

**(2014) 05 BOM CK 0097**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 518 of 2013**

Cosme Mathias Menezes

APPELLANT

Vs

Nagush Electronics

RESPONDENT

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**Date of Decision :** 05-05-2014

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1, Order 9 Rule 13  
Constitution of India, 1950 — Article 227

**Citation :** (2014) 5 BomCR 597

**Hon'ble Judges :** S.B. Shukre, J

**Bench :** Single Bench

**Advocate :** S.M. Singbal, Advocate for the Appellant; N. Noronha, Advocate for the Respondent

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## Judgement

S.B. Shukre, J.—This petition is directed against the order passed on 12.4.2013 in Miscellaneous Civil Appeal No. 74/2012 thereby setting aside the order dated 27.6.2012 passed by Civil Judge, Senior Division, Panaji, rejecting the application of the respondents filed under Order 9 Rule 13 of CPC seeking quashing and setting aside of ex parte judgment and decree dated 12.01.2010. The facts relevant for deciding this petition are stated in brief as under:-

a) The petitioner filed a suit for recovery of money against the respondents. Initially the suit was filed against the proprietorship firm namely, M/s. Nagush Electronics, through its sole proprietor Mr. Ratnakant Naik. The suit was not filed against partnership firm or against its partners.

b) The sole proprietor, on receipt of the summons, appeared before the trial Court on 3.9.2005 and filed his written statement together with counter claim. A preliminary objection was taken by the sole defendant that firm, M/s. Nagush Electronics, was a duly registered partnership firm consisting of five partners, and so the suit was not maintainable. Therefore, petitioner filed an application under Order 30, Rule 1 of CPC on 16.11.2005 for direction to the sole defendant to disclose the names and addresses of the partners of the firm. They were

furnished to the petitioner on the same day. Thereafter, with the leave of Court, the plaint was amended. The leave of the Court for amendment of plaint was granted on 16.10.2007 and the amendment to the cause title was carried out on 12.12.2007, so as to show the institution of the suit as against the partnership firm and all its partners.

c) Petitioner was also directed to take steps to serve all the partners. It appears that petitioner did not file copies of the amended plaint and therefore, fresh summons to the partners could not be issued. Sufficient time was given to petitioner, but necessary steps were not taken.

d) As the suit lingered on at the stage of taking necessary steps by the petitioner to serve the partners, another development took place. On 5.7.2008, the defendant undertook to file vakalatnama on the next date of hearing, which was of 2.8.2008. However, on 2.8.2008, the defendants were absent and suit was directed to be proceeded ex parte against them. The respondents thereafter did not appear either in person or through their Advocate. Ultimately, the suit was decreed ex parte by judgment and decree passed on 12.1.2010 by Civil Judge, Senior Division, Panaji. It was decreed for a sum of Rs. 1,37,720/- together with interest at the rate of 12% per annum from the date of suit till the date of payment.

e) Since there was no compliance with the decree, the petitioner initiated Execution Proceedings against the respondents 17.6.2010. The respondents claimed that they learnt about passing of ex parte judgment and decree against them, only when they received notice issued in the Execution Proceedings on 13.8.2010. Thereafter, the respondents filed an application under Order 9 Rule 13 of CPC for setting aside the ex parte judgment and decree dated 12.1.2010. After hearing both sides, learned Civil Judge by his order passed on 27.6.2012 dismissed the application. Respondents preferred Miscellaneous Civil Appeal No. 74 of 2012 against the said order before Court of District Judge, Panaji. It was allowed by Ad hoc District Judge-I, Panaji, who by her order passed on 12.4.2013, quashed and set aside the order of Civil Judge dated 27.6.2012 and also quashed and set aside the ex parte judgment and decree dated 12.1.2010 and granted the application filed under Order 9, Rule 13 of CPC. The learned Ad hoc District Judge did not consider it fit to impose any costs upon the respondents while allowing the application. It is this order which is under challenge in the present petition.

2. I have heard learned Counsel for the petitioner and learned Counsel for the respondents. I have carefully gone through the order of the learned Ad hoc District Judge impugned herein and also the order passed by the trial Court and the paper book of the writ petition. Now, following points arise for my determination:-

1. Whether the order dated 12.4.2013 passed by Ad hoc District Judge, Panaji is so erroneous and perverse as to make it necessary to quash and set it aside as a

whole?

2. Whether the payment of costs should have been made a condition precedent for setting aside ex parte judgment and decree, in the facts and circumstances of this case?

3. Mr. Singbal, learned Counsel for the petitioner has submitted that there was no reason for the learned Ad hoc District Judge to interfere with the order dated 27.6.2013 passed by learned Civil Judge, Senior Division as it did not show any arbitrary or unreasonable exercise of discretion. He also submits that if at all the order of the learned Civil Judge was to be set aside, it was obligatory for the learned Ad hoc District Judge to impose costs as a condition precedent for allowing the application filed under Order 9, Rule 13 of CPC. Imposition of costs equivalent to decretal amount as a prerequisite for restoration of the suit against the respondents is necessary for securing the interests of the plaintiff, who is decree holder. In support, he places his reliance upon the case of (Ramesh and others Vs. Ratnakar Bank Ltd.), (2006)12 S.C.C. 111, which according to him is not properly considered by the learned District Judge.

4. Mr. Noronha, learned Counsel for the respondents submitted that the roznama would show that the petitioner did not comply with the directions issued by the trial Court for issuance of fresh summons to the partners, and even though it was granted sufficient opportunity, it did not take any steps in that direction and the result was that none of the partners of the partnership firm, M/s Naguesh Electronics, was served with suit summons. He also submits that if the summons was not served upon any of the defendants, there was no question of any defendants giving an undertaking before the Court to file Vakalatnama of his Advocate and the remarks made in this regard in the roznama dated 5.7.2008 are absolutely erroneous. Even otherwise, he submits, no defendant has any authority to give an undertaking for filing of a vakalatnama. Therefore, he submits that the order of the Ad hoc District Judge is completely legal and reasonable and no interference with it, is called for. He also submits that in exercise of writ jurisdiction under Article 227 of Constitution of India, this Court cannot interfere with the order of the lower Court which is based on proper appreciation of material available on record. In support, he places his reliance upon the case of Ramkrishna Girishchandra Dode and others Vs. Anand Govind Kelkar and others, .

5. From the facts narrated earlier, it would be clear that even though the petitioner did not take any steps for issuance of fresh notices to the newly impleaded partnership firm through all its partners after the amendment application was granted on 16.10.2007, the fact remains that Advocate for the original sole defendant continued to remain present on some of the dates on which the suit was posted for various purposes. The amendment to the cause title was carried out on 12.12.2007 and this date is material for considering, as to whether or not partners of the firm M/s Naguesh Electronics had any notice of the date of hearing. On that day after the cause title was amended, the suit was

adjourned to 8.1.2008 and on this date i.e. 8.1.2008, the roznama shows, Advocate Nadkarni was present for defendant No. 1. Roznama makes a further noting regarding petitioner not taking any steps to serve the partners of defendant No. 1. This shows that the defendants did have the knowledge about they having been sued by the petitioner as partners of the firm and also the next date of hearing which was 18.3.2008. A further perusal of the roznama would disclose that on 5.7.2008, the defendant undertook to file the vakalatnama on the next date of hearing and therefore, hearing was postponed to 2.8.2008 for filing of the vakalatnama and written statement of the defendants. Roznama further shows that on 2.8.2008 defendants were absent and hence, suit was directed to be proceeded ex parte against them and thereafter the suit was tried ex parte and also decreed accordingly on 12.1.2010.

6. The facts borne out from the roznama would show that defendants had sufficient notice of the date of hearing and had adequate time to appear and answer the petitioner's claim. Therefore, proviso to Rule 13, Order 9 was attracted and by its application, ex parte decree was not liable to be set aside.

7. Learned Counsel for the respondents has argued that no defendant was authorised in law to give an undertaking to the Court regarding filing of the vakalatnama and therefore, the statement about undertaking could not be used against the defendants so as to make an inference that the defendants or partners of the firm had notice of the date of hearing. He also submits that remarks made in the roznama dated 5.7.2008 are erroneous.

8. Both these submissions cannot be accepted as the roznama dated 5.7.2008 has been written under the signature of learned Civil Judge, Senior Division and therefore, would have to be presumed to be correctly written. No circumstances whatsoever have been shown by the respondents to create any manner of doubt about the correctness of the said entry. Then, the question is of having knowledge of the date of hearing and having sufficient time to answer the claim and not of the nature of the authority of the defendants to file vakalatnama, as is clear from proviso to Rule 13, Order 9 of the CPC. For the sake of convenience, the proviso is reproduced as under:-

"13.....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 plaintiffs claim."

This material aspect has been ignored by the learned Ad hoc District Judge. I am, therefore, of the view that the order of the learned Civil Judge, Senior Division rejecting the application for setting aside ex parte decree could not have been interfered with by learned Ad hoc District Judge. It was an order showing a reasonable exercise of discretion, not amenable to interference in a Miscellaneous Civil Appeal.

9. All said and done. It cannot be forgotten that even the order of the learned Ad

hoc District Judge is discretionary in nature, and therefore, it would have to be viewed from the angle of necessity of it's being corrected in exercise of writ jurisdiction by this Court. It is well settled law that it is not every error that can be corrected or is capable of being corrected in writ jurisdiction. These principles of law enjoin upon the Writ Court to make interference only when the order is so perverse and so illegal as to cause miscarriage of justice. The order of the learned Ad hoc District Judge is erroneous, nay, grossly erroneous, but it certainly does not lead to a miscarriage of justice, as the petitioner would still be getting an opportunity to prove his case against the respondents. Therefore, there is no need to quash and set it aside as a whole.

10. In the case of Ramkrishna (supra), it is held that concurrent findings of facts based on consideration of evidence should not be interfered with. Here, there have been no concurrent findings of facts and the conclusion reached upon consideration of material available on record is grossly erroneous, which for the reasons disclosed earlier, need not be replaced.

11. Now, the question, as to whether or not any costs should have been imposed as a condition precedent for setting aside the ex parte judgment. According to learned Counsel for the petitioner absence of such condition has caused prejudice to the petitioner's right and delay in execution of the decree that may be eventually passed in favour of the petitioner, if at all it is passed. I think he is right. Keeping in mind the factor of prejudice and delay that the provision of costs has been engrafted in Rule 13, Order 9 of the CPC by the legislature and the Court must give due effect to the intention of the legislature in appropriate cases. Learned Ad hoc District Judge by not considering this material aspect has failed to properly exercise jurisdiction, thereby causing prejudice to the rights of the petitioner in this regard. Therefore, now this Court would have to make the necessary correction.

12. The aspect of prejudice and delay can be taken care of by imposing appropriate costs as a pre-requisite for restoration of the suit following the law laid down by the Hon'ble Apex Court in the case of Ramesh (supra). Having regard to the nature of the suit, I am of the opinion that directing the respondents to deposit a sum which is approximately equivalent to the decretal amount should allay the concerns expressed by the petitioner.

13. Learned Counsel for the respondents has referred to me the case of Tea Auction Ltd. Vs. Grace Hill Tea Industry and Another, , to support the argument that if any costs are to be imposed, they should not be excessive or unreasonable. In the said case, Hon'ble Apex Court found that defendant was able to prove sufficient cause for non-appearance and, therefore, held that condition to be imposed should not be unreasonable or excessively harsh. In the present case, the respondents or defendants have been found to have not proved any sufficient cause for their non-appearance and therefore, the concept of reasonableness of costs would have to be understood in the context of defendants failure to show sufficient cause and decision of this Court to not

interfere with erroneous exercise of discretion by Lower Appellate Court in their favour.

14. In such a situation, it would be incumbent upon this Court to alleviate the prejudice that may be caused to the petitioner in the nature of delay in getting what may be found to be due to them, if the suit is eventually decreed. It is also the requirement of Rule 13, Order 9 of the CPC. This discretion, needless to say, has to be exercised in a judicious manner. If no costs are imposed, it must be done for sufficient reasons which must be recorded in writing. But, this has not been done by the first Appellate Court. Therefore, as held earlier by me, this would be a fit case in which reasonable costs should be imposed upon the respondents or the defendants as a condition precedent for setting aside ex parte decree.

15. In the result, the writ petition deserves to be partly allowed. Accordingly, the point No. 1 is answered as in the negative and point No. 2 is answered in terms that as a condition precedent for restoration of the suit, the respondents shall deposit in the trial Court an amount of Rs. 1,50,000/- (Rupees one lakh fifty thousand only) as costs and this amount shall remain deposited with the trial Court till final disposal of the suit in accordance with law. The impugned order of the Ad hoc District Judge, Panaji is modified accordingly. The writ petition is partly allowed and Rule is made absolute in the above terms.