

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO.2432 OF 2013
IN
APPEAL NO.710 OF 2013
IN
SUMMARY SUIT NO.2377 OF 2009
WITH
NOTICE OF MOTION NO.1323 OF 2014
WITH
NOTICE OF MOTION (L) NO.2309 OF 2014

M/s Shree Ambika Aluminium and another ... Appellants
v/s
M/s Ravi Steel Industries ... Respondent

Mr Anand Mishra i/b Mr Ashok Saraogi for Appellants.
Mr Girish Kedia for Respondent.
Mr M.B. Narvekar, Official Assignee present in person.

CORAM: V.M. KANADE &
B.P. COLABAWALLA JJ.

DATE : 18TH JUNE, 2015

P.C. :-

1. This Notice of Motion has been filed by the Appellants seeking to recall the order dated 3rd December, 2013 by which the Appeal was dismissed for non-prosecution.

2. The explanation sought to be given for not remaining present on 3rd December, 2013 is set out in Paragraphs 2 to 6 of the Affidavit in Support of the Notice Motion. They read thus:-

“2. I say that the records of this Hon'ble Court would show that I had initially engaged the services of Advocate Saraogi for the purpose of filing of the present Appeal, however, subsequently instead of contesting the matter on merits, he had been suggesting to settle the matter.

3. I say that initially I could not understand as to why he had embarrassing on settling the matter and in view thereof I had sought to discharge him from present proceeding.

4. I say that subsequently I went to at least 3 to 4 Advocates, however, the fees quoted by them could not be attended by me with the result I could not appoint the other Advocate and the matter remain unauthorized and ultimately came to be dismissed by order dated 3rd day of December 2013 and accordingly hereto annexed and marked Exhibit 'A' is a copy of order passed by this Hon'ble Court.

5. I say that since I could not engage any other Advocate, I once again approach to Advocate Ashok M. Saraogi with a request to help me and thereafter explain to me that being the money matter it is always advisable to settle the same otherwise while defending myself, I will be losing much more amount.

6. I say that on the request made by me Advocate Ashok M. Saraogi had agreed to help me, however, when it has been found on the net, it was disclosed that the appeal is already dismissed.”

3. In these circumstances, the Appellants have prayed that the order of dismissal of the Appeal be set aside and the Appeal be restored to file.

4. This matter has a checkered history and we find that on going through the same, the Appellants have been doing everything in their power to ensure that the decree passed against them in the above Summary Suit does not bear fruit. The Summary Suit was filed by the Respondent (Original Plaintiff) in which a conditional order came to be passed directing the Appellants to deposit a sum of Rs.3,00,000/- on or before 23rd July, 2010. Since the Appellants failed to deposit this amount, an ex-parte decree came to be passed by learned Single Judge on 28th April, 2011 (impugned in this Appeal). On the basis of this ex-parte decree and since the Appellants failed to pay the decretal amount, the Plaintiffs initiated insolvency proceedings and got issued an insolvency notice against Appellant No.2 on 1st August, 2011. After service of this insolvency notice on Appellant No.2, and since no Notice of Motion for setting aside the insolvency notice was filed by Appellant No.2, he committed an act of insolvency on 24th April, 2012. Pursuant thereto, the Respondent herein filed an Insolvency Petition which was contested by Appellant No.2 and which came to be allowed on 15th January, 2013.

5. The matter did not end there. Thereafter, the Appellants filed Notice of Motion No.741 of 2012 for setting aside the ex-parte decree dated 28th April, 2011 and for condonation of delay of 284 days. This Notice of Motion was dismissed on 25th March, 2013 and Appeal (L) No.263 of 2013 from the said order was also dismissed by a Division Bench of this Court on 24th September, 2013. Thereafter, on 21st October 2013, the Appellants filed the present Appeal challenging the ex-parte decree dated 28th April, 2011 passed in the above Summary Suit.

6. When this Appeal was called out on 20th November, 2013 and after it was heard for sometime, the Appellants, who appeared through Advocate Mr Ashok Saraogi, stated that the Appellants wished to engage another Advocate. It was further stated that Appellant No.2 was present in Court. In view of the aforesaid request, this Appeal was stood over to 2nd December, 2013.

7. When this appeal was on board again on 2nd December

2013, the Appellants and their Advocates were absent even though the matter was called out twice on that day. However, with a view to give one last opportunity to the Appellants, this appeal was stood over to 3rd December, 2013. Even on 3rd December, 2013 the Appellants and their Advocates remained absent. In view thereof, this appeal came to be dismissed on 3rd December, 2013 for non-prosecution.

8. Looking to the facts as set out earlier, and the grounds sought to be made out in the affidavit in support dated 9th December 2013, we are not inclined to set aside the order dated 3rd December, 2013 by which this appeal came to be dismissed. On perusing the record and hearing the counsel for the parties, we find that on 20th November 2013, when this Appeal came up before the Division Bench, this Court was on the verge of dismissing the Appeal. At that stage, the Advocate for the Appellants sought to withdraw his appearance and therefore, the matter was adjourned to 2nd December, 2013. On 2nd December 2013, the Appellants, though knowing that the matter was fixed on that date (Appellant No.2 was present in Court on 20th November, 2013 when the matter was adjourned to 2nd

December, 2013), did not remain present. Even when the matter was kept next day viz. 3rd December 2013, the Appellants once again remained absent and it is in these circumstances that the Appeal came to be dismissed.

9. It now transpires that the very same Advocate who had withdrawn his appearance on 20th November 2013, has filed the present Notice of Motion on behalf of the Appellants. The excuse given in the affidavit in support of the Notice of Motion and as reproduced earlier, is that the Appellants could not engage any other Advocate and therefore he approached the present Advocate once again with a request to help him in defending himself in prosecuting the present Appeal. We do not find this excuse either to be genuine or bonafide. The Appellants have not only been seeking to avoid the decree passed against them, but from the record it appears that Appellant No.2 has been evading service even of the insolvency proceedings that have been initiated against him. Furthermore, Appeal (L) No.263 of 2013 filed by the Appellants against the order passed by the learned Single Judge dismissing their Notice of Motion

for condonation of delay of 284 days for setting aside the ex-parte decree is also dismissed. In this order, the Division Bench has inter alia observed that no “special circumstances” have been made out to set aside the ex-parte decree.

10. Hence, looking to the totality of the facts of the present case, we are not inclined to recall the order dated 3rd December, 2013 by which the present Appeal came to be dismissed. Accordingly, Notice of Motion is dismissed. The Appellants shall pay costs of Rs.50,000/- to the Respondent. In view of the fact that we have dismissed the Notice of Motion, we clarify that the Appeal stood dismissed as on 3rd December, 2013.

(B.P. COLABAWALLA, J.)

(V.M. KANADE J.)