

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3690 OF 2022

M/s. Shivalik Ventures Private Limited ..Petitioner

Versus

M/s. Sai Lee Developers ..Respondent

Mr. Mandar Limaye i/by Hassan U. Khan, for the Petitioner.

Mr. Sachin Mhatre a/w Priyanka Singh i/by Mhatre Law Associates,
for the Respondents.

CORAM : NITIN W. SAMBRE, J.

DATE : 7th APRIL, 2022

PC.

1. In a suit for simplicitor injunction based on title, petitioner was served with a suit summons on 3rd February, 2020.

2. The Court passed an order on 29th June, 2016, to proceed *ex-parte* against the petitioner/defendant.

3. On 29th November, 2019, the petitioner took out Notice of Motion being No.1719 of 2020 with following prayer :-

“a. that the delay of 1248 days in filing the Written Statement of Defendant be condoned and *ex-parte* order dated 29.06.2016 be set aside and written statement of Defendant be taken on record and the suit be placed for hearing on merits;

b. for costs of this application;

- c. for such further and other reliefs as may be deemed necessary and proper in the interests of justice and in the circumstances of the case;”

4. The said Notice of Motion is rejected vide order impugned dated 30th November, 2021. As such, this petition.

5. Mr. Mandar Limaye, learned counsel for the petitioner/defendant would invite attention of this Court to the fact that the petitioner though appeared, failed to file its written statement. As such, the Court below committed an error in passing an order thereby directing suit to proceed *ex-parte*. According to him, the appearance of lawyer representing the interest of the defendant is not disputed, that being so, the Court below committed an error in rejecting the Notice of Motion. He would further urge that even if the suit has reached at an advanced stage, though the written statement of the petitioner/defendant is not on record, still the petitioner/defendant has every right to cross-examine the witness of the plaintiff in absence of statutory embargo. The order impugned thereby not permitting the petitioner to conduct cross-examination of plaintiff’s witness is not in tune with the provisions of Order IX Rule 6(a) of the CPC. So as to substantiate his contentions, he has drawn support from the Apex Court judgment in the matter of ***Sangram Singh Vs. Election Tribunal Kotah and Anr.*** reported in ***AIR 1955 SC 425***.

6. While countering aforesaid submissions, counsel for the

respondent/plaintiff would urge that even if the lawyer has appeared intermittently for the petitioner/defendant in the proceedings, since the defendant or its lawyer remained absent, the Court was justified in passing order *ex-parte* on 29th June, 2016. His further contention is if the very conduct of the petitioner/defendant in the suit proceedings is appreciated, the same is nothing but to prolong the suit proceedings. That being so, the Court below is justified in refusing to grant opportunity to cross-examine the witness of the plaintiff. As such, he would urge that the order impugned is in tune with the provisions of law which does not call for any interference.

7. Considered rival submissions.

8. It is not in dispute that the interest of the petitioner/defendant was represented before the Trial Court in SC Suit No.1480 of 2009 may be without filing written statement. In that eventuality, the Court below has committed an error by ordering that suit to proceed *ex-parte* against the petitioner/defendant as the petitioner/defendant has very much appeared in the suit by marking its presence through its lawyer. In this background, the order dated 29th June, 2016 is contrary to the very scheme of order IX Rule 6(a) of the CPC, which reads thus :-

“6. Procedure when only plaintiff appears.- (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-

(a) **When summons duly served** – If it is proved that the summons was duly served, the Court may make an order that the suit be heard *ex parte*,”

The Trial Court ought not to have proceeded ex-parte in view of the fact that the petitioner/defendant has duly appeared through his counsel before the Trial Court and even if such counsel has intermittently remained absent that by itself will not give leverage to the Court to exercise powers under Order IX Rule 6(a) of the CPC.

9. This takes me to the next contention of Mr. Mandar Limaye, whether the petitioner is entitled to cross-examine the witness of plaintiff. Once it is held that the Court below has erred in passing order that the suit be proceeded *ex-parte* against the petitioner, even in absence of written statement, petitioner has every right to cross-examine the witness of the respondent/plaintiff.

10. Even if the order is passed under Order IX Rule 6(a) of the CPC, thereby ordering suit to proceed *ex-parte* against the defendant for want of its appearance on the given date or such subsequent date, on which the hearing of the suit was scheduled, still the petitioner/defendant has every right to cross-examination the witness of the plaintiff. The Apex Court had an occasion to deal with similar issue in the matter of *Sangram Singh (cited supra)*. The Apex Court was sensitive to the very object with the procedural law as laid down and has observed that while dealing with the

application for procedural law as under :-

“16. Now a code of procedure must be regarded as such. It is 'procedure', something, designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.

17. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

11. Paragraph 26 of the judgment in the matter of Sangram Singh (supra) would worth referring, which reads thus :-

“In our opinion, Wallace, J. and the other Judges who adopt the same line of thought are right. As we have already observed, our laws of procedure are based on the principle that, as far as possible, no proceeding in a Court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appealing, then, if he does not appear, the Court may proceed in his absence. But, be it

noted, the Court is not directed to make an 'ex parte' order.

Of course the fact that it is proceeding 'ex parte' will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an 'ex parte' decree or other 'ex parte' order which the Court is authorised to make. All that rule 6 (1) (a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority namely to proceed in the absence of one of the parties. The contrast in language between R. 7 and R.13 emphasises this."

12. The Apex Court thereafter proceeded to consider the very embargo which is created under Order IX Rule 6(a) and observed that the provisions are incorporated with an intention to give leverage to the Court to proceed with the suit, in case, if the defendant fails to appear on given date or such other dates suit was adjourned for hearing. The Court further proceeded to consider the meaning of word *ex-parte* and observed that the word "*ex-parte*" as referred to in Order IX Rule 6(a) of the CPC is to mean that the suit to proceed in absence of party who has failed to appear. While interpreting the said provision in a given eventuality like one which is canvassed in the present petition, the Apex Court has held that even if suit is proceeded *ex-parte* or in case even if the written statement is not placed on record, still the defendant is entitled to cross-examine the witness of the plaintiff.

13. In the aforesaid background, the order impugned apparently appears to be contrary to the very scheme of Order IX

Rule 6(a) of the CPC, so also the law laid down by the Apex Court in the matter of *Sangram Singh (cited supra)*. As such, order impugned dated 30th November, 2021 passed in Notice of Motion No.1719 of 2020 is hereby quashed and set aside. The Notice of Motion No.1719 of 2020 stands allowed.

14. It is ordered that the petitioner/defendant is entitled to examine the witness of the plaintiff.

15. However, considering the very conduct of the petitioner in not co-operating with the Trial Court in expeditious disposal of the suit, its such conduct which has resulted delay in deciding the suit, this Court is inclined to saddle the cost of Rs.1,00,000/- to be deposited with Kirtikar Law Library within a period of four weeks from today.

16. The City Civil Court shall be at liberty to grant schedule and timetable for completing the cross-examination of the plaintiff's witness by the petitioner/defendant. Unnecessary adjournments shall be dealt with harsh conditions.

17. The petition as such stands allowed in above terms.

[NITIN W. SAMBRE, J.]