

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1614 OF 2016

SMT PRABHAWATI DANIEL RATHOD
AND ANR.

...Petitioners

Versus

JHON MARUTI SALVE

...Respondent

....

Mr. Sanjay Salvi, Advocate for the Petitioners.

Mr. Shankar S. Sable, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 21st MARCH, 2016

P.C.

1. Heard Mr. Sanjay Salvi, learned Counsel for the petitioners, and Mr. Shankar S. Sable, learned Counsel for the respondent, at length.

2. Rule. Mr. Shankar Sable waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order

dated 26.11.2015 passed by learned Judge of Small Causes Court, in Misc. Application No.38/2015. By that order, the learned trial Judge rejected the application made by the petitioners for condoning the delay of about 10 months in filing application under Order 9 Rule 13 of Code of Civil Procedure, 1908 (for short, 'CPC') for setting aside exparte decree dated 24.4.2014 passed by learned trial Judge in Suit No.498/2012.

4. Mr. Salvi submitted that petitioner No.1 was not keeping well due to her hip operation and consequently could not move about for long period and was solely dependent on her daughter. Due to ill health of petitioner No.1, petitioner No.2 had to maintain and look after her mother along with her job and had to shuttle between her place of work and her house and was constantly under great pressure and trauma. He submitted that the delay in filing the application is bonafide and genuine. If delay is not condoned, great hardship and prejudice will be caused to the petitioners. He submitted that petitioner No.1 is a widow. He therefore submitted that the delay in filing application under Order 9 Rule 13 of CPC may be condoned.

5. On the other hand Mr. Sable supported the impugned

order. He submitted that the petitioners have not made out any sufficient cause for condoning the delay. He submitted that petitioner No.1 claims that because of hip operation she could not move out of her place. The suit summons was served on 15.12.2012 and the medical report shows that petitioner No.1 was admitted on 5.1.2013 and was given discharge on 18.1.2013. The suit was decreed exparte on 24.4.2014. There is no explanation for the period between 18.1.2013 and 24.4.2014

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. It appears that the respondent has instituted the suit for possession of the suit property. It further appears that the petitioners were served with the suit summons on 15.12.2012. The case of the petitioners is that on 5.1.2013 she was admitted in the hospital and was given discharge on 18.1.2013. The suit was decreed exparte on 24.4.2014.

7. The learned trial Judge has rejected the application. The result of the impugned order is that the application under Order 9 Rule 13 of CPC stands rejected and the exparte decree passed against the petitioners becomes executable.

8. In the case of ***State Of Nagaland vs Lipok Ao & Ors., (2005) 3 SCC 752***, it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

9. In my opinion, if the delay is not condoned, the petitioners will suffer irreparable loss and also will not be in a position to contest the application under Order 9 Rule 13 of CPC. In my opinion, the learned trial Judge should have considered the application for condonation of delay liberally and ought to have allowed the application subject to imposing costs on the petitioners.

10. In view thereof, the impugned order is set aside and the delay in filing application under Order 9 Rule 13 of CPC is condoned, subject to the petitioners paying Rs.10,000/- to the respondent or depositing in the trial Court within four weeks from today under due intimation in writing to the respondent.

The learned trial Judge will decide the application under Order 9 Rule 13 of CPC uninfluenced by the observations made in this order. Rule is made absolute in aforesaid terms. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)