



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Writ Petition No.110/2024

Raju Bhaiyalal Shahu,
Aged about 56 years, Oc.-Business,
R/o.- Hariharpeth, Mahakali Nagar, Shriram Chowk, Akola,
Tq and District Akola. Petitioner
(Original Plaintiff/Non-applicant)

- Versus -

Damodar Ambadas Mandale,
Aged about 59 years, Occ.- Business, R/o.- Flat No.3,
Shridarshan Apartment, Arvind Gosh Road, Ramdaspath, Akola,
Tq and District Akola. Respondent.
(Original Defendant/applicant)

Mr. N.J. Patil, Advocate for petitioner.
Mr. H.M. Mohta, Advocate for respondent.

CORAM : R.M. Joshi, J.
DATE : 13-06-2025.

ORAL JUDGMENT

By consent of both the sides, heard finally at the stage
of admission.

2. This petition takes exception to the order dated
07-11-2023 passed below Exhibit-01 in Misc. Judicial Case
No.332/2023 filed under Order 9 Rule 13 r/w Section 151 of the
Code of Civil Procedure by the defendant in Special Civil Suit
No.3/2016 for restoration of the suit by setting aside exparte
judgment and decree.

3. The facts on record indicate that the petitioner is the plaintiff who filed suit against the respondent/defendant for seeking decree of specific performance of contract and in alternative refund of earnest money is sought. The summons was issued to the defendant. Record shows that the summons was refused by the defendant. However, subsequently appearance was caused before the learned trial Court through Advocate and written statement is also filed on record. It is thereafter the defendant failed to remain present before the learned trial Court and this has resulted into passing of judgment and decree dated 07-01-2023 by the learned trial Court. The petitioner/plaintiff also filed execution proceedings. The same Advocate who had caused the appearance in suit on behalf of defendant, filed Misc. Judicial Case under Order 9 Rule 13 of the CPC for setting aside exparte judgment and decree and for restoration of the suit for its decision on merit. It is the contention of the original defendant in the said application that he is old aged person suffering from illness and therefore he was not able to instruct his lawyer. It is also stated specifically that there were discussions between the parties for the settlement and since he was hopeful for the

settlement, there was no appearance of the defendant before the learned trial Court. This application was opposed by the plaintiff. Learned trial Court allowed the application by passing impugned order.

4. Learned Counsel for the petitioner has drawn attention of the Court to the fact that the conduct of the defendant be considered while appreciating the impugned order. It is his submission that the defendant has refused to accept the summons. Though thereafter he caused appearance through Advocate and filed written statement but, failed to remain present before the learned trial Court. It is his submission that learned trial Court was not justified in setting aside the judgment and decree and to restore the suit. To support his submissions he placed reliance on the judgment of the Hon'ble Supreme Court in case of Vishwabandu vs Shri Krishna and another, reported in (2021) 19 SCC 549.

Learned Counsel for the respondent/original defendant supported the impugned order.

5. There cannot be any dispute made with regard to the position of law that, if the party is in a position to satisfy the

Court that of reason on account of which he was unable to appear before the Court, the Court is fully justified in setting aside the ex parte decree. Here are the peculiar facts in this case which from the record indicate that though the defendant initially had refused to accept the summons, the bailiff report indicates that the same was refused on the ground that he would consult with his advocate for this purpose. In any case defendant had caused appearance and also filed written statement. It is therefore clear that defendant initially was inclined to defend the suit. However, there seems an attempt of settlement between the parties. The pursis Exhibit-40 confirms the fact that parties were trying to settle the dispute and for this purpose the matter was also kept in Lok-Adalat. The defendant has examined himself and stated on oath about his ill-health, so also the attempt made to settle the dispute. Thus, this is not the case wherein there is absolutely no evidence to indicate the justified reason for his absence before the learned trial Court.

6. In the facts and circumstances of the case, learned trial Court has imposed cost of Rs. 10,000/- for restoring the Special Civil Suit No.3/2016 by setting aside the judgment and decree

dated 07-01-2023. It is pertinent to note that though the suit is filed for specific performance of contract, admittedly the plaintiff is in possession of the subject property. As such no prejudice will cause to the plaintiff, if the suit is restored. Needless to say that, it is in the interest of the parties that the *lis* is decided on merit rather than its disposal on technicalities.

7. As far as the judgment cited supra, therein after refusal of the summons, the defendant failed to appear and which led to passing of the judgment and decree against him. Whereas in the present case, there is evidence to indicate that defendant appeared and filed written statement and thereafter parties were trying to settle the dispute, and there is reason to believe that defendant on account of such assurance on plaintiff for settlement of the dispute did not appear. This fact coupled with his ill health makes his case acceptable.

8. For want of any perversity in the findings recorded by trial Court, there is no reason or justification for this Court to cause interference in the impugned order. Hence, petition stands dismissed.

(R.M. Joshi, J.)