

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.308 OF 2024

WITH

INTERIM APPLICATION NO.9413 OF 2024

IN

CIVIL REVISION APPLICATION NO.308 OF 2024

Nilesh Keshavji Nissar

...Applicant

Versus

Mrs. Sheila Ebrahim Botawala
(Deceased) & Ors.

...Respondents

Mr. Chirag Modi a/w Mr. Chetan Shah i/b Mr. Rajesh Chheda, for the Applicant.

Mr. Sagheer A.Khan a/w Mr. Dawood Khan, Ms. Afsha Khan, Mr. Aqil S. Khan i/b Judicare Law Associates, for the Respondent Nos.2, 3 & 6.

CORAM: MADHAV J. JAMDAR, J.
DATED: 25 MARCH 2025

JUDGMENT:

1. Heard Mr. Chirag Modi, learned Counsel appearing for the Applicant and Mr. Sagheer Khan, learned Counsel appearing for the Respondents.

2. By the present Civil Revision Application the challenge is to the legality and validity of the Order dated 3rd May 2024 passed by the learned Appellate Bench of the Small Causes Court, Mumbai in Miscellaneous Appeal No.213 of 2022 as well as to the Order dated 2nd May 2022 passed by the learned Judge, Small Causes Court, Mumbai in Marji Application No.75 of 2022 in R.A.E & R. Suit No.1565 of 2018. The relief sought in said Marji Application No.75 of 2022 is to set aside

ex-parte decree dated 25th February 2022 passed in said R.A.E. & R. Suit No.1565 of 2018. By the impugned order of the learned Trial Court the said Marji Application No.75 of 2022 has been rejected. The said order of the learned trial Court is challenged by the present Applicant i.e. Defendant No.1 before the learned Appellate Bench of the Small Causes Court by filing said Miscellaneous Appeal No.213 of 2022 and the said Misc. Appeal has been dismissed with cost.

3. It is the main submission of Mr. Chirag Modi, learned Counsel appearing for the Applicant that sufficient cause for non-appearance has been shown. He submitted that an Advocate has been engaged immediately, after the suit summons has been served and Vakalatnama is give to the concerned Advocate. However, the concerned learned Advocate has not filed Vakalatnama and therefore the matter proceeded further. He submitted that in February 2022 the Applicant came to know that the said suit has been posted for final hearing. Immediately, another Advocate has been engaged and when the judgment was pronounced on 25th February 2022 the other learned Advocate has appeared, however, as the matter was posted for pronouncement of judgment, the learned Judge of the Small Causes Court did not note the appearance of the learned Advocate. It is further submitted that the Applicant is suffering from severe psychiatric disorder and therefore there are sufficient reasons for exercising power under Order IX Rule 13

of the *Code Of Civil Procedure, 1908* ("CPC").

4. On the other hand, it is the submission of Mr. Sagheer Khan, learned Counsel appearing for the Respondent that both the Courts have concurrently held that sufficient reasons are not furnished. He submitted that there is no perversity in the impugned orders and therefore, no interference in the impugned orders is warranted.

5. Perusal of the record shows that the said suit being R.A.E. & R. Suit No.1565 of 2018 is filed on 25th October 2018 with respect to shop premises admeasuring 80 sq. ft. It is an admitted position that another suit being R.A.E. & R. Suit No.1581 of 2018 has been filed on the same day i.e. 25th October 2018, with respect to adjoining shop which is admeasuring 300 sq. ft. The Applicant is the tenant and the Respondents are the landlords of both these shops.

6. As noted in the submissions of learned Counsel appearing for the Applicant main two reasons are given for none appearance as follows :-

- i.** An Advocate has been engaged immediately, after the suit summons has been served and Vakalatnama is give to the concerned Advocate. However, the concerned learned Advocate has not filed Vakalatnama and therefore the matter proceeded further.
- ii.** The Applicant is suffering from severe psychiatric disorder.
- iii.** It is submitted that therefore there are sufficient reasons for exercising power under Order IX Rule 13 of the CPC.

The reasons given in the Application for non-appearance are *inter alia* in paragraph Nos. 2(j), k, l, and 4. In other paragraph details of the treatment which the Applicant is taking from concerned Psychiatrist are mentioned.

7. It is very relevant to note that as far as this R.A.E. & R. Suit No.1565 of 2018 is concerned the same was decreed *ex-parte* on 25th February 2022. It is the submission of Mr. Modi, learned Counsel that on 25th February 2022 Advocate appeared on behalf of the Applicant before the learned Trial Court, however, as on that date the Suit was kept for pronouncing order, his appearance was not noted. It is significant to note that immediately within a period of 15 days, the said Marji Application No.75 of 2022 was preferred wherein *inter alia* above reasons are mentioned.

8. At this stage, only it is relevant to note that as far as the said other suit being R.A.E.& R. Suit No.1581 of 2018 is concerned, in the said suit the learned trial Court has passed an order directing that the suit be proceeded further without written statement. The Applicant came to know about the said order passed in said suit also in February 2022 and immediately the Application seeking to recall said order and proceeding further with the suit without written statement has been filed by giving identical reasons. Although, the learned Trial Court by Order dated 4th March 2024 has rejected the said Application bearing

Exhibit-16 filed in said R.A.E.& R. Suit No.1581 of 2018, the learned Appellate Court by Judgment and Order dated 1st July 2024, passed in Revision No.60 of 2024 has set aside the order of the learned Trial Court dated 4th March 2024 and directed that written statement of the present Applicant i.e. Defendant No.1 in that Suit be taken on record. It is significant to note that the reasons which are given in the present Marji Application are the same reasons given in the said Application bearing Exhibit-16 filed in said R.A.E. & R. Suit No.1581 of 2018 and the same are accepted by the learned Appellate Court. The relevant portion of Order dated 1st July 2024 passed by the learned Appellate court is in Paragraph No.10, which reads as under :-

“10. That for considering the rival submissions and also gone through the authorities cited by the appellant, by an impugned Order, application Exh. 16, filed by defendant no.1 seeking setting aside the Order passed by the Trial Court dated 19/07/2019 and permission to file the written statement has been rejected. It is the matter of record that the R.A.E. & R. Suit was filed on 25/10/2018 and defendant no.1 was served with writ of summons on 25/01/2019. Defendant no.1/applicant has come with the contention that upon receipt of writ of suit summons he took a meeting with his Advocate and also signed the Vakalatnama. But, according to him, he was having several problem of anxiety and depression from the year 2015 and he was continuously under the medical treatment till 20/07/2019 and meanwhile, it could not easy for him to live a normal life without taking the medicines. Moreover, according to him, in the year 2019 due to Covid-19 pathetic situation, the whole world was in Pandemic situation and working of the Court was also not regular. So, his Advocate was assured him to take care of his case, but he failed to do so and he came to know in February 2022, when normal functions of Court is going on. At that time, defendant no.1 took an immediate decision of finding

*of new Advocate and so on that count he could not file the written statement before the learned Trial Court. In order to support the very contention, the applicant/defendant no.1 has brought on record the details of his medical prescriptions from page no.137 to 151 of Appeal Book. Upon its perusal, one thing is apparent here that **during the said period, the applicant/defendant no.1 was under a continuous medical treatment for his anxiety and depression.***”

(Emphasis added)

It is very clear that same reasons are assigned for delay condonation which were accepted in said Revision by another Division Bench of the Small Causes Court, Mumbai.

9. Perusal of the record shows that the *ex-parte* decree has been passed on 25th February 2022 and within a period of less than 15 days i.e. on 9th March 2022, the said Marji Application No.75 of 2022 has been filed under Order IX Rule 13 of CPC seeking to set aside the *ex-parte* decree.

10. It is relevant to note the reasons given by both the Courts. The learned trial Court has specifically recorded that the medical prescription only states about the medicines to be taken and nowhere the history of the patient is mentioned. It has been further held that it is the duty of the Advocate to represent the Applicant and seek the adjournment which has not been done in the present case and merely on the basis of medical prescription it cannot be said that sufficient cause has been made out. The learned Appellate Court while confirming the order of the learned trial Court has *inter alia* observed that although

in the Marji Application it is stated that Advocate has filed Vakalatnama, however, no Advocate has filed Vakalatnama and therefore false statement is made in the Application. The learned Appellate Court also reiterated the reasons given by the learned trial Court that only prescriptions of the medicine are produced and no cogent evidence of the illness of the Applicant was produced.

11. In view of the above-mentioned reasons given by both the Courts, it is significant to note that in the Marji Application it is specifically mentioned that on 23rd December 2018 suit summons have been served and immediately a meeting was held with an Advocate and signed Vakalatnama has been given to the said Advocate. It is clear that in Marji Application it is not mentioned that Vakalatnama has been filed in the suit. Thus, the learned Appellate Court's observations that it is falsely mentioned in the Application that Advocate has filed Vakalatnama is totally incorrect.

12. Both the learned Courts have completely ignored that in the prescription dated 14th March 2021 which has been given by Dr. Akshay Gopal Chandurkar, it is specifically mentioned that the Applicant is a known case of psychiatry disorder and he suffers from major depressive disorder. Even another prescription given by Dr. Jatin Ukrani dated 30th July 2021 also mentions symptoms of the patient as Anxiety Disorder NOS, Disturbed Sleep and records Provisional Diagnosis as Anxiety

Disorder NOS. Both the learned Trial Court as well as the learned Appellate Court have completely ignored the same. Thus, it is clear that the reasons given by the Applicant are genuine reasons.

13. It is also required to be noted as soon as the Applicant came to know that the said R.A.E. & R. Suit No.1565 of 2018 is placed for final hearing, the Advocate who has appeared for the Applicant before the learned trial Court in Marji Application appeared in the matter. Thus, the Applicant has sufficient and genuine reasons. It is clear that the case is made out for granting said Marji Application No.75 of 2022. Accordingly, the Applicant has made out sufficient cause for not appearing and hence the *ex-parte* Judgment and Decree is required to be quashed and set aside on the condition that Applicant pays cost of Rs.25,000/- to the Respondent trust i.e. Dawood Bhai Musa Bhai Orphanage Trust within a period of four weeks from today.

14. Accordingly, for the above reasons, following order is passed:-

ORDER

- i. The impugned Order dated 3rd May 2024 passed by the learned Appellate Bench of the Small Causes Court at Mumbai in Miscellaneous Appeal No.213 of 2022 as well as Order dated 2nd May 2022 passed by the learned Judge, Small Causes Court, Mumbai in Marji Application No.75 of 2022 in R.A.E. & R. Suit

No.1565 of 2018 are quashed and set aside and the said Marji Application No.75 of 2022 is allowed in terms of prayer Clauses (a), (b), (c) and (d), on the condition that the Applicant pays cost of Rs.25,000/- to the Respondent - Dawood Bhai Musa Bhai Orphanage Trust within a period of four weeks from today.

- ii. The Applicant to file the written statement before the learned trial Court within a period of two months from today.

15. The Civil Revision Application is disposed of in above terms, subject to cost of Rs.25,000/-.

16. As the Civil Revision Application is disposed of, nothing survives in the Interim Application and the same is also disposed of.

[MADHAV J. JAMDAR, J.]