

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9694 OF 2021

Shahurao Chandarrao Auti

... PETITIONER

VERSUS

Ambadas Shambhau Ranmale

... RESPONDENT

Mr. Mahesh Ramnath Sonawane, Advocate for
petitioner;

Respondent sole served

CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 19/04/2022

PRONOUNCED ON : 20/04/2022

PER COURT :-

1. Heard learned Counsel for the petitioner at length. Despite service, none present on behalf of the respondent. On the last occasion also, none was present on behalf of the respondent.

2. The petitioner/plaintiff had filed a suit for specific performance of contract in respect of suit property admeasuring 20 R land from Gut No.109 situated at Supa Tq. Parner, District Ahmednagar, which was owned and possessed by the Respondent/defendant on the basis of registered

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sale deed dated 25.1.2006.

3. The defendant agreed to sell the suit property to the plaintiff for a consideration of Rs.5,25,000/- and executed an agreement of sale pursuant to which, an amount of Rs.20,000/- was paid by the plaintiff to the defendant towards earnest money. Since the defendant failed to execute the sale-deed in respect of the suit property within the stipulated time, though the plaintiff was ready and willing to perform his part of the contract, the defendant did not turn up to execute the sale-deed and, therefore, after issuing a notice, the plaintiff has filed a suit.

4. The defendant was duly served with the suit summons on 14.7.2011. The defendant appeared in the suit and filed written statement on 12.8.2011. He denied all the contentions in the plaint.

5. The defendant had admitted execution of the agreement to sell but took a plea that the plaintiff was not able to pay the balance amount of

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consideration and that he had not committed any breach of contract. The defendant had prayed for dismissal of the suit.

6. The Trial Court framed the issues and the plaintiff has adduced his evidence on 16.7.2013. Copy of the affidavit in view of examination-in-chief was also served upon the defendant on 22.7.2013.

7. The advocate for the defendant had submitted "No instruction pursis" from his client (defendant). Hence, notice came to be issued to the defendant on courts motion dated 22.8.2013. It was duly served upon the the defendant on 31.8.2013. Despite service, the defendant did not appear and, therefore, the plaintiff could not be cross-examined. "No cross-examination" order was passed by the Trial Court on 19.10.2013.

8. The plaintiff adduced evidence of his second witness by filing an affidavit on 19.10.2013. Again, "No cross order" came to be passed in absence of the defendant or his counsel.

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The matter was posted for arguments and ultimately, after considering the pleadings and the evidence of the plaintiff, the trial court decreed the suit by judgment and order dated 7.12.2013.

9. Thereafter, the defendant filed a Civil Misc. Application before the Trial Court under Order 9 Rule 13 of CPC for setting aside *exparte* decree and for restoration of the suit. The said application is registered as Misc.Civil Application No. 66/2019. The defendant *inter alia* filed an application seeking condonation of delay in filing the aforesaid application. The learned Trial Court by the impugned order dated 6.7.2021 allowed the application subject to costs of Rs.5,000/- by setting aside the judgment in Special Civil Suit No.207/2011 dated 7.12.2013. He restored the said suit and directed the parties to lead their respective evidence. Aggrieved with the said order, the petitioner/plaintiff has preferred this writ petition.

10. I heard learned Counsel for the petitioner.

11. It is quite shocking and is apparent from the record that the learned Civil Judge, Senior Division, Ahmednagar, has failed to consider the object and scope of Order 9 Rule 13 of CPC. It is apparent from the record that the defendant was duly served, who appeared in the suit, filed his written statement by engaging an advocate. The suit was not at all proceeded exparte.

12. It is also apparent from the record that upon instructions of the defendant, his counsel had filed "No instructions pursis". It is also not in dispute that the notice which came to be issued on the courts motion was also duly served upon the defendant on 31.8.2013. Even the defendant had specifically admitted service of summons and knowledge of the suit proceedings.

13. It is more shocking to note that the learned trial court, in the impugned order, sans any documentary evidence about the alleged accidental injury to the defendant, accepted and believed his bare words, which as a matter of fact, even could not have been considered. The

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learned Trial Court, at the first instance, should not have entertained an application under Order 9 Rule 13 of CPC. The impugned order is ex facie illegal, which requires to be quashed and set aside. The defendant had other remedy available, if he was aggrieved with the judgment and decree passed by the Civil Judge, Senior Division on 7.12.2013.

14. It is apparent from the record that the defendant had neither tendered any oral or documentary evidence nor did he cross-examine the plaintiff or his witnesses despite due opportunities.

15. The learned Counsel for the petitioner has, therefore, rightly placed useful reliance upon a judgment of this Court in the case of Himachal Pradesh Coop. Mktg. & Development Federation Ltd. Vs. MAFCO, Limited - 1999 (12) LJSOFT 35 : 1999 (4) ALL MR 516. It would be apposite to extract para 13 and 14 of the said judgment, which reads thus, -

"13. Thus, an application under Order 9, Rule 13 of the Code of Civil Procedure can be made in situation where ex-parte decree is passed against the defendant and the grounds available to him are only two, namely, (1) that the summons was not duly served and (2) that he was prevented by sufficient cause from appearing when the suit was called on for hearing. When such an application under Order 9, Rule 13 of Civil Procedure Code, 1908 is made to the Court and this application is rejected, the remedy is provided under Order 43, Rule 1(d) of the Code of Civil Procedure. This remedy is by way of appeal from this order of rejecting defendant's application.

14. On the other hand, in the present petition at hand, however, the situation is totally different. The defendants had filed their Written Statement, which was before the Court. The same was considered by the Court; Issues were framed and settled by the court; Findings against each and every issue was recorded by the Court, after examining the plaintiffs' substantive evidence in the court and the defendants' contentions, raised in their Written Statement. Thus, the case of the plaintiffs and the case of the defendants was weighed and assessed by the learned Judge on the touch stone of preponderance of probabilities. It was only thereafter that the Judgment was delivered by the learned Judge and decree came to be passed. Such a decree, by any stretch of imagination, cannot be called an 'ex-parte decree' and, therefore, Misc. Application No. 18 of 1984 made by the defendants for setting aside the said ex-parte decree (which was not an ex-parte decree) was itself not maintainable. The

Vth Joint Civil Judge, Senior Division, Pune, was, therefore, right in his observation made in para 6 that the Judgment passed by his predecessor, namely, IVth Joint Civil Judge, Senior Division, Pune, was the Judgment on merits, and that the provisions of Order 9, Rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree were not available to the defendants. He, therefore, rightly dismissed the said Misc. Application by his Order dated 13th August, 1986. No interference is, thus, called for." (emphasis supplied)

16. It is implicit from the ratio that neither there was any ground to the defendant that the summons was not duly served upon him nor there was any ground that he was prevented by sufficient cause from appearing when the suit was called on for hearing.

17. As such, it cannot be said to be an ex parte decree which the defendant sought to set aside. In the case at hand also, the situation was more or less similar wherein after considering the written statement of the defendant and weighing the pleadings of the respective parties as well as the evidence of the petitioner, the learned Trial Court had decreed the suit. Such decree cannot be said

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to be an ex parte decree by any stretch of imagination.

18. In the result, the impugned order is quashed and set aside. The petition stands disposed of in aforesaid terms.

(PRITHVIRAJ K.CHAVAN)
JUDGE

BDV