be referred to by their description before the Trial Court i.e. the Appellants will be referred to as the defendants and the Respondents will be referred to as the plaintiffs.

3. The plaintiffs were owners of an immovable property situated in Ponda, as described in the plaint and shall be hereinafter referred to as the suit property. The plaintiffs entered into an agreement dated 20.11.1996 for development of the suit property with the defendants subject to certain terms and conditions. The defendants were also given authority to mortgage the suit property with Bicholim Urban Co-operative Bank Ltd. (Bank) and to raise loans for development of the suit property.

4. It was the case of the plaintiffs that the defendants failed to

honour the terms and conditions of the agreement and the development/construction work on the suit property was far from complete even by year 2005, when the plaintiffs were constrained to institute Special Civil Suit No.20/2005/A before the learned Trial Court. Prior to the institution of the suit, the plaintiffs had terminated the agreement vide notice dated 08.11.2004.

5. The plaintiffs therefore instituted the suit and sought for the following reliefs :-

“a) That it be declared that the said agreement dated 20.11.1996 stands terminated and rescinded.

b) That it be declared that the defendants have no right at all to carry out any construction activity over the said property.

c) For a mandatory injunction directing the Plaintiffs to demolish the incomplete construction put up in the said property and bring it to its original state.

d) For a permanent injunction restraining the defendants, their servant and agents or may other person acting through or under them from carrying out any construction activity and/or interfering in the said property.

e) That it be declared that the Plaintiffs are not liable to pay any amounts in respect of the said loan from the said Bank.

ee) It be declared that the purported deed mortgage dated 30.3.2000 is a null and not binding on the plaintiff.

(f) For or a Mandatory Injunction directing the defendant's to pay any amounts due to the said bank on

account of the said loan.

g) That the Defendants be ordered and decreed to pay to the Plaintiffs an amount of Rs.28,25,000/- on account of damages suffered by the Plaintiffs with further interest thereon at the rate of 10% per annum from the date of the filing of the suit upto actual payment.

h) That, in the alternative to prayer (d) above, the Defendants be ordered and decreed to hand over possession after demolishing the incomplete construction over the said property and bring it to the original state and deliver the same to the Plaintiffs.”

6. The defendants were duly served with the summons for settlement of issues and they put in appearance before the learned Trial Court. The written statement was filed contesting the claim of the plaintiffs. It was the case of the defendants that there were some tenants in the suit property and it is the plaintiffs who were required to settle such tenants. It was the case of the defendants that it was the plaintiffs who failed to settle such tenants and therefore, were themselves responsible for the delay.

7. The record indicates that on 09.07.2009 the defendants were marked ex-parte in the matter. The record also indicates that before the defendants were marked ex-parte on 09.07.2009, neither the defendants nor their Advocate appeared in the matter on the following 17 dates i.e. 20/11/2007, 4/12/2007, 8/01/2008, 22/01/2008, 12/02/2008, 16/02/2008, 26/02/2008, 28/03/2008, 29/04/2008,

24/06/2008, 31/07/2008, 28/08/2008, 25/09/2008, 18/10/2008, 13/01/2009, 04/04/2009 and 09/06/2009.

8. Ultimately, on 11.01.2010, the learned Trial Judge decreed the suit ex-parte and granted the plaintiffs the following reliefs :-

“(a) The suit is decreed.

(b) It is declared that the Agreement dated 20.11.1996, stands terminated and rescinded.

(c) It is declared that the defendants no.1 and 2 have no right to carry out any construction activity in the suit property and are hereby restrained by way of Permanent injunction from carrying out any construction activity and/or interfering in the said property.

(d) By way of mandatory injunction, the defendants no.1 and 2 are directed to demolish the incomplete construction put up in the suit property and bring the same to its original state within two months from today failing which the plaintiffs are entitled to do the same and recover the costs from the defendants no.1 and 2.

(e) The defenaants no.1 and 2 are directed to pay any amounts due to the defendant no.3 on account of the said loan.

(f) The defendants no.1 and 2 are hereby directed to pay to the plaintiff the sum of Rs.28,25,000/-, on account of damages suffered by the plaintiffs with interest thereon at the rate of 10% pa from the date of the suit till actual payment.

(g) Costs by the defendants no.1 and 2.”

9. The defendants filed application for setting aside of ex-parte decree dated 11.01.2010 on 09.09.2010 after the delay of about seven months. By order dated 25.10.2012 the delay was condoned but the learned Trial Judge dismissed the application for setting aside of ex-parte decree.

10. The defendants challenged the order dismissing the application for setting aside of ex-parte decree before this Court. This Court, by order dated 11.08.2014 set aside the order and remanded the matter to the learned Trial Court for deciding the application for setting aside of ex-parte decree afresh. It is in pursuance of such remand order, the learned Trial Court has once again, vide the impugned order dated 09.02.2016, dismissed the application for setting aside of ex-parte decree dated 11.01.2010. Hence, the present appeal.

11. Mr. Nadkarni, learned counsel for the Appellants points out that once the delay was condoned in filing the application for setting aside of ex-parte decree, the learned Trial Judge was required to set aside the ex-parte decree because the reasons in both the applications were substantially similar. He points out that in any case the defendants were only required to show cause for their absence on 09.07.2009. He submits that more than sufficient cause was shown for the absence of the defendants or their Advocate on the said date. He submits that the absence of the defendants or their Advocate on the previous dates was

quite irrelevant and based on the same the learned Trial Court was not justified in making the impugned order and refusing to set aside the ex-parte decree. He relies on *G.P. Srivastava vs R.K. Raizada & Ors*¹ in support of this contention.

12. Mr. Nadkarni on the basis of the instructions submits that the defendants have no quarrel with the reliefs in terms of prayer clauses (b), (c) and (d) of the ex-parte decree dated 11.01.2010 at this point of time. He points out that even in so far as prayer clause (e) is concerned, the same had in fact been rendered infructuous by the time the decree was made and the plaintiffs had even deleted the Bank from array of the parties. He points out that the record indicates that the loan amount obtained by the defendants was already cleared by the subsequent builder cum developer M/s. Rajdeep Constructions and on the date when the ex-parte decree was made there was no further loan payable to the Bank.

13. Mr. Nadkarni submits that the defendants are aggrieved by the relief in terms of prayer clause (f) which direct the defendants to pay damages of ₹28,25,000/- together with interest at the rate of 10% per annum from the date of institution of the suit till the date of actual payment. He points out that the relief of damages was *ex facie* barred by limitation and the learned Trial Judge in the ex-parte decree, has merely observed that the issue of limitation is answered against the

1(2000) 3 SCC 54

defendants because the defendants failed to step into the witness box and to prove this issue. Mr. Nadkarni refers to Section 3 of Limitation Act to submit that it is the duty of the Court to decide the issue of limitation on merits irrespective whether or not such a defence was raised by any of the defendants in the suit.

14. Mr. Nadkarni relied on *Sahara India and Ors vs M.C. Aggarwal HUF*² to submit that in such matters the discretion should be liberally exercised and even the costs which the Court may impose must be reasonable. Mr. Nadkarni submitted that between the date of issuance of ex-parte decree and the date on which the application was made for setting aside of ex-parte decree about eight months later, no prejudice as such was occasioned to the plaintiffs and therefore, the impugned order deserves to be set aside, if necessary, by imposing some reasonable costs.

15. In pursuance of certain queries posed, Mr. Nadkarni submitted that this is not at all a fit case where the defendants ought to be ordered to deposit the entire decretal amount or any portion of the decretal amount as and by way of security. He points out that the builder cum developer Mr. Sudesh Dalvi has already expired and the matter is now pursued by his widow and his daughters. He therefore submits that no orders be made for deposit of any portion of any decretal amount, should the Court, be inclined to set aside the ex-parte

² (2007) 11 SCC 800

decree.

16. Mr. Mulgaonkar, learned counsel for the plaintiffs points out that the conduct of the defendants in this matter has been totally harsh, oppressive and unreasonable. He points out that on several occasions referred to in the impugned order, the defendants or their Advocate remained absent and thereby delayed the disposal of the suit. He points out that the application for setting aside of ex-parte decree was filed after seven months and such application is totally vague and bereft of any material particulars. He points out that by way of formality the defendants have blamed their Advocate and based thereon sought for setting aside of ex-parte decree, which is impermissible. He submits that there is no infirmity in the impugned order and relies on the reasonings in the impugned order, in support of his contention that this appeal be dismissed.

17. Mr. Mulgaonkar points out that the defendants secured a loan by mortgaging the suit property belonging to the plaintiffs. The defendants thereafter defaulted in payment of such loan and in the completion of construction and development of the suit property. He points out that the plaintiffs had to incur huge expenses towards rentals during the period of development and construction was going on and was thereafter abandoned the construction in incomplete state by the plaintiffs. He submits that in such circumstances the discretion ought

not to be exercised in favour of the defendants and this appeal ought to be dismissed. He also relied upon certain decisions in support of his contentions.

18. The rival contentions now fall for my determination.

19. In this case the record clearly bears out that the order to proceed ex-parte was made on 09.07.2009 because on this date neither the defendants nor their Advocate were remained present in the Court. Mr. Nadkarni, learned counsel for the defendants is also right in his submission that in such matters the defendant is required to demonstrate that he/she was prevented by any sufficient cause from appearing on the said date. It is also correct that the expression “*sufficient cause*” appearing in Order IX Rule 13 of CPC is an elastic expression and normally same has to be construed liberally. In *G. P. Srivastava (supra)* the Hon'ble Apex Court has held that the expression “*sufficient cause*” for non appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in point of time.

20. The application for setting aside of ex-parte decree was made by the defendants almost eight months after the ex-parte decree was made earlier. This means that there was almost seven months delay in making of such application. The delay has been condoned by the

Trial Court and there was no challenge to such order of condonation on the part of the plaintiffs. The condonation was basically on the ground that the defendant/Developer was suffering ill health and as a result was unable to know about the ex-parte order and to contact his Advocate for filing the application for restoration earlier.

21. The mere fact that the application for condonation of delay was allowed by the Trial Court does not mean that in every such case, the Trial Court is obliged to set aside the ex-parte decree. The application for condonation of delay referred to sufficient cause for not filing the application for setting aside of ex-parte decree within a period of 30 days from the date on which the same was made. The application for condonation of delay may have nothing to do with the issue of absence on the date the orders were made to proceed ex-parte in the matter. Therefore, it is not possible to accept Mr. Nadkarni's contention that the reasons in the two applications being the same, the application for setting aside of ex-parte decree was required to be allowed.

22. Mr. Nadkarni has submitted slightly on a firmer ground when it comes to explanation of absence on 09.07.2009 is concerned particularly since the explanations offered are required to be construed liberally in such matters.

23. In this case, there is some explanation on record for non

appearance of the defendants or their Advocate on 09.07.2009. The application has pointed out that the Advocate F. B. Bhangu was engaged to appear in the matter and for some inexplicable reasons he failed to appear in the matter on the said date. The application has pointed out that the defendants were under bonafide belief that the said Advocate would appear on the said date particularly since no notice of withdrawal of appearance was received by the defendants.

24. If this explanation is to be considered in isolation, then, subject to imposition of substantial cost, the application for setting aside of ex-parte decree could have been allowed in the facts and circumstances of the present case. However, though antecedent conduct of the defendants may not be a very relevant factor when it comes to setting aside of decree, such conduct, is required to be taken into account when it comes to imposition of conditions for setting aside of ex-parte decree, particularly in the facts of the present case.

25. As noted earlier, the defendants were duly served in this matter and had also put in appearance in this matter. Thereafter, however, on no less than 17 dates, the defendants or their Advocate simply failed to remain present or attend to the prosecution of this case. The record indicates that several opportunities were granted to the defendants and as a result, the prosecution of the suit was unduly delayed. This caused utmost prejudice to the plaintiffs.

26. Beside, this Court cannot ignore the circumstance that from 1996 till 2004 the defendants undertook no development in the suit property or rather failed to complete the development in the suit property. This is despite the fact that the defendants obtained loan from the Bank by mortgaging the very this property. Ultimately, the record bears that M/s Rajdeep Constructions i.e. some other builder/developer cleared this loan amount and has proceeded to complete the construction. This means that the defendants made use of the loan by mortgaging the plaintiffs' suit property and despite this, failed to allot the plaintiffs in constructed premises which were assured in the agreement between the parties. Mr. Mulgaonkar pointed out that on account of all this delay the plaintiffs were required to secure alternate accommodation and pay rentals for such alternate accommodation. He submits that the plaintiffs were forced to agree to less than favourable terms with this new builder/developer for reasons attributable to the defendants. Mr. Mulgaonkar submits that if the ex-parte decree is now set aside, the defendants will once again delay the proceedings and will also not honour any decree which will be made by once again delaying the execution proceedings.

27. According to me, the aforesaid circumstances, are required to be taken into account for the purpose of imposing certain conditions subject to which ex-parte decree to the extent of payment of damages can be set aside at the behest of the defendants. If such circumstances

are ignored, then it will amount to injustice to the plaintiffs, on whom at least *prima facie* this litigation was forced. In the name of imparting justice to the defendants, plight of the plaintiffs cannot be altogether ignored. If the relief is to be granted to the defendants, the same has to be balanced by imposing suitable conditions, which will protect the interest of the plaintiffs as well. The circumstance that on no less than 17 dates the defendants or their Advocate simply refused to appear in the matter, is not an irrelevant circumstance when it comes to imposition of conditions for setting aside of ex-parte decree on the issue of damages. The conduct of the defendants is also relevant in the context of imposition of conditions for setting aside of ex-parte decree.

28. The learned Trial Court has correctly observed that in all such matters it is not sufficient to blame Advocate in a matter of this nature. The defendants were expected to coordinate with their Advocate from time to time. Even assuming that there is some explanation for non appearance of defendants or their Advocate on 09.07.2009, such explanation cannot be stretched to justify non appearance of defendants or their Advocate on no less than 17 occasions in the past.

29. This appeal is therefore disposed of by passing the following order :-

(A) The impugned order dated 09.02.2016 is set aside and the defendants' application for setting aside of ex-parte judgment and decree dated 11.01.2010 is partly granted

subject to the following conditions :-

(i) The defendants shall pay cost of ₹1,00,000/- to the plaintiffs within a period of four weeks from today; and

(ii) The defendants shall deposit with the Trial Court the principal amount of ₹28,25,000/- within a period of eight weeks from today.

(B) In case there is no compliance with the aforesaid conditions, this appeal will be deemed to have been dismissed without any further reference to this Court;

(C) It is clarified that the ex-parte decree dated 11.01.2010 in relation to prayer clauses (b), (c) and (d) is maintained and not set aside. Only the ex-parte decree in relation to prayer clauses (e) and (f) is set aside subject to compliance with the aforesaid conditions within the stipulated period;

(D) If the aforesaid conditions are indeed complied with the Special Civil Suit No.20/2005/A shall stand restored in relation to plaintiffs' claim for damages. In such a restored suit, however, the defendants shall be entitled to lead evidence in respect of all defences raised by them notwithstanding the concession now made on their behalf in relation to prayer clauses (b), (c) and (d) of the ex-parte decree.

(E) The Trial Court, in such an eventuality is directed to dispose of such restored suit as expeditiously as possible and in any case within a period of six months from the date of compliance with condition (A)(ii) relating to deposit of principal amount of ₹28,25,000/- before it.

(F) The Trial Court to order investment of the deposited amount in terms of condition (A)(ii) if complied in any

Nationalized bank and such deposit together with any interest which will be accrued thereon shall abide by the final decree which will be made in such restored suit.

(G) The Trial Court while disposing of restored suit shall not be influenced by any observations made in the impugned order as also the present order. The restored suit will have to be decided on its own merits and in accordance with evidence which the parties will lead before the learned Trial Court in the matter.

(H) The appeal is partly allowed in the aforesaid terms.

30. All concerned to act on the basis of the authenticated copy of this order.

M. S. SONAK, J

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