

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 2601 OF 2018

PETITIONERS:

1. Prabhakar s/o Adkuji Chahare
Aged about 61 years,
Occupation : Cultivation,
R/o Pathanpura Ward No.1,
Chandrapur Tq. and Dist. Chandrapur
2. Ajay s/o Vasantrao Wasekar
Aged about 41 years,
Occupation : Business,
R/o Ramnagar, Ward No.3,
Chandrapur, Tq. & Dist. Chadrapur
3. Smt. Sheela Prabhakar Chahare
Aged about 62 years,
Occupation – Household,
R/o Pathanpura, Ward No.1,
Chandrapur, Tq. & Dist. Chandrapur

Vs.

RESPONDENTS :

1. Subhashchandra s/o Krishnalal Debnath,
Aged about 61 years,
Occupation – Contractor,
R/o Near Archana Apartments,
Uttamnagar, Mul Road, Chandrapur,
Tq. & Dist. Chandrapur.
2. Prakash s/o Narayan Penchalwar,
Aged about 47 years, Occu.: Business,
R/o Banapeth Ward, Chandrapur,
Tahsil and District : Chandrapur.

Mr. M. P. Khajanchi, counsel for petitioners.
Mrs. R. S. Sirpurkar, counsel for respondents.

<u>CORAM</u>	<u>:- MANISH PITALE J.</u>
RESERVED ON	:- 27/10/2020
PRONOUNCEMENT ON	:- 03/11/2020

J U D G M E N T

Heard.

(2) **Rule.** Rule made returnable forthwith with the consent of the learned counsel for the rival parties.

(3) The original defendants are before this Court in this petition raising challenge to an order passed by the Court of Principal District and Sessions Judge, Chandrapur, whereby an application (Exh.17) filed by them has been rejected, wherein they had sought stay of the proceedings in an appeal filed by them before the aforesaid Court. The petitioners claimed that, in terms of the settled position of law, their application for stay ought to have been allowed by the aforesaid Appellate Court, since their application under Order 9 Rule 13 of the Civil Procedure Code, 1906 (CPC), filed before the Trial Court for setting aside ex-parte decree was pending. By relying upon explanation to the said provision, the petitioners claimed that if their appeal stands

disposed of, the application for setting aside ex-parte decree under Order 9 Rule 13 of the CPC would be rendered infructuous, thereby causing grave prejudice to them. The respondent No.1 is the original plaintiff/decreed holder, on whose behalf it is contended before this Court that the Appellate Court was justified in refusing to stay the proceedings in the appeal, in view of the conduct of the petitioners and that in the interest of justice, no interference was warranted in the impugned order.

(4) Since much emphasis has been placed on behalf of respondent No.1 on the facts of the present case which reflect the conduct of the petitioners, it is necessary to refer to the facts leading upto filing of the present writ petition.

(5) The respondent No.1 filed Special Civil Suit No.150/2006 for specific performance of contract against respondent No.2 and he further sought a declaration that sale deed dated 21/01/2006 executed by the petitioner No.1 in favour of petitioners No.2 and 3, was null and void. The petitioners appeared in the aforesaid suit on 02/11/2006 and after seeking adjournment, finally filed their written statement on 20/07/2007. The evidence of respondent No.1 (plaintiff) was recorded on 19/12/2008 and the suit was posted for cross-examination of

respondent No.1 from time to time. As the petitioners and their counsel failed to participate in the proceedings any further, on 25/06/2009, the Trial Court proceeded ex-parte against them. On 27/06/2009, the suit was decreed in favour of respondent No.1, directing him to deposit balance amount of consideration of Rs.6,81,250/- for execution of sale deed. There is no dispute about the fact that the respondent No.1 deposited the said amount immediately. On 27/08/2009, the respondent No.1 filed execution proceeding bearing Special Darkhast No.37/2009. The petitioners were served in the execution proceeding by paper publication on 06/06/2011. In addition, the petitioners were also served through bailiff and the reports were placed on record before the Executing Court on 16/12/2011.

(6) Since the petitioners chose not to remain present before the Executing Court despite service, even in the execution proceeding, they were proceeded against ex-parte. A draft sale deed was prepared and it was filed in the Executing Court on 03/12/2011. The petitioners failed to participate in the execution proceeding and finally appeared before the Executing Court on 09/07/2013, raising certain objections on the draft sale deed, as also on the execution proceedings. These objections were

rejected on 12/08/2013 and 05/02/2014. It is at this stage that the petitioners took steps to challenge the decree passed against them, way back on 27/06/2009. The petitioners first filed application under Order 9 Rule 13 of the CPC, on 01/10/2014, seeking setting aside of the ex-parte decree and thereafter, on 16/12/2014, they filed appeal before the Appellate Court along with an application for condonation of delay of 1970 days. The appeal was initially filed before this Court, but it stood transferred to the District Court, due to change in pecuniary jurisdiction. It is at this stage that the proceedings in appeal remained pending. An interim order was passed in the said proceedings.

(7) The appeal as well as application for setting aside ex-parte decree remained pending and after more than two years, on 13/02/2017, the petitioners sought stay of the appellate proceeding, on the ground that if appeal was disposed of, as per explanation to Order 9 Rule 13 of the CPC, their application for setting aside ex-parte decree would be rendered infructuous. The said application was rejected by the impugned order and the petitioners are before this Court.

(8) Mr.M.P.Khajanchi, learned counsel appearing for the petitioners submitted that as per settled position of law,

the petitioners were entitled to simultaneously file both the proceedings i.e. application for setting aside of ex-parte decree and the appeal challenging the decree. It was submitted that a perusal of explanation to Order 9 Rule 13 of the CPC would show that if the appeal filed by the petitioners stood disposed of, no application under the said provision for setting aside ex-parte decree would lie. According to the learned counsel for the petitioners, this would render the application for setting aside decree filed on behalf of the petitioners, pending before the Trial Court, infructuous and this would cause grave prejudice to them. It was submitted that the Appellate Court while passing the impugned order and rejecting application at Exh.17, failed to appreciate the position of law and thereby committed a grave error. By placing reliance on judgments of the Hon'ble Supreme Court in the case of **Rani Choudhary vs. Lt.-Col. Suraj Jit Choudhary** [(1982) 2 SCC 596], **Bhanu Kumar Jain vs. Archana Kumar and another** [(2005) 1 SCC 787] and **Neerja Realtors Private Limited vs. Janglu (dead) through Legal Representative** [(2018) 2 SCC 649], learned counsel for the petitioners emphasized that the impugned order was based on erroneous appreciation of the position of law as applicable to the facts of the present case and on this basis, it was submitted that the writ

petition deserved to be allowed.

(9) On the other hand, Mrs.R.S.Sirpurkar, learned counsel appearing for the contesting respondent No.1, submitted that the conduct of the petitioners in the present case was such that they did not deserve any indulgence from this Court in writ jurisdiction. It was submitted that the petitioner had left no stone unturned in delaying proceedings before the Courts below, as a result of which the respondent No.1 could not enjoy the fruits of the decree passed in his favour, as far back on 27/06/2009. It was submitted that the respondent No.1 had immediately deposited balance amount before the Trial Court in terms of the decree and that the draft sale deed was also filed before the Executing Court way back in the year 2011, yet the respondent No.1 was not able to enjoy the fruits of the decree. It was submitted that the application at Exh.17, for stay of proceedings before the Appellate Court, was filed by the petitioners more than two years after filing of the appeal as also the application for setting aside ex-parte decree. It was further emphasized that the petitioners were aware about the decree passed against them right from the beginning and yet they had chosen to file the appeal and the application for setting aside ex-parte decree in the year 2014. The learned

counsel also submitted that the petitioners were themselves to blame for the ex-parte decree passed against them, because they chose not to appear before the Trial Court and to participate in the proceedings after having filed their written statement on record. On this basis it was submitted that the writ petition deserved to be dismissed.

(10) Heard learned counsel for the rival parties and perused the material on record. A perusal of Order 9 Rule 13 of the CPC shows that it affords an opportunity to a defendant to apply to the Court for setting aside ex-parte decree by satisfying the Court that in the facts of the case, such an ex-parte decree could not have been passed. There cannot be dispute about the position of law that a defendant who has suffered an ex-parte decree can simultaneously invoke two remedies, firstly, by filing an application for setting aside ex-parte decree under Order 9 Rule 13 of the CPC and secondly, by filing an appeal under Section 96 of the CPC.

(11) This position of law has been recognized in all the three judgments relied upon, on behalf of the petitioners. But, it was observed by the Hon'ble Supreme Court in the case of **Rani Choudhary** (supra) that as per explanation to Order 9 Rule 13 of

the CPC, after the appeal filed by the defendant against an ex-parte decree stood disposed of, it constituted sufficient reason for a ban on proceeding in an application for setting aside ex-parte decree filed by such aggrieved defendant. In the case of **Bhanu Kumar Jain** (supra), the Hon'ble Supreme Court held that application under Order 9 Rule 13 of the CPC would not be maintainable once the Appellate Court disposes of the appeal, as the decree passed by the Trial Court merges with the order passed by the Appellate Court. It was also recognized that explanation to Order 9 Rule 13 of the CPC did not suggest that the converse was also true. In the case of **Neerja Realtors** (supra) the Hon'ble Supreme Court reiterated the aforesaid position of law.

(12) Explanation to Order 9 Rule 13 of the CPC reads as follows :-

“[Explanation – Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex-parte decree.]”

(13) A bare perusal of the aforesaid provision, along with position of law laid down and emphasized by the

Hon'ble Supreme Court, would show that the petitioners in the present case were entitled in law to seek stay of proceedings in the pending appeal before the Appellate Court, while pursuing the application for setting aside ex-parte decree under Order 9 Rule 13 of the CPC. It is clear that if the appeal proceeds and stands disposed of, the application for setting aside ex-parte decree filed by the petitioners cannot be proceeded with and it would be rendered infructuous. This would be clearly prejudicial to the interest of the petitioners, because they would be deprived of demonstrating before the Trial Court that they had sufficient and cogent reasons for not being able to attend hearing of the suit, apart from questioning the correctness of the order posting the case for ex-parte hearing.

(14) This aspect was not correctly appreciated by the Appellate Court while passing the impugned order and rejecting application at Exh.17. The Appellate Court erred in observing that since it had discretion in the matter, the application deserved to be dismissed.

(15) But, at the same time, even if the position of law is in favour of the petitioners, this Court cannot ignore their conduct. A perusal of the material on record shows that the

petitioners sought to delay proceedings in the suit before the Trial Court and even thereafter, by indulging in delaying tactics. The petitioners filed their written statement before the Trial Court more than eight months after having been served. Thereafter, they failed to participate in the proceedings before the Trial Court. Therefore, it was not as if they could not even appear before the Trial Court for want of service. The Trial Court passed ex-parte decree against them on 27/06/2009 and after being served before the Executing Court in June 2011 and December 2011, the petitioners again failed to appear before the Executing Court. As a consequence, they were proceeded ex-parte even before the Executing Court. It was only on 09/07/2013 that the petitioners chose to appear before the Executing Court and filed their objections, which were rejected on 12/08/2013 and 05/02/2014. It took the petitioners, a further eight months to file application for setting aside ex-parte decree on 01/10/2014 and more than ten months to file appeal before the Appellate Court on 16/12/2014. The appeal was filed along with an application for condonation of delay of 1970 days. There is no dispute about the fact that even the application for condonation of delay is yet to be decided and that the petitioners are enjoying an interim order in the said proceeding.

(16) It is in this backdrop, that the petitioners filed the aforesaid application for stay Exh.17 before the Appellate Court on 13/02/2017 i.e. more than two years after filing the appeal and the application for setting aside of ex-parte decree. There is no dispute about the fact that in the meanwhile the respondent No.1 (plaintiff/decreed holder) deposited the balance amount of consideration on 06/08/2009 i.e. immediately after the decree was passed on 27/06/2009 and that the respondent No.1 also filed draft sale deed on 03/12/2011 before the Executing Court. Thus, a period of more than ten years has elapsed and the respondent No.1 was not been able to enjoy fruits of the decree, despite the fact that the entire balance consideration was deposited more than ten years earlier. The conduct of the petitioners is evident from the aforesaid material on record.

(17) This Court is of the opinion that law must act in aid of justice. In peculiar facts and circumstances of a case, while recognizing settled position of law the Court must ensure that the ends of justice are not frustrated in the process.

(18) It is in this backdrop, after having heard the learned counsel for the rival parties, keeping in view the conduct of the petitioners before the Courts below, this Court expressed

that in furtherance of justice, the petitioners ought to hand over possession of the suit property to the respondent No.1, subject to appropriate conditions and subject to the result of the pending proceedings. In this backdrop on 22/10/2020, this Court directed the learned counsel for the petitioners to take instructions in the matter and to report to this Court on 27/10/2020. When the writ petition was called out on 27/10/2020, the learned counsel for the petitioners stated on instructions that the petitioners would handover possession of the suit property to respondent No.1, subject to final orders to be passed in the pending application under Order 9 Rule 13 of the CPC or the appeal filed under Section 96 of the CPC, as the case may be. It was submitted that since the suit property was an agricultural piece of land, appropriate conditions may be imposed on respondent No.1 to maintain account and to present before the Court below, once the possession of the suit property was handed over to the respondent No.1.

(19) In view of the above, considering the position of law pertaining to explanation to Order 9 Rule 13 of the CPC, this Court finds that the impugned order cannot be sustained. Accordingly, it is set aside. The application Exh.17 filed on behalf

of the petitioners before the Appellate Court is allowed and the proceedings in Regular Civil Appeal No. 134/2015, pending before the Appellate Court are stayed till decision of the application for setting aside ex-parte decree bearing MJC No.213/2014, pending before the Court of 4th Civil Judge, Senior Division, Chandrapur.

(20) At the same time, this Court directs the petitioners to handover possession of the suit property to the respondent No.1 within four weeks from today. The respondent No.1 shall maintain account of the proceeds earned from the suit property upon entering possession of the same in terms of this order. The respondent No.1 shall submit account annually before the Courts below in the pending proceedings. It is directed that such handing over of possession to respondent No.1 shall be subject to the result of said pending proceedings. It is made clear that if adverse orders are passed against respondent No.1 in the aforesaid pending proceedings, they shall remain in abeyance for a period of four weeks, to enable the respondent No.1 to seek appropriate interim relief regarding possession, in any further proceedings that may be initiated by the respondent No.1 for challenging such adverse orders, in accordance with law.

(21) Rule is made absolute and the writ petition is disposed of in above terms. No costs.

JUDGE

KOLHE/P.A.