

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 251 OF 2023

United Builders Thr. Its Partner Rashmibhai ... Petitioner
Kotecha

Versus

Hemal Khanderia ...Respondent

Mr. Ajit R. Kantak, Advocate for the Petitioner.

**Mr. Vithal Naik, Advocate Under Legal Aid Services for
the Respondent.**

CORAM: PRAKASH D. NAIK, J
DATED: 3rd AUGUST 2023

ORDER

1. Heard Mr. Kantak, learned counsel for the petitioner and Mr. Naik, learned counsel for the respondent.
2. The petitioner is challenging the orders dated 23.02.2023 passed by Civil Judge, Junior Division at Panaji in CMA No. 35/2022/C and CMA No. 36/2022/C. The petitioner has initiated Regular Civil Suit No. 92/2018/C for eviction under Section 6 of Civil Procedure Code (CPC) and Section 22 of the Rent Control Act.
3. The petitioner's case is that they had leased to the respondents shop no. B-2 admeasuring about 90 square metres at the basement of building known as 'Mahalaxmi Chambers', at Panaji, Goa, vide Lease dated 07.11.2003. The said shop and the lease were subject matter of

a Rent Case No. 51 of 2014/C, which was settled by Consent Terms dated 22.07.2014. The lease rent payable by the respondent to the petitioner on or before 5th of the month is set out in the Lease Deed dated 07.11.2003, which was modified by Consent Terms dated 22.07.2014. It was agreed that in the event of default in payment of monthly rent, the petitioner would be entitled for eviction of the respondent. However, there was a default in payment of monthly rent by respondent from May 2017 onward. Notice was sent to the respondent. Time was sought by respondent for paying the outstanding rent. Ultimately the petitioner was constrained to file the proceedings for eviction. The total outstanding were ₹4,22,000/- till August 2018. The application for eviction was filed on 13.08.2018 praying that the respondent be ordered to pay a sum of ₹ 4,22,000/- being the lease amount outstanding till August 2018 and further amount of ₹ 27,750/- per month from September 2018 till the handing over of the possession of suit shop.

4. The petitioner-plaintiff examined himself as Pw.1 and produced the documents. The defendant did not file written statement within prescribed time and by order dated 06.08.2019, the application for extension of time for filing written statement was dismissed. Vide judgment and order dated 21.12.2021, the suit was decreed in terms of prayer clauses (a) and (b) and partly in terms of prayer clause (c). The defendant-respondent was directed to pay to

the plaintiff-petitioner a sum of ₹ 4,22,000/- being the lease amount outstanding till August 2018 and further amount of ₹ 27,750/- per month w.e.f. September 2018 till the handing over of the vacant possession of the suit shop to the plaintiff and also interest at the rate of 6% per annum on each lease rent amount as and when due every month till payment. Defendant was directed to vacate and hand over the possession of the suit shop to the petitioner.

5. The respondent preferred Civil Misc. Application No. 35/2022/C before the Court of Civil Judge Junior Division, Panaji, for condonation of delay under Section 5 of the Limitation Act along with Civil Misc. Application No. 36/2022/C for setting aside the decree dated 21.12.2021.

6. Vide order dated 23.02.2023, the learned Civil Judge condoned the delay in preferring the application for setting aside exparte decree and vide separate Order dated 23.02.2023, the exparte judgment and decree in Regular Civil Suit No. 92/2018/C dated 21.12.2021, was set aside.

7. Learned Advocate for the petitioner submitted that both the orders are erroneous and contrary to law. The grounds set out in the application for condonation of delay do not justify non-filing of application under Order IX Rule 13 of CPC within a period of 30 days.

There was gross inaction and negligence on the part of the respondent in filing application under Order IX Rule 13 of CPC. The decree was made on 21.12.2021 whereas the application for setting aside the decree was filed on 08.07.2022, there being delay of six months. The petitioner had initiated Execution Proceeding which were served upon the respondent on 04.05.2022 and the application for setting aside decree was filed on 08.07.2022. Number of opportunities were given to respondent. The Court had heard the final arguments after giving opportunity to respondent. There was no reason to set aside the decree after condoning the delay. The learned Judge has failed to appreciate that Order IX Rule 13 of CPC provides setting aside the decree/order upon such terms as to costs, payment or otherwise. The learned Judge failed to appreciate that the respondent was in possession and occupation of premises and there was default in payment of the rent. Each month of delay was costing the petitioner the rents agreed upon by both the parties. The respondent continues to hold the possession without vacating the premises and not paying any rent to the petitioner. The Court ought to have called upon the respondent to show bonafides by affecting the payment of the entire outstanding rent. The impugned order have caused grave prejudice to the petitioners.

8. Learned Advocate for the petitioner relied upon the decision of this Court in the case of **Pranoti Sudesh Dalvi & Ors. vs. Suresh**

Raghuvir Priolkar & Ors.¹, wherein the Court had considered imposing cost upon the defendants for setting aside the decree.

9. Learned Advocate for the respondent submitted that the order condoning the delay and setting aside the decree was passed in special circumstances. The respondent could not appear before the Court on account of the situation occasioned due to pandemic of Covid-19 before the trial Court. Order IX Rule 13 of CPC vests discretionary jurisdiction upon the trial Court. The learned Judge has taken note of the aforesaid circumstances and condoned delay as well as set aside the exparte decree without imposing any costs. The evidence of plaintiff was closed in February 2021. Thereafter the respondent-defendants could not appear due to restrictions imposed on account of the pandemic of Covid-19. Hence the petition may be dismissed.

10. Perused the roznama of proceedings in Regular Civil Suit no. 92/2018/C, the judgment and decree dated 21.12.2021, impugned orders passed by the Court below and the relevant documents which are part of record. On perusal of the roznama, it is apparent that the defendant-respondent did not appear before the Court after the evidence of plaintiff was recorded. The learned Civil Judge vide order dated 21.12.2021, passed the order that suit of the plaintiff stands

¹ 2020 DGLS (Bom.) 1282

decreed in terms of prayer clauses (a) and (b) and partly in terms of prayer clause (c).

11. The respondent preferred an application for setting aside the decree along with the application for condonation of delay. While preferring the application for condonation of delay, it was condoned that the respondent came to know that the judgment dated 21.12.2021 was passed exparte against him on 05.07.2022. He did not have knowledge of exparte judgment and decree prior to that. However, the application was preferred by way of abundant caution. The respondent was prevented by sufficient cause from appearing in the suit which culminated in the exparte decree. The learned Judge by order dated 23.02.2023, condoned the delay by observing that the respondent had shown his source of knowledge to the exparte judgment and decree through execution proceedings which were annexed to the application. The roznama indicates that upon receipt of notice, the respondent appeared in person on 14.06.2022 and sought time to engage Advocate. On 12.07.2022, the Advocate representing respondent filed reply and prayed for setting aside exparte decree. Thus, the grounds stated in the application are properly explained and the delay is justified. The grounds are sufficient to condone the delay.

12. The application for setting aside the exparte decree was preferred on the ground that the respondent had engaged Advocate to appear and defend his interest in the suit. He did not put his appearance due to several SoPs then prevailing and due to circulars issued by the High Court from time to time consequent upon outbreak of pandemic. It was also contended that notice was not issued to the respondent about resumption of hearing of the suit. The respondent himself was the victim of covid which he contracted on 05.05.2021 and had to undergo isolation and follow other necessary guidelines as per prevailing protocol. Due to absence of the Advocate and the respondent-defendant, the Court passed exparte decree. The learned Civil Judge considered the submissions of both the sides and reason for non-appearance by respondent. The Court took into consideration the fact that situation of pandemic had prevailed during the previous years and the Court's regular running was restricted. The Court perused the record of the trial Court and noted that during the stage of plaintiff's evidence, SoP's and circulars were operating. On 02.02.2021, the plaintiff had closed his evidence when the Court resumed its regular hearing. On the said date, the defendant was absent and also not represented by Lawyer. The matter then proceeded for defence evidence. However, it is seen that neither the defendant nor his Lawyer appeared after the Court's regular hearing. Subsequently, the defence evidence was closed and

the matter was heard and finally disposed of in the absence of the defendant. Although no formal order of exparte was passed, the defendant was never heard in the suit. Hence the decision amounted to an exparte judgment and decree against the defendant. The suit otherwise deserves to be decided on merits. The parties should not be made to suffer due to the mistake of his Lawyer who was engaged to look into the matter. Hence the application deserves to be granted so as to avoid prejudice to the applicant-defendant who deserves to be heard. Court refused to direct payment of arrears of rent. With the aforesaid observations, the exparte decree was set aside and it was directed that the suit shall be resorted back. Registry was directed to fix the matter for appearance on 21.03.2023.

13. I do not find any reason to deviate from the view expressed by the trial Court. It is apparent that on account of pandemic situation, the SoPs issued by this Court were in operation. Subsequently the Court proceedings were resumed. Apparently there was no intimation to the defendant-respondent. The trial Court has rightly observed that the defendant should not suffer. The Advocate representing the defendant-respondent did not appear. The learned Civil Judge while condoning the delay as well as while setting aside the exparte decree, has assigned reasons which does not require interference.

14. Another contention of the learned counsel for the petitioner is that the Court should have ordered payment of arrears of rent and/or costs in accordance with Order IX Rule 13 of CPC. Rule 13 lays to set aside decree exparte against the defendant. It provides that in any case in which a decree is passed exparte against the defendant, he may apply to the Court by which the decree was passed for an order to set aside and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make order setting aside the decree as against him upon such terms as to costs, payments or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

15. The trial Court has dealt with the submission of the petitioner that the arrears towards rent shall be directed to be deposited by the defendant. In the present case, it is required to be noted that the defendant could not appear before the Court on account of special circumstances as indicated above and hence no costs, etc. could be imposed for setting aside the exparte decree and hence the decision of the trial Court cannot be faulted.

16. Considering the aforesaid circumstances, I pass the following order :

ORDER

- (i) The Writ Petition is dismissed.
- (ii) The trial Court is requested to conclude the hearing of Regular Suit No.92/2018/C within a period of four months from the date of receipt of the order.
- (iii) Both parties shall cooperate with the trial Court in expeditious disposal of the proceedings.

PRAKASH D. NAIK, J