

(2011) 11 BOM CK 0131

In the Bombay High Court

Case No : Writ Petition No. 4071 of 2003

Yousun Dada Patel (Dead) Through LRs (Shaikh Shabbir
Yousuf Patel and Others) and Others

APPELLANT

Vs

Laxman Prabhat Rodu Real Name Laxman Prabhat Adhane
and Others

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 10, Order 8 Rule 5

Citation : (2012) 2 BomCR 32

Hon'ble Judges : A.V. Potdar, J

Bench : Single Bench

Advocate : V.M. Kagne, for the Appellant; Pooja V. Langhe with Mr. V.R. Langhe,
Advocates for respondents No.1 to 7, 10 and 11, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Potdar, J.—By the present petition, the petitioners - original plaintiffs in RCS No.1118/1998 have questioned the correctness and legality of the order dated 10.12.2002 passed by the 3rd Joint Civil Judge, Junior Division, Aurangabad in MARJI No.494/2002. It appears that Rule has been issued in this petition on 24.08.2004.

2. Heard learned counsel for the respective parties.

3. For better appreciation of the rival submissions it is necessary to advert to the few facts, which gave rise to file the present writ petition.

It appears that the petitioners have filed RCS No.1118/1998 for recovery of possession and perpetual injunction from creating any third party interest in the suit property, against the respondents. It further appears that after the suit summons was served, respondents appeared in the suit through advocate, however failed to file written statement. It also appears that certain opportunities were given to the respondents / defendants to file written

statement, however no written statement was filed. Ultimately, after recording evidence of the plaintiffs/petitioners, the suit came to be decreed vide judgment and decree dated 18.04.2002. It further appears that after the said judgment and decree came to the knowledge of the respondents / defendants, they filed MARJI No.494/2002 on 22.04.2002. This application came to be filed under Order IX Rule 13 of the CPC seeking setting aside the ex parte decree. The said application was contested by the petitioners / plaintiffs by filing say, however, after hearing both the sides, vide order dated 10.12.2002, the said application came to be allowed by setting aside the exparte decree dated 18.04.2002, which order is impugned in the present petition.

4. During the course of submissions, amongst other grounds, legal point is raised by the learned counsel for the petitioners / plaintiffs that the application filed by the respondents / defendants under Order IX Rule 13 of the CPC is not maintainable, as the judgment and decree dated 18.04.2002 was passed under the provisions of Order VIII Rule 5 of the CPC or under Order VIII Rule 10 of the Civil Procedure Code. In support of his contentions, learned counsel for the petitioner placed reliance on the observations in *The Traders Bank Ltd. Vs. Avtar Singh*, . Further reliance is placed by learned counsel for the petitioners on the observations of this Court in "*Rashtriya Chemicals and Fertilizers Ltd., V/s Ota Kandla Pvt. Ltd.*," 1992 (2) Mh.L.J. 1266. The judgments relied on by the learned counsel for the petitioners are not applicable to the present case.

5. Considering the issue involved in this petition, it may be useful to advert the observations of this Court in "*Gaurang Merchant V/s Madhliso & Co.*" 2004 (3) Mh.L.R. 218, wherein it is observed by this Court that Defendant failing to file written statement, Court not decreeing suit on assumption that facts mentioned in plaint are deemed to be admitted but after requiring plaintiff to file his evidence on affidavit, decree passed. The circumstances, falls under Order IX Rule 6 and not under Order VIII Rule 5 or 10 and hence application for setting such decree is maintainable under Order IX Rule 13 of the Civil Procedure Code. Thus, it is clear that if in the suit in which defendants appear but failed to file written statement, however the plaintiff had filed evidence either on affidavit or otherwise, then the decree passed on the basis of the said evidence does not cover under the ambit and scope of Order VIII Rule 5 or Order VIII Rule 10 of the Civil Procedure Code. Perusal of the judgment and decree dated 18.04.2002 indicates that in the said suit, to prove the case of the plaintiffs, the plaintiffs had entered into the witness box and had examined themselves at Exhibit-48. Apart from it, it also appears that brothers of the plaintiffs had also produced documents in his evidence. In the light of this, the submission of learned counsel for the petitioners that the judgment and decree dated 18.04.2002 was passed under Order VIII Rule 5 or 10 of the Civil Procedure Code, is not tenable. In fact, the judgment and decree is squarely covered under the ambit and scope of Order IX Rule 6 of the Civil Procedure Code.

6. Once it is concluded that the judgment and decree, subject matter of the

MARJI Application No.494/2002, is not passed under Order VIII Rule 5 or 10 of the Civil Procedure Code, then it has to be held that the application, seeking to set aside the said decree, is maintainable under Order IX Rule 13 of the Civil Procedure Code. Now the next question, which requires consideration is as to whether to satisfy the ingredients of Order IX Rule 13 of the CPC whether there was sufficient cause for the respondents / defendants which prevented them from appearing or participating in the suit. It is not only contended in the application filed for setting aside the judgment and decree, but respondent No.1 had also entered into the witness box and stated on oath that after service of summons on the defendants, they had engaged one advocate. They are the rustic village people and depended upon the advice of their advocate, however as the dates were not communicated to them by the said advocate, they could not contest the suit properly. As no communication was received from their advocate for a considerable time and hence they changed the advocate, however by that time the judgment and decree was already passed. Considering this evidence given by respondent No.1 before the Court of inquiry, which is not shaken even in the cross examination, reliance needs to be placed on the same. Further, it is a settled principle of law that for the fault of the advocate the litigant must not suffer. The cause shown by the respondents / defendants in the application under inquiry that due to wrong advice or non communication from the advocate, they are prevented from appearing in the suit, is just and sufficient cause. In the circumstances, the defendants / respondents succeed in establishing that the application filed by them is maintainable under Order IX Rule 6 of the Civil Procedure Code. They are further successful in establishing that they have sufficient cause for not appearing / contesting / participating in the suit, which resulted in passing of the ex parte decree against them. In the light of this, no fault can be found with the order impugned in the petition warranting to interfere in the same.

7. Consequently, the writ petition, being sans merits, is dismissed. Rule stands discharged. The stay granted earlier stands vacated. Considering the peculiar facts and circumstances of the case parties to bear their own costs.

8. The parties are directed to appear before the trial court on 1st December 2011. Considering the old age of the proceeding, the trial court is directed to hear and dispose of the suit, in accordance with law, within a period of 3 months from the first appearance of the parties. Learned counsel for the respective parties undertake to communicate this order to the concerned parties. Parties to act on the authenticated copy of this judgment.