

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9242 OF 2012

Shavir Francis Wegas,
since deceased through legal heirs
Sau. Santana Antona Fernandes & Anr. .. Petitioners
vs.
Baban Tukaram Virkar & Ors. .. Respondents

Ms Gauri Godse for Petitioners.
None for Respondents.

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

P.C. :-

1] By order dated 28 September 2012, parties were put to notice that this writ petition will be heard and disposed of at the stage of admission.

2] The learned counsel for the petitioner states that service has been completed upon the respondents and necessary affidavit of service has also been filed. Accordingly, Rule. Rule is made returnable forthwith in view of the order made way back on 28 September 2012.

3] The challenge in this petition is to order dated 31 August 2012 made by the Civil Judge, Junior Division, Murud, allowing the

application made by the respondent no. 1 for setting aside the exparte order dated 11 September 2008 and permitting the respondent no. 1 to file written statement.

4] Ms Godse, the learned counsel for the petitioners pointed out that the application at Exhibit '103', upon which the impugned order has been made was completely sketchy and did not disclose sufficient cause for delay of almost three years in making application to set aside the exparte order made on 11 September 2008. Besides, the application was only signed by the Advocate for the respondent no. 1 and was not even accompanied by any separate application seeking condonation of inordinate delay. Further, Ms Godse pointed out that the conduct of the respondent no. 1 throughout the suit has been one of utter negligence. In these circumstances, the impugned order, which shows undue indulgence to the respondent no. 1 is required to be set aside.

5] The application seeking setting aside of exparte order is not accompanied either by affidavit or application for condonation of delay. However, there are certain averments in the application, which states that the respondent no. 1 was unaware about the suit being filed against him and that the respondent no. 1 had left his home town and had shifted to Kalyan in the District of Thane. In

these circumstances although there is no separate and formal application seeking condonation of delay, it cannot be said that the learned Civil Judge has exceeded jurisdiction in condoning the delay.

6] In this case the service came to be effected upon the respondent no. 1 by way of publication in local newspaper. The application, seeking setting aside of ex parte order states that the respondent no. 1 had shifted his usual place of residence and was staying in Kalyan District. This explanation has been accepted in the impugned order.

7] In matters of condonation of delay, there is bound to be some lapse on the part of the party concerned. However, that by itself, is no reason for declining to condone delay. In the present case, although the delay is substantial, there is no reason to interfere with the discretion exercised by the Civil Court, in the matter of condonation of delay. In case of *N. Balakrishnan vs. M. Krishnamurthy*¹, the Hon'ble Apex Court has held that once discretion is exercised in a positive manner and delay is condoned, normally the superior court will not interfere to the exercise of such discretion, unless it is established that the discretion has been exercised arbitrarily or perverse. Applying such tests, it is difficult to

1 (1998) 7 SCC 123

interfere with the impugned order, in so far as it condones the delay, sets aside the exparte order of filing of the written statement.

8] The Hon'ble Supreme Court has itself observed that in matters of condonation of delay, a liberal approach is warranted, nevertheless, the opposite party cannot be put to very severe prejudice. The prejudice, ought to be mitigated at least by award of substantial costs. In the present case, impugned order has imposed costs of only Rs.3,000/-, which in the facts and circumstances of the case is too meagre.

9] In fact, the petitioner had submitted his say on the application dated 27 July 2012 seeking setting aside of exparte order. Therein the petitioner had objected to the application, but submitted that alternatively and without prejudice, if the Civil Court is inclined to set aside the exparte order, then costs of at least Rs.1,00,000/- to be awarded to the petitioner, as the petitioner has spent a huge amount by way of litigation expenses upto the said stage.

10] In the present case, the suit was instituted on 15 October 2007. The order to proceed exparte against the respondent no.1 was made on 11 September 2008. On 27 April 2012, the respondent no. 1 applied for setting aside '*No WS Order*', when in fact, no such

order was in fact made in the matter. The said application was dismissed on 30 June 2012. Only thereafter i.e. on 27 July 2012, when the matter was at the stage of final arguments, the respondent no. 1 through his Advocate made the application dated 27 July 2012, which has since been allowed by the impugned order. Taking into consideration all such circumstances, ends of justice would be met if the respondent no.1 is required to pay costs of Rs.75,000/- to the petitioners, as a pre-condition for setting aside the exparte order dated 11 September 2008 and for permission, at this belated stage, to file his written statement. The imposition of such costs the facts and circumstances of the present case is necessary because as a result of setting aside of exparte order and permitting the respondent no.1 to file written statement, the proceedings in the suit will be further delayed. This was a matter where evidence and even final arguments had concluded.

11] Accordingly, the impugned order is hereby modified. The amount of costs of Rs.3,000/- is enhanced to Rs.75,000/-. Such costs to be paid by the respondent no. 1 within a period of four weeks from the date on which the authenticated copy of this order is filed by the petitioners before the trial Court and the trial Court brings the contents of this order to the notice of the respondent no. 1. In case the costs are not deposited within a period of four weeks

as aforesaid, the impugned order dated 30 August 2012 shall stand set aside and application at Exhibit '103' shall stand dismissed. If the costs are deposited, the petitioners shall be at liberty to withdraw the same unconditionally. Further, if the costs are deposited and the suit is to proceed, then the learned Civil Judge is directed to dispose of the suit as expeditiously as possible and in any case within a period of one year.

12] Further, in case the costs are deposited and the written statement of the respondent no. 1 is to be taken on record then the petitioner shall also be at liberty to file additional documents and/or lead further and additional evidence in the matter.

13] Rule is made absolute to the aforesaid extent only. There shall be no separate order as to costs in this petition.

14] All parties to act on basis of an authenticated copy of this order.

(M. S. SONAK, J.)