

SPL.C.S. No. 8/2013

Pandurang & Ors., Vs. Suresh & Ors.

ORDER BELOW EXH. 99

Read an application and the reply filed by defendant no.4. Perused the record. Heard the learned counsel for plaintiffs Adv. Shri.K.V. Jadhav and the learned counsel for defendant No. 4 Adv. Smt. Y.A. Modi.

2. Plaintiffs filed this review application and submitted that, on previous date i.e. on 02.11.2023 order passed below Exh. 94 and defendant no.4 was permitted to file the written statement subject to cost. However, defendant no. 4 only filed an application below Exh. 94 to set aside exparte order and to grant time to file the written statement. However, there is no any prayer of defendant no. 4 to grant permission to file the written statement. Defendant no. 4 also has not filed the copy of written statement along-with application below Exh. 94. Defendant no. 4 also has not filed any affidavit and described any good cause for not appearing within the limitation. Even if, it is so, the application at Exh. 94 was allowed and defendant no. 4 was granted permission to file the written statement without having any demand on the part of defendant no.4. Therefore, plaintiffs prayed to review the said order. Plaintiffs also prayed to set aside order below Exh. 94.

3. Defendant no. 4 filed the reply and opposed to this application on the ground that, defendant no. 4 prayed to set aside exparte order and also sought time to file the written statement. The

application at Exh. 94 was allowed and defendant no. 4 also complied the order below Exh. 94. There is no any reason to review the order and prayed to reject the order.

4. On perusal of record, particularly, the application at Exh. 94 and the order passed thereon, it is true that, defendant no. 4 mentioned in the application at Exh. 94 to set aside exparte order which was passed against him. Defendant no. 4 also sought time to file the written statement. The application at Exh. 94 was allowed and exparte order dated 09.03.2018 was set aside and defendant no. 4 was permitted to file written statement subject to cost of Rs. 10,000/- payable by defendant no. 4 to plaintiffs and the cost of Rs. 10,000/- payable by defendant no. 4 to DLSA, Satara. It also appears that, defendant no. 4 complied the order below Exh. 94 and deposited entire cost amount of Rs. 20,000/- in the Court.

5. The learned counsel for the plaintiff Adv. Shri. K.V. Jadhav submitted that, defendant no.4 appeared through application at Exh. 94 when the suit was fixed for the final judgment. There is no any good cause mentioned in the application. There is also no any supportive affidavit of defendant no. 4 to show good cause for his non-appearance. Therefore, the application at Exh. 94 is not maintainable vide Order IX, Rule 7 of the Code of Civil Procedure. He also submitted that, Order IX, Rule 7 is not applicable, when defendant no. 4 appeared at the final stage of the present case.

6. The learned counsel for plaintiffs is also relied upon one authority i.e. ***United India Insurance company Vs. Rajendra Singh & Ors., reported in AIR 2000 Supreme Court 1165*** and thereafter, submitted that, the Court may recall it's order if the order is obtained by practicing fraud by any of the party.

The learned counsel for plaintiffs is also relied upon one authority i.e. ***Mamita Thati Vs. Nepura Pradhan reported in AIR 2014 SC Orissa 79*** and submitted that, the Hon'ble Orissa High Court held in the aforesaid judgment that, if therefore hearing was completed and the suit was not adjourned for hearing, Order IX, Rule 7 could have no application and the matter would stand at the stage of Order IX, Rule 6 to be followed up by the passing of an exparte decree making Rule 13 the only provision in Order IX applicable.

7. In this present suit, it is the true position that the defendant no. 4 filed an application below Exh. 94 to set aside exparte order passed against defendant no.4 and thereafter, defendant no. 4 prayed to grant time to file the written statement.

8. On reading an application below Exh. 94, it appears that, even though defendant no. 4 has not prayed to grant permission to file the written statement but it indicates the intention of defendant no.4 to appear and to file the written statement. Now, it is the stand of plaintiffs that, defendant no. 4 has not proved the reasons mentioned in application at Exh. 94 by

way of affidavit and therefore, the application at Exh. 94 is not maintainable. The learned counsel for plaintiffs also in their written notes of argument at Exh. 106 mentioned that, the Court is required to obtain affidavit of defendant no.4 vide Section 30 of the Code of Civil Procedure. The learned counsel for plaintiffs also mentioned Order XIX, Rule 1 in the written notes of argument and submitted that, the Court is having power to order any point to be proved by affidavit. However, on reading Section 30 as well as Rule 1, Order XIX, it appears that, there is the discretion of the Court to direct to the party to the suit to file affidavit. The Court may direct to party to file affidavit or Court may not direct to party for such acts. It is not the mandate that the Court is required to obtain the affidavit of the party to the suit for proving the reasons mentioned in the application.

9. In this present suit, it is the admitted position that, defendant no. 4 appeared and filed the application at Exh. 94 when the matter reached to the final argument. Plaintiffs, after adducing evidence, filed the pursis at Exh. 87 and closed the evidence. The learned counsel for plaintiffs Shri. K.V. Jadhav also finally argued on behalf of plaintiffs. After completion of final argument of plaintiffs, defendant no. 4 appeared and filed an application at Exh. 94. In this circumstances, even though, defendant no. 4 appeared at the final stage of this proceeding, it is necessary to grant an opportunity to defendants to contest suit. If the, defendants will not be allowed to file written statement and contest the suit then, the matter will not be decided on merit. If,

defendants will not be permitted to file written statement after such long delay then, it will be not in the interest of justice on the part of defendants.

10. Whenever, there is delay on the part of plaintiffs or defendants to take effective steps then, there is only the remedy to impose cost on the parties to the suit. Defendant no. 4 appeared by causing long delay, but it doesn't mean that no opportunity will be granted to defendants. Certainly, it will caused irreparable loss to defendants if defendants will not be permitted to file the written statement.

11. I also read Section 35B of the Code of Civil Procedure, Section 35 b provides that, if, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit, fails to take the step which he was required by or under this Code to take on that date, or obtains an adjournment for taking such step or for producing evidence or on any other ground, the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next, following the date of such order, shall be a condition precedent to the further prosecution of the suit by the plaintiff, where the plaintiff was ordered to pay such costs, the defence by the defendant, where the defendant was ordered to pay such costs.

12. In this present suit, there is the indication on the part of defendant no. 4 that, defendant no. 4 want to file the written statement even though such prayer was not mentioned in the application at Exh. 94. The Court is having discretion to grant permission to defendants to file the written statement. Under this circumstances, there is only remedy to impose cost on the defendants and to compensate to plaintiffs. In this situation, the cost of Rs. 20,000/- is already imposed upon defendant no. 4 vide order below Exh. 94. Defendant no. 4 is also directed to pay cost of Rs. 10,000/- to plaintiffs. Defendant no. 4 also deposited the cost of Rs. 20,000/- in the Court. The compensation is already provided to plaintiffs, wherein defendants caused long delay to file the written statement.

It is also necessary to mention here that, there are enormous judgments of Hon'ble Supreme Court that, the opportunity is required to be granted to defendants to put his defence as the fair trial is the fundamental need requires to be provided to parties. In this present suit, in my opinion, it was necessary to defendant no. 4 to grant him an opportunity to put his defence. The fair trial is required to adjudicate the suit on merit. Therefore, the judgments produced by plaintiffs are not applicable to the facts and circumstances of this present case. Therefore, the submission of the learned counsel for plaintiffs that, review of order below Exh. 94 is required to be done will not be accepted.

13. Therefore, I found that, there is no any reason to review the order below Exh. 94. No irreparable loss will be caused to plaintiffs, if the review application is rejected. I found no substance in the submission of learned counsel of plaintiffs. Hence, I proceed to pass the following order.

ORDER

1. The application is rejected.
2. Both the parties are directed to take note of it.

Vaduj
Date: 20.08.2024

(D.D. Fulzele)
Civil Judge Sr.Dn., Vaduj