

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.11273/2021

Shaikh Firoz S/o Shaikh Ismail
Age 44 years, Occ.Business
R/o Classic Point Garage,
Shop No.3 & 4, N-6, Cidco,
Aurangabad

.. PETITIONER

Versus

1] Jyoti Tanhaji Shinde
Age 48 years, Occ : Service,
R/o Sainagar, House No.1076,
Aurangabad

2] Avinash Bandopant Saiwale
Age : Major, Occu : Business
R/o N-11, E-53/1, Hudco,
Aurangabad

3] Suresh Manohar Kulkarni,
Age : Major, Occu : Business,
R/o Kanchanwadi, Aurangabad

.. RESPONDENTS

...

Shri Shaikh Tarek Mobin H., Advocate for the petitioners
Shri Pramod F. Patni, Advocate for Respondent no.1.

...

CORAM: MANGESH S PATIL,J.

DATE : 11.10.2021

ORAL JUDGMENT:

Heard. Rule. Rule is made returnable forthwith.
With the consent of the parties the matter is heard finally at

the stage of admission.

2] The only question that calls for an examination at the hands of this Court in this proceeding under Article 227 of the Constitution of India is as to if the defendant against whom the Suit is dismissed can seek its restoration by resorting to Order IX Rule 13 of the Code of Civil Procedure.

3] The facts as are necessary for determination of the present Writ Petition can be summarized as under:

The respondent No. 1 filed a Suit for eviction under the Maharashtra Rent Control Act against the respondent Nos. 2 and 3 wherein the petitioner was also arrayed as defendant No. 3. It was her assertion that it was the respondent No. 2 alone who was inducted into the suit premises as a tenant, and he then inducted the respondent No. 3 illegally and unauthorizly. The petitioner was inducted in the suit premises by respondent no.2. The suit was partly decreed only as against the respondent No. 2 tenant. However the suit was dismissed as against the respondent No. 3 as well as the petitioner who were the defendant Nos. 2 and 3.

4] Since the respondent No. 1 put the decree of eviction for execution, anticipating that the petitioner would be dispossessed, he moved an application under Order IX Rule

13 of the C.P.C. alongwith application for condonation of delay seeking restoration of the Suit on the ground *inter alia* that the Advocate who was representing him had expired on 29.2.2016. He had no knowledge about his death and the decree that was passed *ex parte* needed to be recalled.

5] The trial Court rejected his application on the ground that since there was no decree which could have been put to execution as against the petitioner and going by the wordings of the provision of Order IX Rule 13 of the C.P.C. it is only the party against whom a decree is passed who can seek restoration of the Suit, the relief was not available to the petitioner against whom the Suit was dismissed. Even the appeal preferred by him has been dismissed by the District Court on the same ground.

6] The learned Advocate for the petitioner would submit that he has been claiming to be in possession of the demised premises and the effect of the decree passed against respondent No. 2 is likely to cause a serious prejudice to him. He would further submit that even a stranger can prefer an appeal against decree even it prejudicially affects its rights. He would cite the decision in the case of Hardevinder Singh V/s Paramjit Singh and Ors; (2013) 9 SCC 261. He therefore submits that if a stranger can maintain an appeal, the request of the petitioner was merely for restoration of the Suit decided *ex parte*. Both the Courts below have grossly erred in

appreciating the facts and circumstances in refusing to concede to the petitioner's request regarding setting aside of its decree and restoration of the suit.

7] The learned Advocate Mr. Patni for the Respondent No. 1 submits that apart from the fact that the remedy of setting aside of *ex parte* decree is not available to the petitioner, even otherwise, his obstruction proceeding initiated under Section 21 Rule 97 of the C.P.C. was rejected by the executing Court which is executing the eviction decree. He would further point out that the Writ Petition preferred by the petitioner challenging that order has been dismissed by this Court and the decision had reached finality. He would therefore submit that in view of such peculiar supervening events, the Petition is not maintainable.

8] I have carefully considered the rival submissions and the papers. It is a matter of record that though the petitioner was defendant in the eviction Suit, it was dismissed as against him. Consequently, it cannot be said that there is a decree which is passed against him *ex parte*. Going by the wordings of Order IX Rule 13 of the C.P.C., it is only a party against whom a decree is passed *ex parte* who can avail the remedy of getting it set aside and restoration of the Suit.

9] True it is, as is the case in the matter in hand, the decree may have an adverse effect on the rights of the

petitioner since he claims to be in rightful possession of the demised premises. It is equally trite as has been observed by the Supreme Court in the case of *Hardevinder Singh* (Supra) even a stranger can maintain an appeal if his rights are being adversely affected by the decree. However, the point here is not as to whether the petitioner would be entitled to maintain an appeal challenging the eviction decree. The present enquiry is restricted to his right to treat it as an *ex parte* decree and seek its restoration under Order IX Rule 13 of the C.P.C. Therefore, even if it is assumed for the sake of argument that he would be entitled to maintain an appeal under Section 96 of the C.P.C., that would not have any bearing on the present enquiry.

10] As has been rightly noticed by the Courts below, the provision of Order IX Rule 13 of the C.P.C. only enables a party against whom a decree is passed to seek it to be set aside. If that is the case, there is no error or illegality in the consistent observations and the conclusions of the two Courts below that the petitioner does not have any right to maintain a proceeding under Order IX Rule 13 of the C.P.C.

11. Again admittedly the obstruction proceeding preferred by the petitioner under Order XXI Rule 97 of the C.P.C. was rejected and even the Writ Petition preferred by him challenging that rejection has been dismissed by this Court (Writ Petition No. 8449/2017) by the judgment and

order dated 6.7.2017 and even that decision has now reached finality.

12. The upshot of the above discussion is that the petitioner is not entitled to any relief. The Writ Petition is dismissed. The Rule is discharged.

[MANGESH S. PATIL,J.]

umg/