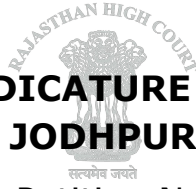




[2024:RJ-JD:47332]

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 14628/2024

Phoolaram S/o Gulabram, Aged About 65 Years, Resident of Rasisar, Tehsil Nokha, District Bikaner, at present residing at Daga Banglow Ke Utter Disha Main Sarvodaya Basti, Bikaner.

----Petitioner

Versus

1. Bajranglal S/o Late Shri Malaram, Resident of Nokha, District Bikaner, at present residing at Daga Banglow Ke Utter Disha Main Sarvodaya Basti, Bikaner.
2. Ramswaroop S/o Late Shri Malaram, Resident of Nokha, District Bikaner, at present residing at Daga Banglow Ke Utter Disha Main Sarvodaya Basti, Bikaner.

----Respondents

For Petitioner(s) : Mr. Nitin Trivedi
For Respondent(s) : Mr. Deen Dayal Chitlangi

HON'BLE DR. JUSTICE NUPUR BHATI**Order****21/11/2024**

1. This writ petition has been filed by the petitioners/plaintiffs under Article 227 of the Constitution of India challenging the order dated 19.07.2024 passed by learned Additional District Judge, Nokha, Bikaner in Civil Suit No. 20/2023 (Bajranglal & Anr. v LRs of Phoolaram), whereby the application filed by the respondents-defendants under Order IX Rule 13 of the Code of Civil Procedure, 1908 ('CPC') was allowed by the learned Trial Court.

2. The writ petition has been preferred with the following prayers:-

"1. By an appropriate writ, order or direction, the order dated 19.07.2024 (Annex.8) passed by Additional District Judge Nokha, Bikaner in Civil Misc. Application No.20/2023 (Bajranglal & Anr. Vs. Phoolaram) whereby the application





under the provisions of Order 9 Rule 13 CPC, filed by the respondents has been allowed, may kindly be quashed and set aside.

2. Any other appropriate writ, order direction which this Hon'ble Court may deem just and proper may kindly be passed in favour of the petitioner. or

3. The cost of the writ petition may kindly be awarded in favour of the petitioner."

3. Briefly stated, the facts of the case are that the petitioner-plaintiff filed a civil suit on 03.05.2017 (Annex.1) seeking cancellation of the sale deed dated 23.08.2016 (Annex.2) and perpetual injunction. It was stated in the suit that the sale was executed in consideration of a total of Rs. 15,45,000/-, out of which only Rs. 1,00,000/- was paid, and therefore, on account of failure of the respondents-defendants to pay the rest of the amount, the petitioner-plaintiff filed the suit. In response to the plaint, the respondents-defendants filed the written statement (Annex.4).

4. Thereafter, ex-parte proceedings were initiated against the respondents-defendants vide order dated 03.02.2023 and the learned Trial Court framed four issues and after taking into consideration the evidence of the petitioner-plaintiff, proceeded ex-parte. Subsequently on 03.06.2023 (Annex.5), learned Trial Court decreed the suit in favour of the petitioner-plaintiff and cancelled the sale deed dated 23.08.2016 and restrained the respondents-defendants from alienating, selling or transferring the property in dispute.

5. On 21.07.2023 (Annex.6), the respondents-defendants filed an application under Order IX Rule 13 of the CPC, read with Section 5 of the Limitation Act, 1963, seeking setting aside of the ex-parte decree granted by the learned Trial Court vide order



dated 03.06.2023 (Annex.5) and for condonation of delay, respectively, while stating that the counsel for the respondents-defendants had underwent a surgery of cornea transplant as well as he was taking treatment of eyes, therefore, could not appear before the learned Trial Court for the proceedings. In response to the said application, the petitioner-plaintiff filed his reply (Annex.7). Subsequent thereto, learned Trial Court vide order dated 19.07.2024 (Annex.8), allowed the application filed by the respondents-defendants under Order IX Rule 13 of the CPC, while imposing a cost of Rs. 10,000/- and set aside the ex-parte decree dated 03.06.2023 (Annex.5).

6. Thus, aggrieved by the order dated 19.07.2024 (Annex.8), passed by the learned Trial Court, the petitioner-plaintiff has preferred this writ petition.

7. Learned counsel for the petitioner-plaintiff submits that the learned Trial Court has erred in allowing the application filed by the respondents-defendants under Order IX Rule 13 of the CPC, as the counsel for the respondents-defendants failed to appear before the learned Trial Court for the proceedings and therefore, the decree dated 03.06.2023 (Annex.5) was rightly passed ex-parte by the learned Trial Court. He also submits that the same counsel representing the respondents-defendants had put in appearance in other cases during the same time period in which he claimed to be undergoing an eye treatment as well as for surgery of cornea transplant and therefore the counsel for the respondents-defendants cannot adopt a pick and choose method for representing the litigants.



8. Learned counsel for the petitioner-plaintiff further submits that a counsel can easily make alternative arrangements so that the respondents-defendants are properly represented and therefore, it was the duty of the counsel for the respondents-defendants to make alternative arrangements for representing the respondents-defendants, or he could have asked his brother, Mr. Shailendra Sharma, who was also having an experience of more than 20 years in the litigation and therefore, under these circumstances, the learned Trial Court rightly proceeded ex-parte and allowed the cancellation of the sale deed vide order dated 03.06.2023 (Annex.5), which was wrongly set aside by the learned Trial Court vide order dated 19.07.2024 (Annex.8) upon the application filed by the respondents-defendants under Order IX Rule 13 of the CPC.

9. Learned counsel for the petitioner-plaintiff also submits that the sole reason on the basis of which the learned Trial Court allowed the application filed by the respondents-defendants under Order IX Rule 13 of the CPC, was that since the counsel representing the respondents-defendants was suffering from health issues, therefore, it was not possible for him appear at a place that was 70 km far from his place of practice and he thus submits that the same cannot be a reason to set aside an ex-parte decree, inasmuch as it was the duty of the counsel to make such arrangements and that, he cannot be granted relaxation solely on the ground that his place of practice was distant.

10. *Per contra*, learned counsel for the respondents-defendants submits that the order dated 19.07.2024 (Annex.8) passed by the learned Trial Court, allowing the application filed by the



respondents-defendants under Order IX Rule 13 of the CPC, is just and proper and does not warrant interference by this Court inasmuch as the respondents-defendants had clearly specified in the application (Annex.6) filed under Order IX Rule 13 of the CPC, that the counsel representing the respondents-defendants was facing health issues in respect to the eyes; that he went to the hospital on 20.11.2022, 26.11.2022, 15.12.2022, 29.12.2022, 14.01.2023, 28.01.2023; he had also undergone a surgery for cornea transplant, which was not successful and the problem with his vision still persisted, after which he had to undergo another operation for the cornea transplant and the same was also submitted before the learned Trial Court, and therefore, it was only after considering the circumstances at hand, the learned Trial Court allowed the application filed by the respondents-defendants under Order IX Rule 13 of the CPC and set aside the ex-parte decree dated 03.06.2023 (Annex.5).

11. Learned counsel for the respondents-defendants also relied upon the judgment passed by the Coordinate Bench of this Court in the case of **LRs of Late Smt. Keshar Devi & Ors. v. Smt. Vajeera** [S.B. Civil Writ Petition No. 5786 of 2013 decided on 08.11.2013], wherein it was observed that the litigant should not be made to suffer for the negligence of their counsel, however the respondents-defendants in the case at hand are at an even better position since in the present case, the counsel for the respondents-defendants could not appear because of some health issues and there was no negligence, and therefore, the litigants, i.e. the respondents-defendants cannot be made to suffer in the instant case. He thus submits that the order dated 19.07.2024



(Annex.8), passed by the learned Trial Court does not suffer from any infirmity.

12. Heard learned counsel for the parties, perused material on record and judgment cited at the Bar.

13. This court finds it apposite to refer to Order IX Rule 13, CPC before adjudicating the matter on merits. And the same is reproduced as under:

"13. Setting aside decree ex parte against defendant.—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 any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further than 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 plaintiff's claim.

Explanation.—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."

Thus, an ex-parte decree can be set aside by the court where the defendant satisfies the court that: (i) Summons were not duly served upon him; or (ii) he was prevented by any sufficient cause from appearing before the court when the suit was called on for hearing.





14. Now coming to the facts of the case, this court, upon perusal of the material available on record, finds that on 01.09.2022 the counsel representing the respondents-defendants before the learned trial court was present before the learned trial court and the next date was fixed on 16.11.2022. Meanwhile the counsel representing the respondents-defendants was facing vision related health issues and had to take treatment regularly however, during the subsequent period the cornea of his left eye got completely damaged due to which he had to undergo surgery and was regularly taking treatment for the same, i.e., from the second week of November, 2022 to July, 2023. In the meanwhile the respondents-defendants tried contacting their counsel but were unable to get in touch with him as he was facing health issues. Thereafter, as soon as the counsel representing the respondents-defendants came to know about the ex-parte decree, appropriate remedy was availed.

15. This Court also finds that the submission of the learned counsel for the petitioner-plaintiff that the reason assigned by the learned Trial Court while allowing the application filed by the respondents-defendants under Order IX Rule 13 of CPC that it was on account of the health issues that it was not possible for the counsel for the respondents-defendants to appear for the proceedings, is not justified, inasmuch as the counsel for the respondents-defendants has clearly submitted in his application that he was suffering from health issues, and therefore, it was rightly observed by the learned Trial Court that it was not practically possible for the counsel for the respondents-defendants to appear before the learned Trial Court, which was 70 km far



from his place of practice during the proceedings, taking into account his medical condition.

16. Thus, looking to the facts of the case, this court is of the considered view that the respondents-defendants have shown sufficient cause preventing them from appearing before the court and the learned trial court after duly taking into consideration the reasons assigned, has set aside the ex-parte decree dated 03.06.2023. Further, as far as the contention of the counsel appearing on behalf of the petitioner-plaintiff that it was the duty of the counsel to make alternative arrangements is concerned this court is of the view that merely because the counsel representing the respondents-defendants failed to make some alternative arrangement, the respondents-defendants cannot be made to suffer for the same as it would not be in the interest of the justice. At this juncture this court finds it apposite to refer to the judgment passed by the Hon'ble Supreme Court in **Rafiq v. Munshilal, (1981) 2 SCC 788** wherein the Hon'ble court has taken a view that a party cannot be made to suffer because of the inaction of his advocate. The relevant para of the aforesaid judgment is reproduced as under:

"3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the



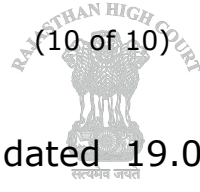


proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs 200 should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr A.K. Sanghi."

17. Thus, the learned trial court has rightly allowed the application filed by the respondents-defendants under Order IX



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Rule 13, CPC vide order dated 19.07.2024 (Annex.8) and the same does not call for interference of this court.

18. Accordingly, in view of the above, the instant writ petition is dismissed. Any application(s), if pending, shall also stand disposed of. No order as to the cost.

(DR. NUPUR BHATI),J

312-ajayS/-

