



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 122 OF 2023

Mangala Jeevan Lokhande.

...Applicant.

Versus

Sunil Narsingrao Lokhande.

...Respondent.

Mr. Vishal Kanade, Mr. Mohil Punjabi i/b Rajesh Singh & Rahul Singh for the applicant.

Mr. Darshan Nagpure for respondent.

Coram : Sharmila U. Deshmukh, J.

Date : October 30, 2023.

P. C. :

1. By this revision application, applicant seeks quashing of the order dated 19th January 2023 passed in Miscellaneous Civil Appeal No.1 of 2023 reversing the judgment and order dated 22nd December 2022 passed in Marji Application No. 222 of 2021.

2. Facts of the case are that applicant who is original plaintiff had filed L.E. Suit No. 47/53 of 2011 against the respondent who is her brother-in-law seeking eviction and other consequential reliefs. On 17th June 2011, the respondent has filed written statement in the said suit. On 27th September 2017, the advocate engaged by the respondent withdrew his appearance on the ground that no instructions were received by him. On 12th July 2018, amended plaint

along with amended writ of summons was served upon respondent through the bailiff, who has filed his service report. On 5th December 2018, the respondent filed additional written statement and the trial Court fixed the matter for arguments for marking of documents filed along with affidavit of evidence of PW-1. On 8th April 2019, additional affidavit of examination-in-chief was filed by the applicant and the matter was thereafter adjourned for the cross-examination of applicant to 8th January 2020. On 22nd January 2020, as the respondent failed to cross examine applicant, the cross-examination came to be closed. On 22nd January 2020, the applicant closed her evidence and the matter was fixed for the evidence of defendant. On 4th March 2020, as the respondent failed to file his evidence, trial Court closed the evidence of respondent and posted the matter for final arguments on 30th March 2020. At that point of time, due to national lockdown due to Covid-19 pandemic, the matter was adjourned from time to time and upon relaxation of lockdown and partial commencement of Court functioning, the matter was fixed on 8th December 2020 and thereafter adjourned for final arguments on 21st January 2021 and thereafter to 7th February 2021, 5th March 2021 and 22nd March 2021 for arguments. On all these dates, respondent failed to appear, and on 22nd March 2021, the applicant concluded her arguments and the trial Court closed the arguments of respondent

and fixed the matter for judgment. On 6th April 2021, the trial Court passed judgment and decree, decreeing the suit. On 21st August 2021, respondent filed Marji Application under Order IX, Rule 13 of CPC for setting aside the judgment and decree. On 16th November 2022 and 25th November 2022, in spite of service of Execution Application No. 292 of 2021, the respondent failed to appear before the executing Court and warrant of possession came to be issued. On 3rd December 2022, respondent preferred stay application, which came to be rejected by the trial Court. On 22nd December 2022, trial Court dismissed the application for setting aside the ex-parte decree, which came to be challenged by respondent before the appellate bench of Small Causes Court, which allowed the appeal, leading to the present revision application.

3. Heard Mr. Vishal Kanade, learned counsel appearing for the applicant and Mr. Nagpure, learned counsel appearing for the respondent.

4. Learned counsel for the applicant has taken this Court through the findings of trial Court as well as the appellate Court. He would submit that considering the manner in which the matter has been proceeded, conclusion which can be safely arrived at is that the respondent has been grossly negligent in prosecuting the

proceedings. He would further point out that the only ground on which ex-parte judgment and decree is sought to be set aside is that mother-in-law of respondent was suffering from cancer and that the respondent and his wife were looking after her and were therefore unable to keep track of suit. He would further submit that respondent was well aware of the proceedings and had also engaged an advocate and, that the conduct of respondent is grossly negligent. He would submit that the reason set forth does not constitute sufficient cause to set aside the judgment and decree. He would further submit that the application for setting aside ex-parte decree came to be filed on 21st August 2021 and the knowledge was ascribed to the over-hearing of conversation which took place between the applicant and her son and it is inconceivable that respondent was not aware of the proceedings.

5. *Per contra*, learned counsel for the respondent submits that cause shown is sufficient to set aside ex-parte judgment and decree. He would submit that due to serious illness of his mother-in-law, the respondent had gone in mental depression and therefore could not attend the proceedings. According to him, there was inability to attend the proceedings due to illness of mother-in-law and the same constitutes a sufficient cause. He submits that after the expiry of his

mother-in-law in the year 2021, respondent was free to pursue the proceedings and had thereafter adopted necessary remedy for setting aside ex-parte judgment and decree. He would urge that principles of natural justice require that the judgment and decree of trial Court be set aside. He relied upon decision of the Apex Court in *Y. P. Lele v. Maharashtra State Electricity Distribution Co.Ltd. [2023 SSC Online SC 997]*.

6. Considered the submissions and perused the record.

7. L.E. Suit No. 47/53 of 2011 was filed in the year 2011 and the written statement came to be filed on 17th June 2011. There are no reasons given by the respondent for not contacting his advocate and giving proper instructions for defending the suit. Record indicates that for want of instructions, the advocate for respondent had withdrawn his appearance from suit after intimating the respondent. Subsequently, in the month of July 2018, amended plaint along amended writ of summons was served upon respondent and despite thereof, the respondent had failed to participate in the proceedings. After recording the evidence of applicant, trial Court decreed the suit by judgment and decree dated 6th April 2021.

7.1 It cannot be said that the respondent did not have knowledge

about the proceedings inasmuch as even in the month of July 2018, the amended plaint along with amended writ of summons was served upon respondent. Thereafter, the matter had proceeded further and it is ultimately in the year 2021, that judgment and decree came to be passed. The only reason which has been given for the non appearance of respondent is that his mother-in-law was suffering from cancer since 2000 and that the respondent and his wife were the care-givers to his mother-in-law.

8. It needs to be noted that the suit was filed in the year 2011, in which respondent had filed his written statement in the year 2011 which is subsequent to the contracting of ailment by his mother-in-law in the year 2000. The respondent had engaged an advocate to represent him in the proceedings and there is no reason which has been shown as to why respondent could not have contacted his advocate and given appropriate instructions. It is not disputed that the respondent had been informed by his advocate about the lack of instructions and had thereafter withdrawn his vakalatnama. I do not find any sufficient reason as to why the respondent could not have contacted his advocate and given appropriate instructions, the admitted position being that respondent as well as his wife were the care-givers and as such his wife in the respondent's absence could

have taken care of her mother.

9. The reason put forth is the inability to attend the Court and diligence is sought to be shown by submitting that when the respondent was free to attend proceedings, he had initiated proceedings to set aside ex-parte judgment and decree. The Court proceedings cannot be stalled till the litigant is free to prosecute / defend the proceedings. In the present case, on the specious ground of illness of his mother-in-law, respondent claims inability to attend the proceedings and that he was under mental depression and tension and, as such, the respondent wants that the suit of the year 2011, which came to be decreed after a period of 10 years, should be restored after setting aside the ex-pare judgment and decree. Being fully aware of the proceedings and having chosen not to participate in the proceedings without any cogent reason justifying his absence for a period of 10 years during trial, in my opinion, the conduct of respondent is nothing but negligent.

10. The appellate Court while reversing the finding of trial Court has, after observing that respondent was informed by his advocate, held that accepting that the respondent should have contacted a new advocate or should have asked someone, is something which cannot be said at this stage, and that the Court has to reasonably see that in

such situation a person does not realise anything. It needs to be noted that situation which is the ailment of mother-in-law of respondent is since the year 2000 and she expired in the year 2021, i.e., for a period of 21 years. In the intervening period, respondent had not only engaged an advocate but had also filed his written statement. There is nothing to show that during this period, the respondent was not attending his day to day affairs. As such, it cannot be said that there was any inability on the part of respondent to attend the proceedings.

11. As regards the ground that respondent being under mental depression and tension, admittedly there is no material which is produced on record to demonstrate the same. For the purpose of adjudicating an application under Order-IX Rule-13 of CPC, the Court has to be satisfied that the party was prevented by any sufficient cause from appearing when the suit was called on for hearing. As a sufficient cause will necessarily exclude a negligent conduct, in my opinion, the discretion could not have been exercised by the appellate Court in favour of the respondent.

12. Having regard to the discussion above, revision succeeds. Revision application is allowed in terms of prayer clause (a).

[Sharmila U. Deshmukh, J.]