

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 644 OF 2010

Grindly Gases & Petrochemicals Pvt. Ltd. .. Petitioner
vs.
Shri S. P. Agarwal & Ors. .. Respondents

Mr. S. M. Oak i/b. Mr. Sagar Joshi for Petitioner.
Mr. D. S. Chandnani for Respondents.

CORAM : M. S. SONAK, J.
DATE: 16 APRIL 2015

P.C. :-

1] This petition challenges order dated 5 September 2009 made by the 4th Joint Civil Judge, Senior Division, Thane, rejecting the petitioner's application for condonation of delay in filing application under Order 9 Rule 13 of CPC to set aside judgment and decree dated 30 November 1999.

2] The learned counsel for the petitioner submitted that in Special Civil Suit No. 203 of 1997, no proper notice was served upon the petitioner, as the registered address of the petitioner had been changed w.e.f. 23 March 1996. The learned counsel pointed out that Order 29 Rule 2(b) of CPC requires that service upon a company has to be made on its registered office. Further, the learned counsel pointed out that there is material on record which establishes that the petitioner came to know about the *ex-parte* decree only on 5 April 2008, after the bailiff visited the petitioner's factory for attachment of moveable property in pursuance of execution proceedings. In such circumstances, sufficient cause was shown for the delay in taking out application for setting aside of *ex-parte* decree. The learned Civil Judge has erred in declining to condone the delay and therefore the impugned order warrants interference.

3] Having heard the learned counsel for the parties and perused the record, in my judgment, no case is made out to interfere with the impugned order. One of the main reasons, stated by the learned Civil Judge for not acceding to the prayer for condonation of delay is that the petitioner approached the Court with a false case. The application seeking condonation of delay, solemnly stated that the petitioner obtained knowledge of the *ex-parte* decree only on 5 April 2008. However, as noted by the learned Civil Judge, there is overwhelming material on record, which suggests that the petitioner had obtained knowledge of the *ex-parte* decree dated 5 April 2008, much earlier and there is really no explanation as to why such a misstatement was made in the application or for that matter the explanation for delay, after such knowledge of *ex-parte* decree.

4] The *ex-parte* decree, in the present case, was made on 30 November 1999. The application to set aside the same has been made only on 4 May 2009, i.e., after almost ten years. In the course of execution proceedings, on 22 October 2007, the executing authorities drew a panchanama at the factory premises of the petitioner. Such panchanama records the presence of the company accountant Mr. Kamleshbhai Hargovan Merak. There was neither any ambiguity that execution proceedings, pursuant to which the panchanama was drawn, concerned execution of *ex-parte* decree dated 30 November 1999. There is no denial of the fact that Mr. Kamleshbhai Merak was very much present, when such execution was levied and panchanama drawn. Mr. Kamleshbhai Merak, is not some ministerial employee, but the company accountant. In such circumstances, the learned Civil Judge is right in saying that the petitioner approached the Court with a false case seeking condonation of delay.

5] The petitioner, by letter dated 24 March 2008 had offered to make payment of Rs.51,000/- to the decree holder, in pursuance of '*personal discussion*' with the decree holder. The decree holder responded to the letter dated 24 March 2008 on 30 March 2008. This letter is addressed to '*Shri. Prakashbhai*' and therefore, the learned counsel for the petitioner submitted that there is no clarity as to who the said Prakashbhai is. Be that as it may, there is no denial as to the authenticity of such letter. The letter, makes specific reference to the discussion regarding the Court order, meaning thereby *ex-parte* decree, i.e., 30 November 1999. Besides, even if we are to go by the petitioner's letter dated 24 March 2008 and the personal discussions referred to therein, it is inconceivable that in no reference was made to the decree dated 30 November 1999. The petitioner has itself vaguely made submissions that some negotiations were going on between the parties, with regard to the amounts payable. All this makes it clear that the petitioner was aware of the *ex-parte* decree much prior to 5 April 2008 and the statement urging otherwise, is false. This is because

6] There is no merit in the contentions that there was no effective service upon the petitioner before the *ex-parte* decree dated 30 November 1999 was made. This aspect, is strictly speaking, not very relevant at this stage. What is really relevant is the delay of almost ten years in seeking setting aside the *ex-parte* decree dated 30 November 1999. However, even if, this aspect is to be considered, there is really no merit in the submissions of the petitioner with regard to defective service. This is because the record indicates that pursuant to the summons in the suit, one of the Director of the petitioner company did put in appearance in the matter. On his behalf time was applied to file Written Statement and the same was

also granted by the Court. Thereafter, however, the Director did not bother to appear or file Written Statement. The impugned order makes detailed reference to the manner in which the suit proceeded and finally *ex-parte* decree came to be made on 30 November 1999.

7] The learned counsel for the petitioner submitted that this Court ought to adopt a liberal approach in the matters of condonation of delay. This is ordinarily correct. However, for this purpose, it is for the petitioner to make out some sufficient cause. Further, it is most important that the petitioner approaches the Court with a true and *bona fide* case. As has been held by the Hon'ble Supreme Court in case of *Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai – 2012 (5) Mh. L. J. 584*, if the explanation given by the applicant seeking condonation of delay is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In the name of liberal approach, this Court, can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the decree which sought to be set aside and lot of time has been consumed at the various stages of litigation. In any case, the explanation, that is offered must at least be *bona fide*. In this case, as noted by the learned Civil Judge, the explanation offered is not *bona fide*.

8] There is no scope to accept explanation offered *post facto*, once the falsity of the explanation originally offered, stands exposed. It was the duty of the petitioner to approach the Court with a true and candid case and thereafter urge that there was sufficient cause for seeking to set aside the *ex-parte* decree after delay of about ten years. The petitioner, apart from not being candid, has been

thoroughly negligent in the matter. Even if, the petitioner's case that they became aware of the *ex-parte* decree only on 5 April 2008 is to be accepted, the application to set aside the same came to be made only on 4 May 2009, i.e., after delay of further one year. In the interregnum, the petitioner made an application to stall the execution proceedings by urging that the original contract between the parties contained an arbitration clause and therefore, the *ex-parte* decree was itself a nullity. The petitioner, thus, took its chance to stall the execution proceedings, on the basis that the *ex-parte* decree was a nullity. At that stage, no serious grievance was made in the matter of alleged deficiency in service of summons, before the *ex-parte* decree came to be made. This indicates that the petitioner is adopting all means to protract the execution of the decree obtained by the respondents wayback on 30 November 1999. Upon such means meeting with no success, the petitioner has chosen to seek condonation of delay by setting up a case, which stands belied from contemporaneous record.

9] In this case, the decree holder had deposited an amount of about Rs.5,00,000/- way back in the year 1994 with the petitioner company, in pursuance of an agency agreement. There is no serious dispute that the petitioner company failed to make any supplies and therefore, the respondents sued for recovery of Rs.5,00,000/- with interest. The judgment and decree made wayback on 30 November 1999, directs payment of about Rs.6,71,104/- along with interest to the decree holder. By interim order made in the present proceedings, about 50% of the decretal amount has been paid to the decree holder. However, the balance stands deposited in fixed deposit accounts, in pursuance of orders made by this Court. Thus, though the respondents have a decree in their favour from 30 November

1999, the respondents are yet to recover the entire amounts under the decree. The petitioner, also has no serious dispute that the amount of Rs.5,00,000/- deposited by the respondents, wayback in the year 1994 had to be returned to the decree holder. The grievance now raised, relates more to the interest which has been awarded by the *ex-parte* decree.

10] Some efforts were made by this Court, to see if the matter could be amicably resolved. The respondents, offered to accept some reduced rate of interest provided, the matter were to end at this stage. The petitioner, however, expressed desire to carry the matter further, as is they are entitled to do so.

11] Therefore, upon cumulative consideration of the aforesaid circumstances, this Court detects no jurisdictional error or perversity in making of the impugned order. This petition is, accordingly, dismissed. There shall be no order as to costs.

12] At this stage, the learned counsel for the petitioner submits that the decree holder may not be permitted to withdraw 50 % of the decretal amount which is invested under the orders of this Court. This is because, the petitioner seeks to take a recourse against this judgment and order before the Hon'ble Apex Court. In such circumstances, the respondent - decree holder is restrained from withdrawing the balance decretal amount for a period of eight weeks from today.

(M. S. SONAK, J.)

Chandka