

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1123 OF 2016

NENSEE CONSTRUCTIONS PVT. LTD. ...Petitioner
Versus
MADHAVSINGH GORDHANDAS AND ORS ...Respondents

....
Mr. Ghanshyam Upadhyay i/b. Law Juris, for the Petitioner.
Mr. V.J. Mehta a/w. Mr. M.B. Madekar & Sachin Kudalkar i/b.
Madekar & Co. for Respondent No.1.

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CORAM : R. G. KETKAR, J.

DATE : 27th JANUARY, 2016

P.C.

1. Heard Mr. Upadhyay, learned Counsel for the petitioner and Mr. Mehta learned Counsel for respondent no.1, at length
2. Mr.Upadhyay orally prays for deleting the names of respondent Nos.2(a) to respondent No.10 as respondent No.1-orig.plaintiff is the only contesting respondent. He also seeks leave to amend prayer clause (a) so as to raise challenge to the order passed on Notice of Motion NO.352/2015. Leave as prayed for is granted. Amendment

shall be carried out forthwith.

3. Rule. Mr.Mehta, waives service on behalf of respondent No.1. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as defendant No.9, has challenged the judgment and order dated 31.7.2015 passed by learned Judge, presided over in Court Room No.2 of the Bombay City Civil Court at Greater Bombay in Notice of Motion No.351/2015 and Notice of Motion No.352/2015 in Suit No.9777/1987. Defendant No.9 took out Notice of Motion No.351/2015 for condoning the delay of 30 days in taking out Notice of Motion for setting aside order dated 3.11.2014. Defendant No.9 also took out Notice of Motion NO.352/2015 for recalling the order dated 3.11.2014 by which the Court dismissed Notice of Motion No.1303/2011 in default.

5. Mr. Upadhyay submitted that learned trial Judge refused to

condone the delay, however, after considering the merits, he also rejected Notice of Motion No.352/2015 for setting aside the order dated 3.11.2014. He submitted that having regard to the fact that there is delay of 30 days, learned Judge ought to have condoned the delay and should have proceeded with Notice of Motion No.352/2015. As the Notice of Motion No.1303/2011 was dismissed in default, learned trial Judge should have restored the Motion and if necessary by imposing costs. He submitted that tomorrow is the next date of hearing before the trial Court. Defendant No.9 will appear tomorrow and argue Notice of Motion No.1303/2011 and will not seek any adjournment. He states that defendant No.9 will abide by order imposing costs by this Court.

6. Mr. Mehta invited my attention to the Rozanama and submitted that on 13 occasions, defendant No.9 either did not appear or though Advocate for defendant No.9 was present did not argue the matter. In fact on 5.3.2014, learned trial Judge adjourned the Motion as and by way of last chance. Despite that, defendant No.9 did not argue the Motion and, therefore, the Court had no option but to

dismiss the Motion in default.

7. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record.
8. As noted earlier, defendant No.9 has taken out Notice of Motion NO.1303/2011 for rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure Code, 1908. On 3.11.2014, said Motion was dismissed for default. Defendant No.9 took out Notice of Motion No.351/2015 for condoning delay of 30 days. By the impugned order, learned trial Judge rejected that Motion. 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. Having regard to the shortness of the delay as also in view of decision of the Apex Court in **State of Nagaland** (supra), in my opinion, learned trial Judge ought to have condoned the delay of 30 days in taking out Notice of Motion No.351/2015.
10. As far as dismissal of Notice of Motion No.352/2015 is concerned, though learned trial Judge declined to condone the delay, he entered into the merits of the case and dismissed the Motion. In my opinion, after condoning the delay only learned trial Judge could have gone into the merits or de-merits of the case made out by defendant No.9 for restoration of Notice of Motion No.1303/2011. As defendant No.9 has now shown his readiness and willingness for disposal of the Motion without asking for any adjournment, in my opinion interest of justice would be served by restoring Notice of Motion No.1303/2011 subject to costs of Rs.15,000/- to be paid to the plaintiff or to be deposited within two weeks from today in the trial Court under due intimation in writing to the plaintiff's advocate.

11. Mr. Mehta submitted that the plaintiff is a senior citizen. In view thereof, the plaintiff is at liberty to apply to the trial Court for disposal of the Suit in a time bound manner, more so when the Suit is of the year 1987. If such a proceeding is taken out, learned trial Court will deal with the same and pass appropriate orders.
12. In view thereof, the impugned order is set aside. Notice of Motion Nos.351/2015 and 352/2015 are allowed and the order dated 3.11.2014 dismissing Notice of Motion No.1303/2011 is set aside. Notice of Motion No.1303/2011 is restored to the file of the Court. Rule is made absolute in aforesaid terms. Writ Petition is disposed of accordingly. All the parties including the trial Court shall act on an authenticated copy of this order.

(R. G. KETKAR, J.)

Deshmane (PS)