



IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.149 OF 2024

1. Smt. Maya Sitaram Pansikar @Panashikar,PETITIONERS
w/o. Mr. Sitaram Panashikar,
Age 78 years, Occ. Homemaker,
(R/By G.P.A. Holder – Petitioner No.3)

2. Smt Sulaksha Kelkar,
W/o. Mr. Laxmidas Kelkar, Age 60 yrs.
Occ. Homemaker,
(R/By G.P.A. Holder- Petitioner No.3)

3. Mr. Laxmidas Kelkar
s/o. Mahadeo Kelkar,
Age 66 yrs, Occ: Priest,
All Residents of H. No.3/55, Panshiwada,
Pernem, Goa – 403 512.

v/s.

1. Mr. Sagar Gauns,
s/o. Mr. Gurudas Gauns,
Age 46 yrs, Occ. Businessman,
R/o. H.No.177, Bairo Alto, Assgao, Bardez,RESPONDENT
Goa.

Mr. Siddhesh Kulkarni with Ms. Harshita Prasad, Advocates for the
Petitioners.

Mr. J.J. Mulgaonkar with Ms. Shweta Parulekar, Advocates for
Respondent.

CORAM: **BHARAT P. DESHPANDE, J**

DATED : **13th June, 2024.**

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith.

2. Matter is taken up for final disposal at the admission stage itself.

3. Heard Mr. Kulkarni, learned Counsel for the Petitioners and Mr. J.J. Mulgaonkar with Ms. Shweta Parulekar, learned Counsel for the Respondent.

4. The controversy in the present petition is in connection with an order dated 05/10/2023 passed by the trial Court whereby an application for setting aside an ex-parte order dated 08/05/2023 filed by the Petitioner/Defendant stands rejected.

5. Mr. Kulkarni submits that the respondent filed a suit for specific performance of contract wherein the summons was issued to the Defendant. The summons was served on the Defendant and accordingly the Defendant/Petitioner appeared through his Advocate and thereafter the matter was fixed for written statement as well as reply. He submits that the Petitioner filed an application for extension of time to file a written statement on 08/03/2023 and thereafter on 17/04/2023. Both these applications were allowed and the matter was posted on 08/05/2023 for filing of the written statement. He submits that when the matter was taken up on 08/05/2023, the Petitioner remained absent so also his Advocate. The learned trial Court passed an order to proceed ex-parte and placed the matter for ex-parte evidence.

6. Mr. Kulkarni submits that an application was filed for setting aside ex-parte order on 10/07/2023 giving reasons that the earlier Advocate appearing for the Petitioner withdrew his Vakalatnama and issued notice to the Defendant which was served two days prior to the date fixed on 08/05/2023. He submits that the Petitioner being senior citizen was unable to engage another Advocate within the short time and was unable to attend the Court. He submits that the notice by his earlier Advocate was not served 7 days in advance as required. He submits that the above ground was sufficient enough to condone the delay as well as to set aside the ex-parte order since the matter was pending for further evidence of the Plaintiff.

7. Per contra, Mr. Mulgaonkar submits that there is no explanation coming forward from the Petitioner as to why he failed to appear on 08/05/2023 and also on the subsequent date i.e. 30/06/2023 when the ex-parte evidence of the Plaintiff was recorded and the matter was fixed for further evidence. He submits that the application was filed beyond time without any prayer for condonation and also without giving sufficient explanation.

8. Mr. Mulgaonkar submits that ground which has been raised today was not before the trial Court and that the Petitioner has raised the ground that he did not receive any notice of his Advocate. However, the trial Court found that such notice was received two days in advance.

9. The record clearly goes to show that the Petitioner was duly served with the summons and accordingly he appeared through his Advocate and filed the application for time to file the written statement. On the second occasion such application was allowed and the matter was fixed for written statement on 08/05/2023.

10. The record further shows that when the matter was called out on 08/05/2023, the Petitioner along with his Advocate remained absent and therefore the learned trial Court passed an order directing to proceed ex-parte against the Defendant. The matter was fixed for evidence of the Plaintiff.

11. It is the matter of record that the earlier Advocate of the Petitioner issued a notice to the Defendant intimating that he will be withdrawing his Vakalatnama. This notice was admittedly served on the Petitioner two days prior to 08/05/2023. It is also admitted fact that the Advocate failed to appear before the trial Court on 08/05/2023 in order to intimate the trial Court that he be permitted to withdraw his Vakalatnama for and on behalf of the Petitioner.

12. In the matter of civil nature, normally the Advocate appears for the party and the party need not be present on all dates. Since the matter was fixed for written statement the concerned Advocate who was appearing for the Petitioner was duty bound to appear before the Court and inform

the Court that he has issued a notice of withdrawal and he intends to withdraw his Vakalatnama. Such default on the part of the Advocate is certainly a sufficient cause for the Defendant for the simple reason that any default committed by the Advocate cannot be considered as default on the part of the said party and for such default, the party cannot be penalized.

13. The learned trial Court in its impugned order clearly observed that the notice was served on the Defendant however failed to consider that the Advocate appearing for the Defendant failed to attend the proceedings on 08/05/2023 thereby informing the Court that he wished to withdraw his Vakalatnama. In such circumstances, when the Advocate appears and informs the Court that he intend to withdraw his Vakalatnama the Court was duty bound to issue notice to the Defendant as observed by this Court in the case of **Govinda Bhagoji Kamable and ors v/s. Sadu Bapu Kamable** (2004(6) BomCR 552) and in the case of **M/s. PDT Trading Company v/s. Shri Digant S/o. Rajesh Shah** (Manu/Mh/1495/2023 dated 30/1/2023) (SLP No.5813/2023 pending in the Supreme Court).

14. The learned trial Court though rightly blamed the Defendant for not appearing on 08/05/2023 inspite of receiving notice from his Advocate, failed to consider the fact that the Advocate was duty bound to appear on 08/05/2023 thereby intimating the Court about his intention to withdraw

the Vakalatnama. It is no doubt true that the Defendant failed to appear on 08/05/2023 however it seems that the learned trial Court without giving any opportunity to the Defendant passed an ex-parte order on 08/05/2023. It is necessary to note here that it was the first default on the part of the Defendant on 08/05/2023.

15. Secondly when an application was filed on 10/07/2023 giving above reasons, the same ought to have been considered sympathetically and by even awarding some costs as the matter was still pending with the trial Court.

16. By rejecting such application, the learned trial Court is certainly denied the opportunity to the Defendant/ Petitioner to contest the matter.

17. Ends of justice could have been met by imposing some costs on the Defendant so as to avoid multiplicity of the litigation.

18. Objections raised on behalf of the Respondents with regard to the maintainability of the present proceedings on the ground that there is alternate efficacious remedy needs to be rejected since the application was filed under Order 9 Rule 7 CPC and not under Order 9 Rule 13 for setting aside ex-parte decree.

19. Having said so, the impugned order needs to be quashed and set aside and accordingly the application filed by the Petitioner needs to be allowed.

20. The impugned order dated 05/10/2023 below Exh.27 is hereby quashed and set aside.

21. Paragraph No.9 of the impugned order seems to be an inadvertent mistake on the part of the trial Court since it is submitted by the learned Counsel for the Petitioner that no such application under Section 63 of the Indian Evidence Act r/w. Order VIII Rule 1A(3) of CPC was filed.

22. The application at Exh.27 stands allowed and accordingly the ex-parte order dated 08/05/2023 passed against the Defendant is hereby quashed and set aside, subject to payment of costs of Rs.10,000/- (Rupees Ten Thousand only) to the Plaintiff, within a period of one week.

23. Rule is made absolute in the above terms.

BHARAT P. DESHPANDE, J.