

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

**APPEAL FROM ORDER NO. 805 OF 2024
WITH
INTERIM APPLICATION NO. 14719 OF 2024
IN
APPEAL FROM ORDER NO. 805 OF 2024**

Smt. Lata Sayanna Elmal And Others ...Appellants
Versus
Mr. Vinod Kumar Nagabathula And Another ...Respondents

Mr. Sandeep Sharma i/b. Thakordas and Madgavkar for Appellants
Mr. Satyavan N. Vaishnav a/w. Ms. Nupur J. Kukherjee i/b. M/s. N. N.
Vaishnawa & Co. for Respondents

CORAM : M. M. SATHAYE, J.

DATED : 11th DECEMBER 2024

P.C.:

1. Heard learned Counsel for the Appellants/Defendants and learned Counsel for the Respondents/Plaintiffs finally on 03.12.2024 and the matter is placed today for passing order.
2. This is an Appeal filed challenging the order dated 04/05/2024 passed by City Civil Court, Greater Mumbai in Notice of Motion No. 1786 of 2022 in S.C. Suit No. 4705 of 2012 and Execution Application No. 285 of 2019. By the said impugned order, the motion taken out by Appellants for setting aside the *ex-parte* decree and for consequential prayers of opportunity to file written statement as well as hearing of the suit is dismissed.

3. Learned Counsel for the Appellants has submitted as under. That the *ex-parte* judgment and decree was passed on 16.03.2019 thereby the decreeing the suit filed by the Respondents directing the Appellants to hand over vacant and peaceful possession of the suit property. That in February 2020, execution notice was received wherein the Appellants appeared and taking exception to some order, filed Writ Petition No. 1896 of 2020 seeking stay to the execution. That this Writ Petition was converted into Civil Revision Application No. 202 of 2022 on 20.04.2022. That on 28.04.2022, the petition was dismissed for default for not carrying out necessary amendment, which order was later on recalled. Thereafter ultimately on 04.05.2022, the civil revision application was withdrawn with liberty to file necessary proceedings and then the present Notice of Motion under provision of Order 9 Rule 13 of the Code of Civil Procedure, 1908 was filed, immediately in May, 2022.

4. It is urged that the Appellants are poor and the Appellant No. 2-Mr. Praveen Vasant Elmal had suffered paralysis attack in 2013 and was hospitalised and Appellant No. 3 was the only earning member and as such they were entirely dependent on their advocate. Due to such health and financial conditions, Appellants could not take steps and apply for setting aside the *ex-parte* decree in time. The Appellants have relied upon 2 medical certificates dated 06/02/2020 and 02/05/2022 in support of his submissions. It is further submitted that Rozanama shows change of Advocate and therefore the Appellants were diligently following up the matter. On these submissions, it is submitted that the Appellants have made out sufficient cause and therefore, the motion under Order 9 Rule 13 should have been allowed.

5. On the other hand, learned Counsel for the Respondents submitted that medical certificates relied upon by the Appellants are issued by BHMS and DSAC doctors and they are hardly helpful. It is submitted that if the Appellant No. 2 was really suffering from serious health issues, he would not have gone to doctors which are not even MBBS. He submitted that under Article 123 of the Limitation Act, limitation to set aside ex-parte decree is 30 days from the date of the decree or 30 days from the date of knowledge only if summons or notice was 'not duly served'. He submitted that in the present case, the summons was served which is obvious from the Rozanama which indicates that the Advocate had appeared for the Appellants and reply / sur-rejoinder was filed and therefore, the limitation would be 30 days from the date of decree.

6. He submitted that the date of ex-parte decree is 16.03.2019 and the Appellants applied for the certified copies on 15.04.2019 and received it on 13.05.2019, which is clear from xerox copy of the certified copy produced at page no. 204 of the Appeal compilation. It is submitted that if in April/May 2019, the Appellants were aware of the *ex-parte* decree, there is no explanation why necessary action was not initiated till filing of the WP/1896/2020 in February 2020. It is submitted that if the Appellants could keep the track of when to apply for certified copies in April 2019, it cannot be believed that they could not apply in time. He further submitted that nothing believable is on record to show that they were prevented by sufficient cause from appearing in the suit.

7. It is further submitted by learned Counsel for the Respondents that this is a case where Appellants has transferred the tenancy in Respondents' favour with consent of landlord on payment of substantial amount by the

Respondents to both Appellants and landlord. The Appellants had handed over the possession of the suit premises to the Respondents in June 2012 and had agreed to remove their belongings in the suit premises, however, the Appellants thereafter reverted and filed false complaint against the Respondents about the forcible dispossession and that is how the subject suit was filed.

8. I have considered the submissions carefully and perused the record.

9. At the outset, it is necessary to note that from the Rozanama produced on record, this is a clear case where the Appellants had received suit summons and therefore, limitation for setting aside the ex-parte decree would be 30 days from the date of ex-parte decree. The ex-parte decree is dated 16.03.2019 and first action thereafter initiated for opposing the execution of the ex-parte decree was undertaken in February, 2020 by filing writ petition in this Court. Medical certificate produced are of February, 2020 and May, 2022. The medical certificate of February, 2020 is really speaking not legible at all and is written in most casual manner. The issuing doctor is D.S.A.C., Mumbai and it does not establish anything. Other certificate produced is of May 2022, which makes a general statement that the Appellant No. 2 is suffering from Hemiplegia with Hypertension and he is under treatment of doctor for last 3 to 4 years. This is once again a certificate found to be very general in nature and cannot help the Appellants in establishing either degree or time of health issues.

10. There is absolutely no explanation why the Appellants did not initiate any action from May 2019 till February 2020. It is rightly pointed out by learned Counsel for the Respondents that the Appellants were diligent enough to apply for certified copies in April, 2019 and receive them in May,

2019. Therefore, the Appellants had full knowledge of the ex-parte judgment and decree. Despite that, till notice of execution was received, they did not initiate any action. The first action initiated was filing WP/1896/2020 in February 2020, which was subsequently converted in Civil Revision Application which was ultimately withdrawn on 04/05/2022 with observations that the withdrawal of the Revision Application will not preclude the Appellants from taking recourse to Order 9 Rule 13 of the CPC. From these dates, it is more than clear that the Appellants were not only not diligent to take steps in time despite knowledge, but also tried to prolong the matter by filing writ petitions / revision applications and kept dragging the matter, thereby dodging the execution.

11. Viewed in the light of aforesaid narration, if the impugned order is perused, it has recorded that as per the case of the Appellants, the Appellant No. 2 was discharged on 02/03/2013 and reply was filed by the Appellant No. 3 after the discharge of Appellant No. 2 from the hospital. It is recorded that this means after the discharge of the Appellant No. 2, the Appellant no. 3 was attending the matter. It is further recorded that from Rozanama dated 25.09.2013, it can be seen that the Appellants have filed sur-rejoinder, which mean that matter was being attended and the Appellants had knowledge of the proceedings. From these findings, learned Trial Judge has disbelieved the case of the Appellants that due to paralysis attack suffered by the Appellant No. 2, they were not in a position to attend the proceedings. It is further recorded that the Appellants were having knowledge of the decree on 15.04.2019 when they applied for certified copy and received the same on 13.05.2019. Filing of the Writ Petition as well as its disposal as withdrawn, is also recorded by the Trial Court.

12. The arguments about Covid pandemic has also been considered by the Trial Court and it is rightly held that the Writ Petition was filed in the High Court before the Covid pandemic started. For the delay from the receipt of the certified copy of the ex-parte judgment till filing of the Writ Petition, there was no explanation and covid pandemic was also not there.

13. Learned Trial Court has even considered the limitation under Article 123 as 30 days from the knowledge of the ex-parte decree. Even then it is rightly noted that from May, 2019 when the certified copies were received, the first action taken was filing of the Writ Petition in February, 2020 which is beyond the period of limitation.

14. In view of the aforesaid facts and circumstances, there is no perversity or error apparent in the impugned order. The reasons given and the conclusion drawn in the impugned order are based on material available before the Court. No interference is called for. There is no merit in the Appeal.

15. The Appeal from Order and pending Application are accordingly dismissed. No costs.

16. All concerned to act on duly authenticated or digitally signed copy of this order.

(M. M. SATHAYE, J.)