

(2017) 06 BOM CK 0120
In the Bombay High Court
Case No : 70 of 2016

Prabhakar s/o Dasrathji Bobde, & Ors.	APPELLANT
Vs	
Jageshwar s/o Bhaskarrao Patre, & Anr.	RESPONDENT

Date of Decision : 13-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 37 Rule 3\(2\)](#)

Citation : (2017) 06 BOM CK 0120

Hon'ble Judges : Shalini Phansalkar-Joshi

Bench : SINGLE BENCH

Advocate : H.R. Gadhia, A.H. Lohiya

Final Decision : Allowed

Judgement

1. The legality, validity and propriety of the order dated 26.04.2016 passed by 4th Joint Civil Judge, Senior Division, Nagpur in Summary Civil Suit No.178/2010, thereby rejecting the application filed by the petitioner to set aside the ex parte decree passed therein on 25.04.2013, is challenged in this revision.
2. Brief facts of the Revision are to the effect that, the respondent herein has filed Summary Civil Suit No.178/2010, against the present petitioner's for recovery of the amount. The notice of the said suit was served on the petitioners and they had engaged the counsel, who had filed application for grant of leave to defend the suit. As per the contention of the petitioners, their counsel, however, has not pursued the matter diligently. He did not inform them about the stage and progress made in the matter. As a result, the ex parte decree came to be passed against the petitioners. The petitioner therefore, filed M.J.C. No.90/2014 for setting aside the said ex parte decree and for permission to defend the suit.
3. This application came to be resisted by the respondent contending inter alia that the petitioners had not attended the matter diligently. It was submitted that after filing of the application for leave to defend, the petitioners were under legal

obligation to attend the Court proceeding regularly, which they have failed to do. The petitioners are also literate persons and having knowledge about the Court proceeding. The opportunity was granted to the petitioners by the Courts to defend the suit, but despite that they remained absent and were trying to shift the blame on their counsel. Hence, it was submitted that as no sufficient cause was made out, the ex parte decree passed in the Summary Suit cannot be set aside.

4. In support of their case petitioner Nos.1 and 2 adduced their evidence. The Trial Court considered the said evidence and also the record and proceeding of the Summary Suit No.178/2010 and was pleased to hold that as the petitioners were duly served with notice and had also appeared in the suit through their counsel, it was their responsibility to pursue the said matter. They cannot shift the entire claim on their counsel to get the ex parte decree passed in the matter set aside. The Trial Court therefore, rejected the petitioners' application for setting aside the ex parte decree.

5. While challenging the impugned order of the Trial Court, the learned counsel for the petitioners has mainly and in my considered opinion, rightly, relied upon the provisions of Order 37 Rule 3 subrule(2) of the Code of Civil Procedure (state amendment). The said subrule provides as follows:

3. (1)

(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant, a summons for judgment in Form No.4A in Appendix B or such other form as may be prescribed from time to time returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed, and stating that in his belief there is no defence to the suit.

In the instant case admittedly such summons for judgment in Form No.4A as prescribed in AppendixB was not at all served on the petitioners after their appearance in the suit. In view thereof, even assuming that they had appeared in the suit and filed application for permission to leave, as no such fresh summons as contemplated in subrule (2) of Rule 3 of Order 37 C.P.C. was issued or served upon the petitioners before pronouncing of the judgment, the ex parte judgment passed against them cannot sustain. The learned Trial Court should have considered this legal provision, which is special statutory protection given to the defendant in a suit to be tried summarily. The entire order of the Trial Court is conspicuously silent about the compliance of this legal provision.

6. In view thereof, the impugned order of the Trial Court needs to be quashed and set aside thereby giving an opportunity to the petitioner to appear in the matter to defend the suit, so that it can be decided on merit.

7. The revision is accordingly allowed. The impugned judgment and order passed by the Trial Court is quashed and set aside.

8. The ex parte decree passed in Summary Suit No.178/2010 on 25.04.2013, is hereby quashed and set aside, giving permission to the petitioners to appear in the Trial Court and to defend the said suit.

9. On the request of the learned counsel for both the parties, the hearing of the suit is expedited.

10. Trial Court to make every endeavour to dispose of the suit as expeditiously as possible and within a period of six months.