



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO.297 OF 2015

1. Latabai w/o Laxmanrao Bandamwar,
Age : 57 years, Occu.: Household and Agriculture,
R/o.: Ambedkar Nagar, Nanded,
Tal. & District : Nanded
2. Bhagyalaxmi w/o Dinkar Kotalwar,
(Since deceased through her L.Rs.)
 - i. Dinkar s/o Narharirao Kotalwar,
Age : 75 years, Occu.: Business,
 - ii. Sachin s/o Dinkar Kotalwar,
Age : 33 years, Occu.: Business
 - iii. Sau Archana w/o Ramesh Kotalwar,
Age : 45 years, Occu.: Household
Through GPA holder of petitioner
No.ii i.e. Sachin s/o Dinkar Kotalwar

PETITIONERS
(Orig. Plaintiffs)

VERSUS

1. Abdul Ajij s/o Abdul Wakil,
Age : 51 yeas, Occu.: Business & Agri.,
R/o.: Ganimpura, Nandea,
Tal. & District : Nanded
2. Kevalabai w/o Shrawan Narwade,
Age : 75 years, Occu.: Agriculture,
R/o.: Nerli, Tal. & Dist. Nanded
3. Umaji Shrawan Narwade
(Since deceased through LRs.)
 - i. Smt. Shobhaji w/o Umaji Narwade,
Age : 33 years, Occu.: Household,
R/o.: Nerli, Tal. & Dist. Nanded

- ii. Sandesh s/o Umaji Narwade,
Age : 15 years, through guardian
mother, Shobhabai w/o Umaji Narwade,
Respondent No.3-i
- iii. Deepa d/o Umaji Narwade,
Age : Minor, through guardian
Mother- Shobhabai w/o Umaji Narwade,
Respondent No.3-i
- 4. Bhimrao s/o Shrawan Narwade,
Age : 36 years, Occu.: Agriculture,
R/o.: Nerli, Tal., & Dist. Nanded
- 5. Pandurang s/o Shrawan Narwade,
(Deceased)

.... **RESPONDENTS**

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Mr. Prashant R. Katneshwarkar, Senior Advocate i/b Mr. Rahil Kazi, Advocate for the Applicants.

Mr. Rajendra Deshmukh, Senior Advocate i/b Mr. Pavankumar Agrawal, Advocate for Respondent No.1

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CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 22/08/2024.

PRONOUNCED ON : 25/10/2024

ORDER :

1. The present applicants, who are the original plaintiffs in Special Civil Suit No.125 of 2005, have preferred this application challenging the order passed below Exhibit-1 in Miscellaneous R.J.E. No.216 of 2007, passed by the learned trial court i.e. the learned Civil Judge (Senior Division), Nanded on 06/10/2015, whereby the *ex-parte* decree dated 16/08/2007 passed against the

present respondent No.1 i.e. original defendant No.5 in the suit, is set aside.

2. Background facts are as under :

The applicants / plaintiffs had filed the aforesaid suit for specific performance of agreement to sell dated 30/11/2001 allegedly executed by present respondent Nos.2 to 4 in their favour in respect of the land Gut No.136, admeasuring 1 H 11.75 R at village Nerli, Taluka and District : Nanded. The applicants had also claimed that declaration in respect of sale deed executed by respondent Nos.2 to 5 in favour of the present respondent No.1 on 03/06/2004 being null & void as it was executed by playing fraud upon aforesaid respondents. Admittedly, there was an *ex-parte* order against respondent No.1 and his application for setting aside no WS order also rejected on 16/08/2007 i.e. on the date of judgment itself. However, respondent No.1 then filed an application R.J.E. No.216 of 2007 under Order-IX Rule 13 of CPC for setting aside the *ex-parte* decree and the same is allowed on 06/10/2015 by the learned trial court and hence this application.

3. The learned senior counsel Mr. Katneshwarkar for the applicants / plaintiffs vehemently argued that the learned trial

court has definitely erred in setting aside the *ex-parte* decree against present respondent No.1 / defendant No.5 by ignoring the fact that his application for setting aside no WS order was already rejected by the then presiding officer and therefore, the application filed for setting aside the said *ex-parte* decree on the same ground, was definitely hit by the principle of *resjudicata*. He pointed out that no sufficient cause had been shown by respondent No.1 for setting aside the decree. In support of his submissions, he relied on various following judgments.

- A) *Arjun Singh vs. Mohindra Kumar, reported in 1964 AIR (SC) 993;***
- B) *B. Janakiramaiah Chetty vs. A. K. Parthasrthi, reported in 2003 AIR (SC) 3527;***
- C) *G. Ratna Raj (Dead) by Legal Representatives vs. Sri Muthukumarasamy Permanent Fund Limited and another, reported in (2019) 11 SCC 301;***
- D) *Vishwabandu vs. Sri Krishna and another, reported in 2021 SCC OnLine SC 828;***
- E) *Swapan Kumar Mazumdar vs. Hajera Begum, reported in (2014) 4 Gauhati Law Reports 86;***
- F) *Rudra Nath Mishra vs. Kashi Nath Misra and others, reported in 1975 SCC OnLine All 393 and***

G) *The Traders' Bank Ltd., vs. Avtar Singh, reported in ILR (1987) 1 Delhi.*

4. On the contrary, the learned senior counsel Mr. Deshmukh supported the impugned order and submitted that the order rejecting the application of respondent No.1 for setting aside no WS order cannot be treated as *resjudicata* for allowing the subsequent application under Order-IX Rule 13. He pointed out that there was collusion between original plaintiffs and defendant Nos.1 to 4 since the defendant Nos.1 to 4 had admitted the claim of plaintiffs and hastily executed the sale deed as per the aforesaid *ex-parte* decree within the limitation period of filing appeal or application for setting aside *ex-parte* decree. He also relied on following judgments.

- A) *Nanda Dulal Pradhan and another vs. Dibakar Pradhan and another, reported in 2022 (3) RCR (Civil) 508;***
- B) *Gaurang V. Merchand and others vs. Madhliso and Co. Pvt Ltd. And others, reported in (2004) 106BOMLR153 and***
- C) *Writ Petition No. 4071 of 2003 (Yousun Dada Patel (dead) through Lrs. & others vs. Laxman Prabhat Rodu Real Name Laxman Prabhat Adhane and others, of this court, delivered on 17/11/2011.***

5. Heard rival submissions. Also perused documents on record.

6. Though the learned senior counsel for the applicants vehemently argued that the application for setting aside the decree under Order-IX Rule 13 of CPC is not maintainable, but under the various judgment of this court as well as the Hon'ble Apex Court it has been settled that decree passed under Order-VIII Rule 10 of CPC is to be treated as an *ex-parte* decree and therefore, for setting aside such decree, application under Order-IX Rule 13 of CPC is definitely maintainable. Therefore, there is no need to discuss the judgments relied by the applicants on this aspect.

7. The learned senior counsel for the applicants also tried to argue that the learned trial court had already rejected the application filed by respondent No.1 during pendency of the suit for setting aside no WS order against him and the grounds in those applications were similar to the grounds raised in the application for setting aside *ex-parte* decree. Thus, he claimed that the impugned order is hit by principle of *resjudicata*. However, it is significant to note that the learned trial court had in fact dismissed the application for setting aside no WS order, filed by respondent No.1 on the same day when the said decree was passed. Further,

the observation of the then Presiding Officer in respect of the grounds raised, was not supported by the evidence. As such, the same was rejected without verifying the material in that respect. However, the impugned order definitely indicates that in support of the ground raised in the application for setting aside *ex-parte* decree, respondent No.1 had led the evidence and filed documentary evidence to that effect about illness of his father, which prevented him to file written statement. Therefore, the principle of *resjudicata* will not be applicable in the instant case on the ground that application for setting aside no WS order, filed by respondent No.1, was rejected.

8. It is to be noted here that setting aside *ex-parte* decree under Order-IX Rule 13 of CPC is a discretionary relief and that can be granted if it is shown that the person against whom such decree was passed, was not duly served or he was prevented from filing written statement due to sufficient cause. In the instant matter, respondent No.1 appears to have filed oral as well as documentary evidence in support of the cause which prevented him from filing written statement. Not only this but the learned trial court has also imposed certain cost for causing inconvenience to the present applicants. Thus, it can be seen that the learned trial court has

rightly exercised the discretion by setting aside the *ex-parte* decree by assigning proper reasons. As such, no interference is required in the impugned judgment and order and therefore, the present civil revision application stands dismissed and disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)