

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.16867 OF 2024

Khairunnisa Mohammed Umer

Mansoori

V/S

Abubakar Suleman Patel & Ors.

....Petitioner

....Respondents

Mr. Bahraiz Irani a/w Mr. Afrin Dalal, Mr. Shane Santos a/w
Mr. Anosh Irani *for the Petitioner.*

Mr. R.P. Singh *for Respondent No.3.*

CORAM: SANDEEP V. MARNE, J.

DATE : 19 NOVEMBER 2024.

P.C.:

1. The Petition challenges the order dated 16 October 2024 passed by the learned Judge of the Small Causes Court allowing MARJI Application No.292 of 2023 filed by Defendant No.3 under provisions of Order 9, Rule 13 of the Code of Civil Procedure, 1908 (**the Code**) and setting aside the *ex-parte* decree dated 4 July 2023 subject to payment of costs of Rs.10,000/-.

2. I have heard Mr. Irani, the learned counsel appearing for Petitioner and Mr. Singh, the learned counsel appearing for Respondent No.3.

3. After having considered the submissions canvassed by the learned counsel appearing for parties, it is seen that Defendant No.1 was served with suit summons, who failed to appear and defend the suit. So far as Defendant Nos.2 and 3 are concerned, the Bailiff report would indicate that the Bailiff made repeated attempts to serve suit summons on Defendant Nos.2 and 3 at the suit premises which were found to be locked. Finally on 7 October 2021, the Bailiff has pasted summons in respect of Defendant Nos.2 and 3 on the door of the suit premises in presence of the neighbouring occupier. However Bailiff report would indicate that the neighbouring occupier had informed the Bailiff that Defendant Nos.2 and 3 normally visit the suit premises after 3 p.m. The Bailiff could have therefore made an attempt to serve the suit summons after 3 p.m. on Defendant Nos.2 and 3. The learned Judge of the Small Causes Court has considered the fact that the suit summons has not been personally served on Defendant Nos.2 and 3. No doubt, the learned Judge has recorded a finding in paragraph 15 of the order that service of suit summons on Defendant Nos.2 and 3 by pasting the same on suit premises is also a valid service. However considering the nature of proceedings, the Trial Court has exercised discretion in setting aside the *ex-parte* decree after noticing Defendant Nos.2 and 3 were not personally served with the suit summons.

4. Mr. Irani, the learned counsel would rely upon the judgment of the Apex Court in ***Parimal vs. Veena***, (2011) 3

SCC 545 in support of his contention that any irregularity in service of summons cannot be a ground for setting aside *ex-parte* decree against Defendant. The Apex Court has held in paragraphs 11 and 12 of the judgment as under:

“11. The aforesaid provision reads as under:

“13. *Setting aside decree ex parte against defendant.* - 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 in thinks fit, and shall appoint a day for proceeding with the suit:

* * *

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 plaintiff's claim.”

(emphasis added)

12. It is evident from the above that an *ex parte* decree against a defendant has to be set aside if the party satisfies the court that *summons had not been duly served* or he *was prevented by sufficient cause* from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.”

5. However perusal of the second proviso to Order 9, Rule 13 of the Code would indicate that irregularity in service of summons need to be coupled with the knowledge of filing of the suit by the Defendant. In the present case, there is nothing to indicate Defendant Nos.2 and 3 otherwise had knowledge about filing of the suit by the Plaintiff.

6. I am therefore, not inclined to interfere in the discretion exercised by the learned Judge in setting aside the *ex-parte* decree. However at the same time this Court cannot turn blind-eye to the fact that the conduct of the Defendant Nos.2 and 3 in not appearing in the suit has resulted in grave prejudice to Petitioner and setting aside the *ex-parte* decree would result in substantial delay in decision of the suit. If Defendant Nos.2 and 3 were to appear in the suit after noticing the pasted summons at the suit premises in October 2021, the suit would have progressed substantially by now with participation of Defendant Nos.2 and 3 therein. Now the entire clock is sought to be set back by setting aside the *ex-parte* decree, which would undoubtedly result in substantial delay in decision of RAE Suit No.311 of 2020. Plaintiff has made all earnest attempts of serving the suit summons on Defendant Nos.2 and 3. The suit summons was sought to be served on two occasions earlier, when Defendant Nos.2 and 3 were not found at the suit premises by the Bailiff and the Bailiff pasted the suit summons at the suit premises. Therefore Plaintiff cannot be blamed for decision of the suit *ex-*

parte. In such circumstances, if the Trial Court was to exercise its discretion in setting aside the *ex-parte* decree, it ought to have imposed exemplary costs on Defendant No.3 while doing so. In my view, costs of Rs.10,000/- imposed by the Trial Court on Defendant No.3 is minuscule and the same deserves to be enhanced substantially.

7. The Writ Petition is accordingly disposed of by not disturbing the order setting aside *ex-parte* decree. However the amount of costs imposed by the Trial Court are enhanced to Rs.1,00,000/-. Thus in addition to costs of Rs.10,000/- already imposed by the Trial Court, Defendant No.3 shall pay additional amount of Rs.90,000/- to the Plaintiff towards costs. With the above directions, the Writ Petition is **disposed of**.

8. Considering the fact that the entire clock in the suit is required to be set back, it would be appropriate that the Trial Court expedites decision of RAE Suit No.311 of 2020. The learned counsel appearing for Defendant No.3 makes a statement that Written Statement shall be filed within a period of four weeks from today. Statement is accepted. The Trial Court shall may take earnest efforts for deciding the suit in an expeditious manner.

Digitally signed
by
SUDARSHAN
RAJALINGAM
KATKAM
Date:
2024.11.22
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(SANDEEP V. MARNE, J.)