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**(1989) 08 BOM CK 0024**

**In the Bombay High Court**

**Case No : Writ Petition No. 4800 of 1988**

Mrs. Lalita D. Nadkarni and others

APPELLANT

Vs

S.G. Punjabi

RESPONDENT

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**Date of Decision : 25-08-1989**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

**Citation : AIR 1990 Bom 160 : (1990) 1 BomCR 105 : (1989) MhLj 1074**

**Hon'ble Judges : Sujata Manohar, J**

**Bench : Single Bench**

**Advocate : C.R. Dalvi, N.R. Jagtap and Smt. Mohana R. Naik, for the Appellant;  
R.S. Bhonsale, Miss Kiran V. Gupta and Rajiv J. Mane, for the Respondent**

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## **Judgement**

1. One Dr. D.S. Nadkarni was the owner of Plot No. 11-C of Town Planning Scheme II of Andheri and the late Mrs. Y. Ambiya, was the owner of the adjoining plot being Plot No. 11-A of the same scheme. The owners of the said two plots entered into an agreement on 14th May, 1947 under which they leased the said plot on monthly basis to the father of the First Respondent. The Petitioners are the successors-in-title of Dr. Nadkarni and Mrs. Ambiya while the First Respondent is the successor-in-title of his father. The tenancy in favour of the First Respondent in respect of the plot terminated by a notice dated 2nd October, 1970.

2. Thereafter on 10th of August, 1971, R.A.E. Suit No. 3866 of 1971 was filed in the Court of Small Causes at Bombay for eviction of the First Respondent from the said plots and for possession. The First Respondent was represented by an Advocate in the suit. He filed his written statement. Issues were framed on 22nd July, 1976. It seems that on 28th June, 1977, the advocate of the First Respondent withdrew his appearance for want of instructions.

3. From the end of 1978 onwards there was negotiation between the parties for settlement of the dispute and for the purchase of the said plots by the First Respondent. Two adjournments were taken for this purpose in 1978-79. In

March, 1979 it is the contention of the First Respondent that in view of the talks of settlement which were in progress, he did not engage another Advocate. He also remained under the impression that the suit will be got adjourned by the Petitioners and hence he remained absent when the suit was called out on 3rd May 1979. He was also absent on 4th May, 1979 when evidence was recorded. On 5th May, 1979 an ex parte decree was passed against the First Respondent. This decree was executed by the Petitioners on 13th July, 1979 as a result of which the Petitioners obtained possession of the said plots.

4. Thereupon on 16th July, 1979 the First Respondent filed an application for setting aside the ex parte decree. He also lodged an appeal from the ex parte decree before the Appellate Bench of the Court of Small Causes and filed an application for condonation of the delay on 17th July, 1979.

5. On 3rd March 1980, the Advocate for the First Respondent did not press his application for condonation of delay and hence on that date, the notice was discharged for want of prosecution. Thereupon the appeal which was not then numbered, was also rejected. The order states:

"The appellant's advocate states that the appellant does not want to prosecute this appeal. Since, however, the application for condoning the delay in filing the appeal has been withdrawn, the objections taken by the office to the filing of the appeal survive and the appeal will have to be rejected."

6. The application for setting aside the ex parte decree was dismissed by a learned single Judge of the Court of Small Causes on 16th November, 1981. The Appellate Bench of the Court of Small Causes at Bombay, however, allowed the appeal and set aside the ex parte decree by its Order dated 22nd August, 1988. In the present writ petition, the Petitioners have challenged this order of the Appellate Bench of the Court of Small Causes.

7. It is contended that Shri Dalvi, learned Advocate for the Petitioners that in view of the rejection of the appeal filed by the First Respondent, the application for setting aside the ex parte decree cannot survive and it ought to have been dismissed. Now, under Order 9, Rule 13 of the Code of Civil Procedure. It is provided as under:

"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 the sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree....."

Explanation II is as follows:

"Where there has been an appeal against a decree passed ex parte under this rule and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal no application shall lie under this rule for setting aside that ex parte decree."

In the present case, the appeal was merely lodged. It could not be numbered because there was delay in filing the appeal and without the condonation of delay, the appeal could not have been numbered. The defendant did not press the application for condonation of delay and hence the appeal was automatically rejected. In such a case where the application for condonation of delay is withdrawn and the appeal comes to be rejected, there is no consideration of the appeal at all by the appellate Court. Explanation II makes it clear that if the appellant has withdrawn the appeal, the application under Order 9, Rule 13 is not maintainable. The present case is similar to a case of withdrawal of the appeal. In fact the withdrawal in the present case is at an earlier stage of considering the application for condonation of delay. In such a situation, there can be no bar to maintainability of an application under Order 9, Rule 13 of the Code of Civil Procedure.

8. Shri Dalvi drew my attention to a decision of this Court in *Kantilal Khodabhai Patel Vs. Chiba Bava Bhandari*, . In that case the appeal which was preferred was dismissed summarily. The Court said that the order of the trial Court had merged in the appellate order summarily dismissing the appeal and hence no application under Order 9, Rule 13 could be maintained against the order of the trial Court. Such is not the present case where the appeal has not been filed or entertained at all.

9. In the case of *Smt. Surinder Kaur Vs. Mohinder Bahadur Singh*, , an appeal was filed against an ex parte decree. It was dismissed as time barred. The Court said that although the appeal was dismissed as time barred by the appellate authority, it must be taken as affirming the ejectment order made by the Controller. It therefore, held that the ejectment order had merged in the appellate order. Therefore, in law, there was no ejectment order on which an application could be made under Order 9, Rule 13. In the present case, without any condonation of delay, the appeal cannot be numbered and taken on file. There is therefore, no order in the appeal with which the order passing the ex parte decree can merge. The ratio of this decision therefore has no application to the present case. The application of the First Respondent Under O. 9, R. 13 was therefore, properly entertained by the Court of Small Causes.

10. The appellate Court after considering in detail the reasons given by the first Respondent for remaining absent has come to a conclusion that the First Respondent has shown sufficient cause for remaining absent on the date when the ex parte decree was passed. The order of the appellate Court sets out in detail the purpose of the suit and the talks of settlement which were in progress. After considering all the circumstances it has held that there was sufficient cause for the First Respondent's absence. I am substantially in agreement with the reasoning of the appellate Court and do not see any reason for interfering with the same. It has been urged by Shri Dalvi that the First respondent ought to have remained present on 4th May, 1979 and 5th May, 1979 and that no assurance was given by the Petitioners to the First Respondent that the suit

would be adjourned. The First Respondent however, has set out the previous history of negotiations as well as the previous two adjournments which were obtained for settlement. The appellate Court has rightly come to the conclusion that there was sufficient cause for his absence on 4th May, and 5th May, 1979. The appellate Court has rightly set aside the ex parte decree.

11. The Petitioners have also taken out Civil Application No. 4600 of 1988 for contempt and for other directions. It seems that pursuant to the ex parte, decree, the Petitioners obtained possession of the plots on 13th July, 1979.

12. After the ex parte decree was set aside on 22-8-1988, the 1st Respondent on 19th September, 1988 lodged a caveat in this Court. No notice however, was given to the Petitioners in the meantime filed the present writ petition and obtained an ex parte stay of the order dated 22nd August, 1988 on 22nd September, 1988.

12. However, in view of the order of the appellate Court of 22nd August, 1988 setting aside the ex parte decree, the First Respondent made an application for execution in the Small Cause Court in which he was granted possession of the said plots at 10.00 a.m. or 10.30 a.m. on 22nd September, 1988. The First Respondent was informed of the stay order of his order only at 1.30 p.m. on 22nd September, 1988. Unfortunately, the writ was sent to the Small Cause Court only on 28th September, 1988.

13. In these circumstances. Shri Dalvi does not press the contempt application. In the circumstances and looking to the order passed in the writ petition today there can be no question of restoring possession to the petitioners. The First Respondent is present in Court. He states that he is in possession of the suit plots and there are not encroachments on the suit plots. He also states that he will maintain a proper fencing around the plots in order to prevent any encroachments and through his Advocate he gives an undertaking that he shall not part with possession or create any third party interest in respect of the said plots pending the hearing and final disposal of the suit before the Court to Small Causes at Bombay. The First Respondent to file a written undertaking to this effect in Court within the one week.

15. In the premises, Rule is discharged. In the circumstances there will be no order as to costs.

16. Rule discharged.