

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

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APPEAL FROM ORDER NO.763 OF 2017
WITH
CIVIL APPLICATION NO.1027 OF 2017

James C. Pereira & Ors. ...Appellants
Vs
Shobha Rajkumar Rajpal & Ors. ...Respondents

WITH
APPEAL FROM ORDER NO.744 OF 2017
WITH
CIVIL APPLICATION NO.995 OF 2017

M/s. Radio T.V.Commercials,
Partnership Firm ...Appellant
Vs
Shobha Rajkumar Rajpal and Ors. ...Respondents

...

Mr. Mayur Khandeparkar with Ms. Gayatri Sharma i/by
S.K.Shrivastav and Co. for Respondent No.7 in AO/763/2017 and
for Appellants in AO/744/2017.

Mr. Girish Godbole, Senior Counsel with Mr. Ferhan Duhas with
Ms. Jyoti Ghag i/by Dua Associates for Respondents.

Mr. Sukand Kulkarni with Ms. Diksha Tripathi i/by Mr. Amit
Karkhanis for Respondent Nos.6 to 8 in AO 744/2017 and for
appellant in AO/763/2017.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : APRIL 13, 2022.
PRONOUNCED ON: APRIL 22, 2022

P.C. :

These Appeals From Order under Order 43 Rule 1(d) read with 104 of the Civil Procedure Code, 1908, challenges the order dated 1st September, 2017 by which the learned trial Judge declined to set aside the ex-parte decree passed against the appellants.

2 Brief Facts are as under;

Respondent No.1 filed Short Cause Suit No.8582 of 1998 before this Court against the appellants, inter-alia, for decree of declaration with respect to property called ‘Ama House’. Appellants had appointed “Daphtari Ferreira & Divan” as their advocates on record before this Court and had instructed them to appear and file Written Statement. Accordingly, Written Statement was filed in the year 2006. Sometime, in the year 2015, appellants were informed about passing of final judgment and decree in the said suit in the Bombay City Civil Court. On enquiry, appellants were informed that said suit was transferred to City Civil Court, Bombay in view of the Bombay City Civil (Amendment) Act, 2012 and the decree was passed on 23rd October, 2015. Whereafter, appellants moved Motion under

Order 9 Rule 13 of the Code of Civil Procedure, 1908 ('CPC' for short) for setting aside the ex-parte decree passed against them. Notice of Motion No.4860 of 2015 was dismissed on 1st September, 2015. Therefore, these Appeals From Order.

3 Heard Mr. Khandeparkar, learned counsel for the appellants in Appeal From Order No.763 of 2017, Mr. Sukand Kulkarni for the appellants in Appeal From Order No.744 of 2017 and Mr. Girish Godbole, learned counsel for respondents/original plaintiffs.

4 Mr. Khandeparkar, learned counsel for the appellants would submit that the appellants/defendants filed their Written Statement and thereafter, issues were framed on 12th June, 2015. Pointing out Roznama dated 2nd July, 2015, Mr. Khandeparkar submitted, on the said date, in absence of defendants, proceedings were adjourned for recording evidence. Mr. Khandeparkar pointed out that on 27th July, 2015, plaintiffs' affidavit in lieu of evidence, was taken on record and the matter was adjourned for cross-examination/

marking of documents. Mr. Khandeparkar submitted although the affidavit of evidence was filed alongwith compilation of documents, its' copy was not served on defendants. His next submission is that, appellants could not attend the Suit Proceedings since the appearance of the advocate of the appellants was not shown on the cause-list of 9th February, 2015, 12th June, 2015 and 2nd June, 2015. Mr. Khandeparkar in support of his submission would rely on the copies of cause-list of respective dates. Mr. Khandeparkar submitted that not showing the name of the advocate for the appellants in the cause-list was '*Sufficient Cause*' to set aside the ex-parte decree under Order 9 Rule 13 of the CPC. Mr. Khandeparkar, relied on the judgment of the Apex Court in the case of **Harishankar 2001 (10) SCC 301**. The issue before the Apex Court was "*Whether, not showing the name of the advocate for the appellant in the cause-list is 'Sufficient Cause' to set aside the ex-parte decree under Order 9 Rule 13 of the CPC*". The Hon'ble Apex Court has held that '*advocates' non-appearance in the case when the case is taken up on the ground that his name was not shown in the cause-list is indeed a 'Sufficient Cause'*'. Thus, Mr. Khandeparkar submitted that inspite of showing the '*Sufficient*

*Cause*¹, the trial Court declined to set aside the ex-parte decree and, therefore, interference is called for. Nextly, he submitted that having regard to the facts of the case, ex-parte decree be set aside and parties be relegated, to trial at the stage of leading evidence, in-as-much as the issues in the suit have been framed.

5 Mr. Godbole, learned Senior Counsel for the respondents, submitted that suit in question was transferred to City Civil Court, Greater Bombay on 1st December, 2012. Decree therein was passed on 23rd October, 2015. Yet, the application moved by the appellants on 18th December, 2015 seeking to set aside the ex-parte decree does not disclose the reasons, which prevented them from attending the suit proceedings since December, 2012. Mr. Godbole, therefore, submitted that the impugned order requires no interference.

6 Herein, pursuant to Bombay City Civil (Amendment) Act 2012 and Notification dated 28th August, 2012, various suits as specified in the Act pending in this Court were transferred to Bombay

City Civil Court with effect from 1st October, 2012. A list of matters so transferred was put up on the web-site of the Bombay High Court. Therefore, it cannot be said that the appellants were not aware about transfer of the subject suit to the Bombay City Civil Court. However, the fact remains, on 12th June, 2015 when issues were framed, names of the appellants' advocate were not shown in the cause-list. Likewise on 2nd July, 2015, 27th July, 2015, 24th August, 2015 and 5th September, 2015 and 23rd October, 2015, appellants' advocate name was not shown in the cause-list. Therefore, it is to be held that the appellants were prevented by '*Sufficient Cause*' from appearing when suit was called on for hearing. As such, it cannot be said, that the defendants did not appear in proceedings deliberately. Apex Court in the case of **Harishankar (Supra)** has held that '*not showing the name of the advocate in the cause-list is a 'sufficient cause' to set aside the ex-parte decree.*' Therefore, in consideration of the facts of the case, in my view, interference in the impugned order is called for. I hold that the appellants have shown '*Sufficient Cause*' for setting aside the ex-parte decree passed in Short Cause Suit No.8582 of 1998. As a result, the appeals are allowed. The impugned order

dated 1st September, 2017 is quashed and set aside. In consequence, the ex-parte decree dated 23rd October, 2015 in Short Cause Suit No.8582 of 1998 is quashed and set aside subject to cost of Rs.25,000/- each in both the appeals payable to the plaintiffs within four weeks from today. In the facts and circumstances of the case, parties to the suit shall appear before the trial Court on 13th June, 2022. Whereafter, trial Court shall proceed with suit to hold trial in accordance with law and shall make an endeavour to dispose of the suit preferably before 31st May, 2023. The Appeals From Order are allowed and disposed of in aforesaid terms.

7 As the appeals itself are disposed of, nothing survives in the applications therein and same are also disposed of.

(SANDEEP K. SHINDE, J.)