



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10121 OF 2023

Neha Punjabi And Others.

...Petitioners.

Versus

Vishambar Khemchand Mehrotra
and Another.

...Respondents.

*Dr. Abhinav Chandrachud i/b Mr. Khan Jaaved Akhtar for the petitioners.
Mr. Aurup Dasgupta, Sonam Ghiya and Darshika Hemnani i/b Jhangiani,
Narula & Associates for the respondent.*

Coram : Sharmila U. Deshmukh, J.

Date : December 5, 2023.

P. C. :

1. By the present petition, exception is taken to the order dated 25th July 2023 passed in Revision Application No.11 of 2020 setting aside the order of trial Court dated 21st September 2019 passed in Miscellaneous Notice No. 282 of 2008 in R.A.E. Suit No.496/1281 of 1995. By the impugned order, the revisional Court while setting aside the order of trial Court, permitted the Respondent's application under Order-41 Rule-27 of CPC and remanded the matter to the trial Court for re-trial directing the trial Court to give equal opportunity to the respondent plaintiff to produce rebuttal evidence. Petitioners herein are the Defendants

being the legal heir of the original Defendants and the Respondent is the Plaintiff before the Trial Court.

2. There are several previous rounds of litigation between the parties and it is necessary to briefly advert to the same:

R.A.E. Suit No.496/1281 of 1995 was instituted by respondent against the Petitioners seeking ejectment. On 28th August 2008, ex-parte decree was passed decreeing the suit and directing the petitioner to hand over peaceful possession of the suit premises.

On 18th December 2008, Miscellaneous Notice No.282 of 2008 was filed under Order-9 Rule-13 of CPC for setting aside the ex-parte decree and for condonation of delay along with the medical evidence that the original Defendant No 2 was suffering from cervical cancer. By judgment dated 1st April 2009, the application was allowed and the ex-parte decree was set aside subject to payment of costs along with arrears of rent.

As against the order of trial Court, respondent preferred revision, being Revision Petition No. 99 of 2009, which came to be allowed by the revisional Court, as against which Writ Petition No.

3383 of 2010 was filed by the petitioners. This Court in Writ Petition No. 3383 of 2010 set aside the order of revisional Court and Miscellaneous Notice No.282 of 2008 was restored to the file with liberty to the parties to lead evidence.

During the evidence of parties, trial Court refused to exhibit certain documents produced by the witness of petitioner, as against which Writ Petition No. 9635 of 2018 was filed in this Court, which came to be allowed by this Court vide order dated 11th June 2019. Civil Application No. 1830 of 2019 was filed by respondent seeking modification/ clarification of the order dated 11th June 2019 which was decided by this Court vide order dated 14th August 2019 leaving it open for respondent to urge all pleas and grounds before the trial Court as the law permits.

By order dated 30th August 2019, respondent's application below Exhibit 101 for permission to examine the witness came to be rejected. Vide order dated 21st September 2019, Miscellaneous Notice No. 282 of 2008 was allowed, the delay of 81 days was condoned and the ex-parte decree was set aside restoring the suit to file.

As against this, Revision Application No.11 of 2020, was filed

by respondent. In the said revision, an application was moved by Respondent under Order-41 Rule-27 of CPC for leading additional evidence to which the reply was filed by the petitioner.

3. By the impugned order dated 25th July 2023, the revisional Court allowed the application and remanded matter to the trial Court with a direction to give equal opportunity to respondent no. 1 to adduce the rebuttal evidence.

4. Heard Dr. Chandrachud, learned counsel appearing for the Petitioner and Mr. Dasgupta, learned counsel appearing for the Respondent.

5. Dr. Chandrachud, learned counsel for the petitioner has taken this Court through the various orders passed in the previous litigation between the parties. He submits that on the basis of evidence on record, the trial Court allowed the application filed under Order 9 Rule 13 of CPC. He submits that the medical records came to be marked pursuant to the orders of this Court. Drawing attention of this Court to the findings of revisional Court, he would contend that the revisional Court has relied upon the findings in order dated 26th February 2010 passed in Revision Petition No 99 of 2009, that the petitioner has no documentary evidence to suggest

that for a particular period, she was suffering from illness without noticing the fact that the said order dated 26th February 2010 was set aside by this Court in Writ Petition No. 3383 of 2010. He submits that by order passed below Exhibit 109, the trial Court had rejected the application taken out by the plaintiff for leading rebuttal evidence vide order dated 30th August 2019, which was not challenged by the respondent and as such has attained finality. He submits that without a challenge to the order passed below Exhibit-109 in Revision Application No.11 of 2020, the revisional Court has considered the order of 30th August 2019 and permitted the plaintiff to lead rebuttal evidence. He submits that sufficient and justifiable cause was made out for setting aside the ex-parte decree and, as such, the revisional Court on the basis of orders passed and findings recorded in previous revision application, which was set aside by the High Court, could not have allowed the revision and remanded the matter by giving an opportunity to the respondent to adduce rebuttal evidence.

6. *Per contra* Mr. Dasgupta, learned counsel appearing for the respondent submits that by the order passed in Writ Petition No. 3383 of 2010 filed challenging the order passed in the first Revision Application No. 99 of 2009, the trial Court was directed to permit the

parties to lead evidence. He submits that in the second round of litigation when there was refusal to accept the documents produced by the parties, by order dated 11th June 2009, the trial Court was directed to mark the documents and clarification was sought by filing Civil Application No. 1830 of 2019. Inviting the attention of this Court to the order dated 14th August 2019 annexed at page 137 of petition, Mr. Dasgupta submits that this Court has held that the rebuttal evidence is a consequence and not the subject of writ petition which engendered the order dated 11th July 2019 and that it lies within the trial Court's discretionary jurisdiction to decide the plaintiff's requirement to meet the consequences that flowed from trial Court's implementing the order dated 11th June 2019. He submits that subsequent thereto, an application below Exhibit-109 was filed which came to be rejected vide order dated 30th August 2019. Drawing attention to Revision Application No.11 of 2020, he would urge that the entire history was placed for consideration of the revisional Court and a specific pleading as to the order dated 30th August 2019 has been incorporated in the revision application as also in the ground of challenge. He submits that inadvertently, no relief as against the order rejecting the application below Exhibit-109 was sought in the revision application. He would however submit that an application to lead additional evidence under Order-41 Rule-27 was

filed which came to be allowed. He would further submit that before the trial Court matter is fixed for final arguments and the evidence is completed. He submits that as regards the ailment of petitioner, there is categorical admission of petitioner's witness that the petitioner was not suffering from cancer in the year 2008 which was the relevant date. In support of his submission, Mr. Dasgupta relied upon the decision of the Apex Court in the case of *Akhilesh Singh @ Akhileshwar Singh v. Lal Babu Singh* [Civil Appeal No. 2108 of 2018 dated 21st February 2018].

7. Considered the submissions and perused the record.

8. Against the order of trial Court condoning the delay of 81 days and setting aside the ex-parte decree dated 20th August 2008, revision application No 11 of 2020 came to be filed. For the purpose of deciding the revision application what was required to be considered is whether there was any jurisdictional error or material irregularity or illegality so as to warrant interference. The Trial Court on the basis of evidence led by the parties had found sufficient cause for setting aside the ex-parte judgment and decree and condoned the delay of 81 days. The scope of Order-9 Rule-13 is very clear and the provision requires the Court to be satisfied that the party was prevented by any sufficient cause from appearing when the suit was

called for hearing. In the present case, the trial Court on the basis of evidence on record has considered the documents marked as Exhibit-95 to 108, which was permitted to be marked as exhibits pursuant to the order of this Court and had allowed the application. While doing so, the trial Court had considered that disease of cancer is not like a viral fever, which can be said that once it is cured, the person is physically fit and fine to do regular pursuits. The trial Court on the basis of documentary evidence observed that since 2006, defendant no.2 was undergoing treatment for cancer and other diseases.

9. The revisional Court took into consideration the findings in the earlier round of litigation, i.e., Revision Application No. 99 of 2009 which held that there is no sufficient cause for the petitioner as she has no documentary evidence to support her case. The findings of the first revision application could not be taken into consideration as subsequently by virtue of orders of this Court, the parties were permitted to lead fresh evidence and in W.P. No 9635/2018 this Court had permitted the medical records to be marked as Exhibits. Before the trial court the medical records were exhibited and considering the documentary evidence, the ex-parte judgment and decree was set aside.

10. The revisional Court on the basis of orders passed by this

Court in previous litigation, held that trial Court was given the liberty to assess the quality of evidence which the respondent is going to produce and as such the evidence of the petitioner has to be rebutted by leading cogent and clinching evidence by the respondent and the basic opportunity must be given to the respondent. Taking support from the order of this Court in Writ Petition No.3383 of 2010, the revisional Court held that this Court had permitted the parties to adduce their evidence and even the last order of this Court dated 14th August 2019 permitted the respondent to invoke the jurisdiction of trial Court to make a proper case to produce the rebuttal evidence. The revisional Court set aside the impugned order on the ground that it is based upon one sided evidence and the opportunity is required to be given to Respondent to adduce the rebuttal evidence. While doing so, the application under Order-41 Rule-27 came to be allowed and the matter was remanded to the trial Court for permission to lead rebuttal evidence.

11. The entire reasoning of the revisional Court would indicate that what weighed with the revisional Court is that the respondent was not given an opportunity to lead rebuttal evidence. The appellate Court failed to take note of the fact that by order dated 30th August 2019 the Respondent's application below Exhibit 109 was

rejected, which order was not challenged by the Respondent and had attained finality. The Respondent could not be permitted to have another bite of the cherry in revisional proceedings. I am not inclined to accept the submission advanced by Mr. Dasgupta that the order of 30th August 2019 was also the subject matter of revision application, for the reason that there was no prayer for setting aside of the order dated 30th August 2019 and that order was not even annexed to the application. There are certain pleadings in the revision application pertaining to the application below Exhibit 109 but then the revision application narrates the entire previous litigation which included the order passed below Exhibit 109. In my view, incorporation of pleadings regarding the order dated 30th August, 2019 cannot be construed as a challenge to the order dated 30th August 2019 without a specific prayer for setting aside the order. The revisional Court has done precisely that. By the impugned order the revisional Court has in fact allowed the application below Exhibit 109 without there being any challenge to the same.

12. The revision application did not challenge the order dated 30th August 2019 is also clear from the fact that an application came to be filed under Order-41 Rule-27 of the CPC seeking to produce rebuttal evidence. If the subject matter of revision application was

also the order of 30th August 2019, there was no necessity for the respondent to file an application under Order-41 Rule-27 of CPC. The appellate Court has in fact not considered the validity of the order dated 21st September 2019 which was subject matter of challenge and the findings are in respect of the order dated 30th August 2019 passed below Exhibit-109 which was not the subject matter of revision application.

13. If one looks at the provisions of Order-41 Rule-27 and 28 of CPC, it provides for the contingencies in which the Appellate Court may permit the parties to produce additional evidence and the mode of taking additional evidence. Rule 28 of Order 41 provides that wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the trial court to take such evidence and to send it when taken to the Appellate Court. The mode prescribed indicates that the additional evidence adduced is for the purpose of enabling the Appellate Court to effectively adjudicate the issue pending before it. Even if the revisional Court has permitted the production of additional evidence, the mode prescribed in Order-41 Rule-28 has not been followed. The Revisional Court has set aside the order of the Trial Court and directed a re-trial.

14. It is settled that order of remand should not be passed routinely. If the Appellate Court did not agree with the findings of the Trial Court, it has to come with a proper finding of its own. In the present case even assuming that the Appellate Court was right in allowing the application under Order 41 Rule 27 of CPC, the Appellate Court ought to have adopted the mode prescribed in Rule 28 of Order 41 of CPC for taking additional evidence and on the basis of additional evidence adjudicated the revision.

15. Although pursuant to the order of revisional Court the matter has proceeded further, it needs to be noted that no rebuttal evidence could have been permitted in view of the admitted position that by an order of 30th August 2019, the respondent's application for leading rebuttal evidence has been rejected, which has attained finality. Under the guise of an application under Order-41 Rule 27 of CPC, the order of 30th August 2019 passed by the trial Court cannot be circumvented.

16. Another reason which would justify setting aside of the order of revisional Court is that the case of petitioners is that original defendant no.2-tenant was suffering from cancer and as such could not participate in the proceedings. It is an admitted position that the summons was duly served upon the petitioners. The evidence which

has come on record would indicate that there was removal of Carcinoma in the year 2006. However, as rightly pointed out by the trial Court, the ailment of cancer is not an ordinary ailment and subsequent thereto, there are certain post surgery treatments required to be undergone by the patient and the after-effects can set in. The witness during evidence has stated that she was undergoing radiological treatment after removal of carcinoma in the year 2006.

17. The requirement of Order-9 Rule-13 is sufficient cause being shown for non appearance when the suit was called on for hearing. Facts of the case would indicate that in the year 2006, i.e., during the pendency of the proceedings, the original Defendant No 2 was suffering from serious ailment like cervical cancer. The evidence on record shows that she was undergoing medical treatment. It is well known that for an ailment like cancer, after-effects are grave inasmuch as thereafter the patient is required to undergo various treatments to ensure that there is no relapse.

18. In that view of the matter, in my opinion, the order of trial Court accepting the cause shown by the petitioner cannot be said to suffer from infirmity so as to warrant interference by the appellate Court.

19. In the light of above discussion, petition succeeds in terms of prayer clause (a).

[Sharmila U. Deshmukh, J.]