

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.273 OF 2024

Vernon Xavier Dias and Ors.

...Petitioners

Versus

Richard Misquitta and Ors.

...Respondents

...

Mr. R.M. Haridas i/b. Mr. Pratik Rahade for the Petitioners.

Ms Lipika Biswas with Mr. Prabhat J. Dubey and Ms Aarti E. Yadav for Respondent No.1.

CORAM : SANDEEP V. MARNE, J.

DATED : 18 JUNE 2024.

PC:

1. Rule. Rule is made returnable forthwith.

2. The challenge in the present petition is to the order dated 6 November 2023 passed by the Small Causes Court at Mumbai rejecting M.A.R.J.I. Application No.113 of 2022 filed by Petitioners under Order 9 Rule 13 of the Civil Procedure Code, 1908 (**Code**) for setting aside ex-parte decree dated 9 March 2018 passed in R.A.E. & R. Suit No.238/946/1982. The Appellate Bench of the Small Causes Court has confirmed the Trial Court's order by rejecting the Miscellaneous Appeal by Judgment and Order dated 14 December 2023, which is also the subject matter of challenge in the present petition.

3. I have heard Mr. Haridas, the learned counsel appearing for Petitioners and Ms Lipika Biswas, the learned counsel appearing for the Respondents.

4. After having considered the submissions canvassed by the learned counsel for the parties, it is seen that the Suit is instituted by the Plaintiffs for recovery of possession of the Suit premises on the ground of non-payment of rent as well as for recovery of arrears of rent. The Suit was initially decreed ex-parte on 21 February 2001. The ex-parte decree was set aside by allowing the application filed by Petitioners by order dated 3 August 2001. The said order dated 3 August 2001 was challenged by Plaintiffs/Respondents by filing Civil Revision Application No.1709 of 2001, which remained pending till the year 2016, during which the trial in the Suit remained stayed. The Civil Revision Application No.1709 of 2001 came to be ultimately withdrawn by Plaintiffs/Respondents on 28 March 2016 and hearing of the R.A.E. & R. No.238/946/1982 resumed after 28 March 2016. Perusal of the roznama would indicate that Advocate for the Defendant /Petitioners appeared in the Suit after the order dated 28 March 2016 and even contested the same on the ground of jurisdiction by filing an application to that effect. He attended dates in the Suit till the application for dismissal of Suit on the ground of jurisdiction came to be rejected on 5 October 2017. On 8 November 2017 however, the Advocate of the Petitioners informed the Court that he had withdrawn the vakalatnama on behalf of the Petitioners by addressing letter dated 25 October 2017 to the Petitioners. Petitioners do not dispute receipt of letter dated 25 October 2017, however, they cite the reason of their old age for failure to appoint

another Advocate to defend the Suit. It appears that the Suit came to be listed on few occasions after withdrawal of vakalatnama by Petitioners' Advocate and finally considering the evidence led by Plaintiffs, the Suit came to be decreed on 9 March 2018 in absence of defence of the Defendants.

5. The Petitioners filed application under Order 9 Rule 13 of the Code for setting aside *ex parte* decree and since there was delay of 270 days, M.A.R.J.I. Application No.7 of 2019 was filed seeking condonation thereof. By order dated 1 October 2022 delay of 270 days came to be condoned. The M.A.R.J.I. Application No.113 of 2022 was subsequently taken up for consideration on merits and by the impugned order dated 6 November 2023, the Small Causes Court has proceeded to reject the application for setting aside *ex parte* decree. Essentially referring to pendency of the Suit for 40 years, the Appellate Bench has confirmed the decision of the Trial Court by rejecting the Miscellaneous Appeal filed by Petitioners.

6. No doubt, Petitioners are guilty of negligence in not appointing a new Advocate after receipt of letter dated 25 October 2017. The Suit has been pending since 1982 and by the time it was decreed *ex parte* on 9 March 2018, period of 36 long years had elapsed. It also bears mention that suit was earlier decreed *ex parte* on 21 February 2001 and at the instance of the Petitioners, the same was restored by order dated 3 August 2001. No doubt the Suit has been pending for a considerable period of time. However, the delay in its decision is also attributable to the conduct of the Plaintiffs, who

challenged order dated 3 August 2001 in this Court by filing Civil Revision Application No.1709 of 2001, which remained pending for over 15 long years in this Court, during which period the Suit could not proceed. In my view therefore, it would not be appropriate to blame Petitioners for pendency of the Suit for over 40 years.

7. The time gap between withdrawal of appearance by Advocate of Petitioners on 8 November 2017 and the date of *exparte* decree of 9 March 2018 is also not too long. The time gap is roughly about four odd months. Considering the justification pleaded by Defendant/Petitioners, it cannot be said that the Defendants are guilty of negligence to such an extent that they must be punished by not restoring the suit by setting aside the *exparte* decree. This is particularly true because of the nature of the Suit that is instituted by the Plaintiffs. The Suit is for recovery of possession on the ground of arrears of rent. It is the contention of Mr. Haridas that the rent has been paid to the brother of the Plaintiffs and that the Defendants must get an opportunity to prove this assertion by leading their evidence. In my view the opportunity needs to be given to the Defendants to lead their evidence in respect of their assertion about payment of rent to the brother. At the same time Petitioners need to be mulct with exemplary costs for their negligent conduct.

8. The Petition accordingly succeeds. Orders dated 6 November 2023 passed by the Small Causes Court and 14 November 2023 passed by its Appellate Bench are set aside. M.A.R.J.I. Application No.113 of 2022 is

allowed in terms of prayers made therein. The *exparte* decree dated 9 March 2018 passed in R.A.E. & R. Suit No.238/946/1982 is set aside and the Suit is restored to be decided in an expeditious manner by affording an opportunity to the Defendants/Petitioners to lead evidence. Petitioners shall pay to Plaintiff-Respondent No.1 costs of Rs.2,00,000/- within a period of four weeks from today. Payment of costs within the stipulated time shall be condition precedent for setting aside the *exparte* decree.

9. With the above directions, the writ petition is allowed. Rule is made absolute.

[SANDEEP V. MARNE, J.]