

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 162 OF 2022
WITH
INTERIM APPLICATION NO.1077 OF 2022

Gajanan Chintaman Gujar
Age : 67 years, Occu. : Retired
R/o. 2205, Vigneshwar Co-Op.
Housing Society Ltd. Sambhaji Nagar,
S. N. Marg, Andheri East, Mumbai-400069 ...Appellant.

Versus

1. Aparna Shankar Gujar
 Age : Adult
2. Prashant Shankar Gujar
 Age : Adult
 Both R/o. BMC No.86, Gurkha Chawl,
 Ankush Port Samiti, Golibar Road,
 Vasudev Balwant Marg,
 Near Sarvodaya Lane,
 Ghatkopar West, Mumbai-40086
3. Vigneshwar Co-Op. Hsc. Ltd.
 Sambhaji Nagar, S. N. Marg,
 Andheri East, Mumbai-400069.

Mr. Pankaj Pandey, i/b. Mr. Ramesh Chandra Pandey for Appellant.
Mr. S. C. Mangle, for Respondent Nos. 1 and 2.

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 23 AUGUST 2023.

PRONOUNCED ON : 01 SEPTEMBER 2023.

JUDGMENT:

1. **Admit.** Respondent Nos.1 and 2, who are Plaintiffs in the suit and contesting parties, are served and represented by an advocate. With the consent of the learned advocates appearing for the parties, the appeal is taken up for final hearing.

2. By this appeal, Appellant challenges order dated 15 November 2021 passed by the City Civil Court rejecting Notice of Motion No.3946 of 2019. The motion was filed by the Appellant, who was defendant No.1 in the suit, for setting aside *ex parte* order dated 16 November 2016 and *ex parte* decree dated 16 December 2017 passed by the City Civil Court in S. C. Suit No.4818 of 2011 against the appellant, who was the sole defendant in the suit originally filed. During pendency of the suit, Respondent No. 3 was impleaded as defendant No.2 to the suit. Since the Society (Defendant No. 2/Respondent No. 3) is not a contesting party, Appellant is referred in the present order as Defendant and Respondent Nos. 1 and 2 as Plaintiffs.

3. In their suit, Plaintiffs sought a declaration that they are absolute owners of suit premises bearing Room No.205, Building No.2, Vighneshwar Housing Co. Op. Society Ltd., Sambhaji Nagar, S. N. Marg,

Andheri East, Mumbai 400069 and that the Defendant and his family members did not have right, title or interest therein. As an alternate prayer, Plaintiffs sought a declaration that they have a right to reside in the suit premises alongwith the defendant on payment of 50% society charges. Relief of injunction was also sought against the defendant from alienating or creating third party rights in the suit premises.

4. Appellant-defendant were served with suit summons on 03 February 2012. Though he did not appear initially on 28 February 2013 and 03 July 2013, the Roznama indicates that defendant appeared through his advocate on 14 March 2013 and the suit was referred to mediation. It appears that defendant or his advocate thereafter filed to remain present in the suit. The suit was amended for impleadment of society as defendant No.2 and the appellant-Defendant was served with notice of Chamber Summons as well as amended copy of plaint. However, he failed to remain present. The Roznama indicates that the appellant was present in person on 19 February 2015. He did not file any written statement. He was served with copy of evidence affidavit and list of documents. On account of absence of appellant, 'No Cross' order was passed against him on 16 November 2016. Suit came to be finally decreed on 16 December 2017 in absence of appellant. After Plaintiff filed execution proceedings for execution of decree dated 16 December 2017, appellant-defendant filed Notice of Motion No.3946 of 2019 on 04 October 2019 seeking setting aside of 'No Cross' order dated 16 November 2016 and *ex parte* decree dated 16 December 2017. The

motion was opposed by the Plaintiffs by filing reply. By order dated 15 November 2021, the City Civil Court had proceeded to dismiss Appellant's Notice of Motion No.3946 of 2019. Aggrieved by that order, Appellant has filed present appeal.

5. Mr. Pandey, the learned counsel appearing for Appellant would contend that the Appellant relied on his advocate for defending the suit. That his advocate did not communicate the progress of the suit to the appellant. That appellant is not a very highly educated person and is incapable of understanding the niceties of legal procedure. He would further submit that the agreement for allotment of permanent alternate accommodation has been executed in favour of the appellant and that he is in exclusive possession of the suit premises, wherein he is residing with his family members. If the *ex parte* decree is not set aside, the appellant and his family members would be thrown out from their residential house. In support of his contentions, he would rely upon judgment of the Allahabad High Court in ***Shiv Kumar Pandey Vs. State of Uttar Pradesh***, 2021 DGLS(Alld.) 924.

6. *Per contra* Mr. Mangle, the learned counsel appearing for Respondent Nos.1 and 2-Plaintiffs would oppose the appeal and support the order passed by the City Civil Court. He would submit that appellant has been extremely casual in defending the suit. That though he was present on various occasions before the City Civil Court, he neither filed written statement nor participated in any of the proceedings of the suit.

That the appellant cannot be permitted to be blame his advocate to hide his own defaults. That the appellant was keeping a watch on the proceedings and cannot be said to be altogether ignorant about prosecution of the suit. That the Plaintiffs have succeeded in securing a decree in their favour after a long legal battle and they must be allowed to enjoy the fruits of the decree and at this stage, the appellant cannot be permitted to object the decree. He would further submit that the Apex Court has frowned upon litigants blaming their advocates in its judgment in *Salil Dutta Vs. T. M. and M.C. Private Ltd.*, (1993) 2 SCC 185. That under the provisions of Order 9, Rule 13 of the Code of Civil Procedure, *ex parte* decree can be set aside only if it is proved that summons was not served on defendant. He would further submit that appellant ought to have filed appeal challenging the decree and that no ground existed for seeking setting aside of the *ex parte* decree. He would pray for dismissal of the appeal.

7. Rival contentions of the parties now fall for my consideration.

8. It is not in dispute that the appellant was served with suit summons on 03 February 2012. Roznama indicates that the his Advocate appeared before the court on 14 March 2013. When Court observed that the dispute was amongst family members, it felt that the same can be resolved amicably. The Court therefore referred the dispute for mediation and adjourned the suit to 24 April 2013. The mediation failed and the

appellant or his advocate did not remain present before the Court at various dates on 22 April 2013, 17 June 2013, 03 July 2013, 20 November 2013, 05 December 2013, 28 January 2014 and 08 April 2014. On 07 July 2014, Plaintiff filed Chamber Summons No.392 of 2014 for amendment of plaint and served the same by private service on appellant. The appellant however did not appear. Roznama shows that appellant personally remained present before the Court on 13 April 2015, but his advocate was absent. On the next date of hearing on 26 June 2015, another advocate engaged by appellant Mr. Santosh Gujar was present. Chamber summons for amendment was allowed. The Appellant thereafter remained personally present on 19 November 2015 and thereafter continuously remained absent.

9. It is a common ground that appellant did not file written statement in the suit. However, perusal of Roznama indicates that Court did not pass 'No written statement' order till the year 2016. The Roznama of 01 September 2016 shows that the suit was adjourned for filing of written statement to 16 November 2016. On that date, 'No cross' order was passed on account of absence of appellant. On 30 January 2017, Plaintiffs filed evidence-closure pursis. Although 'No Cross' order was already passed on 16 November 2016, Roznama shows that suit was adjourned on 13 July 2017 for passing no cross order. Thereafter defendant continuously remained absent, and the Court finally decreed the suit on 16 December 2017.

10. Power of the Court to set aside *ex parte* decree is traceable to Order 9 Rule 13 of the Code of Civil Procedure, which reads thus-

O. 9. Decree against plaintiff by default bars fresh suit

13. Setting aside decree *ex parte* against defendants.- In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it 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 an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also: [Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]

11. The contentions of the learned counsel appearing for Respondent Nos.1 and 2 that *ex parte* decree can be set aside only in the event of non-service of summons appears to be erroneous. The Court is empowered to set aside the *ex parte* decree if the defendant proves that he was prevented by a sufficient cause from appearing when the suit is called for hearing. It would be therefore necessary to examine whether the defendant was prevented by sufficient cause from appearing in the suit.

12. In support of his prayer for setting aside the *ex parte* decree, the appellant pleaded following reasons in his Notice of Motion:

“2. I say that I came to know on 19.08.2019 when execution application No.59 of 2019 takeout by the plaintiff have served to me thereafter I contacted my advocate and instructed him to do the needful in the matter and accordingly my advocate Mr J. P. Tripathi who has looking the said matter but he failed to reply of my query about the said matter. I say that my earlier advocate has not given any proper response and not explained about the fact of the case and also what steps has been taken by them is not explained and therefore I have appoint new advocate to Ramesh Chandra Pandey as an advocates to act appear and plea for me and my present advocate enquired about the matter and apply for certified copy of the order and decree on dated 16.09.2019 and received the copy of judgment and decree on 21.09.2019 passed by this Hon’ble court, hence I came to know that the aforesaid suit was Proceed without my advocate appearance who is on record have not appear in the said case and also not inform to me when I had made enquire from time to about the progress of the matter but he always says that I have look into the matter when it be require inform to you and on believing his statement and worlds I have not enquired about further about the case which is pending before this Hon’ble court. I further say that I shocked and surprised to receive execution application taken out by the plaintiff of the decree passed in the suit, whereby plaintiff is declared that the plaintiffs are joint owners of the suit premises i.e. Room No.205, Bldg. No.2, Vigneshwar Co-op. Hsg. Scy Ltd., Sambhaji Nagar, S. N. Marg, Andheri (E) Mumbai-400069 along with defendant No.1 of the suit premises, the plaintiffs have right to stay in the suit premises along with defendant and his family members by paying 50% of the maintenance charges.

3. I say that in fact, the said room premises original occupied by my father Mr. Chintamani Ramchandra Gujar on or before 1960, therefore the said room premises is ancestral property and plaintiffs have no any right, tile and share of the said suit premises, I further say that my father who was occupied the said

suit property was expired on 10.03.1963 at the address of the suit property and after his father death my family and my brother Mr. Shankar Gujar together residing in the said suit premises. Hereto annexed and marked as Exhibit-"B" is the copy of the receipt issued by the Hindu Asmasaan development committee at Koldongari, Andheri East Mumbai, of my father. I further say that the plaintiffs No.1 have been marriage with my brother in the year 1977 and she have not consumed and not co-habited with my late brother therefore by mutually consent between them the marriage was dissolve and plaintiff No.1 has left from my brother life i.e. Mr. Shankar Gujar and she has permanently left from my house i.e. suit premises, and till death of my brother Mr. Shankar Gujar she has no way concern with my late brother i.e. Mr. Shankar Gujar, hence plaintiff have no any right title and share in the said property as well as she has no right of the said room which is acquired by my father, hence question does arise to allow the plaintiffs to reside in the suit premises. I further say that plaintiff No.2 who has claimed as the legal heirs of my late brother as a son, it is noted that marriage was dissolve within months from the marriage between plaintiff no.1 and my late brother then how can claim over right title and share of the suit premises by the plaintiff No.2, I further say that I have search report of ration card issued by the rationing authority in the said ration card no names are mentioned of the plaintiffs in the ration report. therefore the plaintiffs have no right title and share of the suit premise, hence it has necessary to this Hon'ble court please to consider the request of the defendant No.1 and allow to contest the said matter on merits to prove that plaintiffs have no any right, title and share in the suit premises. Hereto annexed and marked as Exhibit-"C" is the copy of the ration report. I further say that my late brother Mr. Shankar Gujar till life time residing with me and I have provide more than 30, years day to day foods and butter and medical expenses of his requirement for better manner all the medical paper I have not keep because I was not aware it will be used in future and subsequently after receive of execution application taken out by the plaintiffs I have search in house then I have found some documents and medicals papers of the my deceased brother. Hereto annexed and marked as Exhibit-

"D" is the copy of medicals papers of the deceased Mr. Shankar Gujar. I further say that on the basis of my good look care of my late brother Mr. Shankar Gujar he has wishes me by executing WILL & Affidavit cum N. O. C. in my favour for transfer all his right, title and share of the said suit premises. Hereto annexed and markes as **Exhibit-"E" (colly)** are the copy of the will & affidavit Cum N. O. C. dated 14.12.2009.

4. I say that upon believing the assurance promise belief and trust given by my advocate I have not come before this Hon'ble court to appear in person in the case and I have totally depend on the words given by my advocate and my advocate was not informed to me about the statue of the said case, therefore I am unable to attendant the matter.

5. I say that for the I came to know on on 19.08.19 when I have received the copy of the execution application No.59 of 2019 about the decree has been passed against me in the said suit and I have appoint new advocate who has applied for certified copy of the entire proceeding on 16.09.2019 and he has obtained the certified copy of entire proceeding on 21.09.2019, however, there is delay of about 693 days in filing present notice of motion. I say that there is delay of about 693 days in filing the present notice of motion, however under these circumstances the said delay is liable to be condoned. I say that the plaintiff has not approached this Hon'ble court with clean hands and has played fraud upon me as well as upon this Hon'ble court."

13. It is appellants case that he relied exclusively on his advocate to defend the suit and that he was not appraised about progress of the suit by his advocate. This reason alone may not be sufficient to seek setting aside the *ex parte* decree, as it was the responsibility of the appellant to file his written statement and defend the suit and he cannot blame his advocate. Though the learned counsel appearing for Petitioner has relied

upon judgment of Allahabad High Court in *Shiv Kumar Pandey* (supra) which makes reference to the judgment of the Apex Court in *Rafiq Vs. Munshilal*, 1981 AIR(SC) 1400, the learned counsel for Respondent Nos.1 and 2 has relied upon subsequent judgment of the Apex Court in *Salil Dutta* (supra) in which it is held in paragraph No.8 as under-

“8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in ‘Rafiq’ must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head-office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hearing they felt piqued and refused to appear before the court. Maybe, it was part of their delaying tactics as alleged by the plaintiff. Maybe not. But one thing is clear -they chose to non-cooperate with the court. Having adopted such a stand towards the court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.”

14. Thus, following the ratio of the judgment of the Apex Court in ***Salil Dutta*** appellant cannot be permitted to blame his advocate for the purpose of seeking setting aside the *ex parte* decree.

15. However there are other factors which would come to the aid of appellant. Parties to the suit did not appear to be well educated persons. They are related to each other. Plaintiff No.1 is the wife of appellant's brother. Both parties are claiming rights in respect a small room received as permanent alternate accommodation, in lieu of tenancy of rights of appellant's father. Roznama in the suit do indicate that the appellant remained present before the Court. It appears that he was not guided properly about requirement of filing of written statement. The Roznama does not indicate that 'No written statement' order was not passed as late as till 01 September 2016, when the Court still solicited written statement from appellant. Shortly thereafter, the suit was decreed *ex parte* on 16 December 2017.

16. Another major factor in favour of the appellant is that he is in possession of the suit premises. There is no doubt to this position. Defendant has been residing in the suit premises with his family members. It is appellant's case that the agreement for permanent alternate accommodation has been executed in his favour and that therefore he is the real owner of the suit premises. It is also his case that Plaintiff No.1 did not cohabit with his brother and that their marriage was dissolved

within few months. All these defences now sought to be raised by appellant have gone unnoticed on account of his failure to file written statement or to defend the suit. In view of admitted position that the appellant is residing in the suit premises with his family members, rejection of his application for setting aside *ex parte* decree would result in his eviction from the suit premises. It is therefore in the interest of justice that appellant needs to be given an opportunity to defend the suit.

17. Also of relevance is the alternate prayer made by Plaintiffs in their suit. It reads thus:

“b) Alternative and without prejudice to prayer (a), it be declared that the plaintiff no. 1 and her son, the Plaintiff no. 2, have a right to stay in the suit premises along with the defendant and his family members on her agreeing to pay 50% of the society charges.”

18. Thus, Plaintiffs claimed alternate relief of residing in the suit premises alongwith appellant. This alternate prayer contains an implied admission on the part of Plaintiffs that Appellant/Defendant has 50% share in the suit property. On account of appellant's absence in the suit, this prayer could not be adjudicated and the City Civil Court proceeded to decree the suit in terms of prayer clause (a), and without considering alternate prayer in clause (b), declared Plaintiffs to be sole owners of the suit premises.

19. Considering the overall conspectus of the matter, in my view, opportunity needs to be given to the appellant to put up his defence in the suit. Though appellant may not have made out a foolproof case in his pleadings for setting *ex parte* decree by technically fulfilling the requirements of Order 9 Rule 13 of the Code, it cannot be said that the Rules of procedure are so rigid that the Courts are rendered powerless to come to an aid of a defendant in a case, where refusal to set aside *ex parte* decree would result in failure of justice. In a case where Defendant's absence results in grant of unwarranted relief in favour of Plaintiff, the Court can exercise its discretion and come to the aid of Defendant in granting him/her an opportunity to put up defence. In this case, the effect of Plaintiffs' implied admission of Defendant having 50% share in alternate prayer is required to be considered, or else Defendant's absence would result in grant of undue rights in favour of Plaintiffs. These findings however are *prima facie* and made for limited purpose of deciding whether *exparte* decree could be set aside. These findings would therefore not affect the mind of the Court in deciding Plaintiff's first prayer of declaration of exclusive ownership in the suit property.

20. While taking a view that defendant needs to be offered an opportunity to put his defence in the suit, he is required to saddled with exemplary costs for the conduct exhibited by him during prosecution of the suit. I therefore feel that ends of justice would meet if the appellant is directed to pay costs of Rs.50,000/- to Respondent Nos.1 and 2

(Plaintiffs) as pre-condition of setting aside the decree dated 16 December 2017.

21. I accordingly proceed to pass following order.

- (i) Order dated 15 November 2021 passed by City Civil Court in Notice of Motion No.3946 of 2019 is set aside.
- (ii) Notice of Motion No.3946 of 2019 stands allowed in terms of prayers made therein.
- (iii) Decree dated 16 December 2017 passed in S. C. Suit No.4818 of 2011 is set aside and the Suit is restored on the file of City Civil Court.
- (iv) Appellant shall be entitled to file written statement in the suit within a period of four weeks from today. Appellant shall bring this order to the notice of the City Civil Court forthwith. Parties to appear before the City Civil Court on 15 September 2023
- (v) Appellant shall pay costs of Rs.50,000/- (Rs. Fifty Thousand Only) to the Respondent Nos. 1 and 2. Costs be deposited in City Civil Court within two weeks. Respondent Nos.1 and 2 shall be entitled to withdraw amount of costs.

- vi) It is made clear that failure to deposit costs or to file written statement in stipulated time shall result in restoration of the order dated 15 November 2021. Appellant shall cooperate with the City Civil Court in expeditious disposal of the Suit without seeking any unnecessary adjournments.
- vii) Hearing of suit is expedited and the City Civil Court is requested to make an endeavour to decide the suit as expeditiously as possible.

22. With the above directions, the appeal is allowed, with costs as indicated above.

SANDEEP V. MARNE, J.

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