

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5089 OF 2013

Ujagarsingh (decd) through Amriksingh and others ... Petitioners
Vs.
Mohinderkumar C. Mehta (decd) through LR's Komal
Mohinderkumar Mehta and others ... Respondents

Mr. Rajesh B. Parab for Petitioners.
Mr. Ashish Kamat a/w. Mr. Nikhil Rajani and Ms Pallavi Ghaisas i/b. V. Deshpande & Co. for Respondents.

CORAM : R. G. KETKAR, J.
DATE : JULY 20, 2016

P.C. :

Heard Mr. Parab, learned Counsel for petitioners and Mr. Kamat, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants' have challenged the judgment and order dated 30.11.2009 passed by the learned Judge presiding over Court Room No.15 of the Court of Small Causes at Bombay in Miscellaneous Notice No.550 of 1990 as also the judgment and order dated 26.11.2012 passed by the learned Appellate Bench of the Small Causes Court in Revision Application No.126 of 2010. By these orders, the Courts below dismissed the notice taken out by the defendants for restoration of Miscellaneous Notice No.286 of 1988, which is taken out by the defendants for setting aside the ex-parte decree dated 17.09.1985 passed in R.A.E.Suit No.3451 of 1984.

3. Predecessor in title of the respondents, Chunilal Mehta instituted Suit against predecessor in title of the defendants herein for eviction. On 17.09.1985, Suit was decreed ex-parte. Original Plaintiff Chunilal

Mehta expired on 02.01.1986. Defendants took out Miscellaneous Notice No.286 of 1988 on 28.03.1988 under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree. As Advocate for the defendants as also defendants did not appear, that notice was discharged on 25.08.1988. Defendants took out application on the next day i.e. 26.08.1988 for restoration of Miscellaneous Notice No.286 of 1988. By order dated 29.08.1988, Miscellaneous Notice No.286 of 1988 was restored on payment of costs within two weeks. Defendants did not pay the costs and Miscellaneous Notice No.286 of 1988 was discharged on 26.06.1990. On 14.08.1990, defendants took out present Miscellaneous Notice No.550 of 1990 for restoration of Miscellaneous Notice No.286 of 1988. By the impugned orders, the Courts below have dismissed that notice. It is against these decisions, defendants have instituted the present Petition.

4. In support of this Petition, Mr. Parab has taken me through the affidavit of Surjit Ujjagar Singh, Constituted Attorney of the defendant, and in particular paragraphs 2 to 6 thereof. For the reasons stated therein, he submitted that Miscellaneous Application No.550 of 1990 deserves to be allowed. In particular, he submitted that on 26.06.1990, Miscellaneous Notice No.286 of 1988 was discharged. On 14.08.1990, present application is taken out. In paragraph 5 of the application, it is asserted that defendants' Advocate took inspection of the proceedings on 01.08.1990 and learnt about discharge of Miscellaneous Notice No.286 of 1988 on 26.06.1990. In the process, there is delay of 18 days in filing the application. He, therefore, submitted that the Courts below ought to have condoned the delay and allowed the application.

5. On the other hand, Mr. Kamat has taken me through the trial Court's order and in particular paragraph 16 thereof. In paragraph 16,

the learned trial Judge has observed that defendant has not even prayed for condoning the delay in filing the application. As there is no prayer for condoning the delay, the Court cannot assume jurisdiction for entertaining and trying the said application. Apart from that, he submitted that defendant was negligent in conducting the proceedings. He, therefore, submitted that no case is made out for interfering with the impugned orders.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, for non-compliance of order dated 29.08.1988, Miscellaneous Notice No.286 of 1988 was discharged on 26.06.1990. Defendant has prayed for following reliefs:

- “a. the dismissal order dated 26th June 1990 discharging the notice bearing No.286 of 1988 be set aside and fresh date for hearing be given for hearing the said notice;
- b. for the cost of application;
- c. for such other and further reliefs.”

7. In paragraph 5 of the application, defendant contended that records were misplaced and Miscellaneous Notice No.286 of 1988 did not appear on the Board. He changed Advocate and requested the new Advocate to enquire about the proceedings. Accordingly, new Advocate took inspection of the proceedings on 01.08.1990 and learnt that the Notice bearing No.286 of 1988 was discharged by the Court on 26.06.1990. It is not in dispute and is rather matter of record that the present application is taken out on 14.08.1990. Perusal of the prayers extracted hereinabove shows that no prayer for condoning the delay in filing the application is made. Article 122 of the Limitation Act, 1963 lays down the period of 30 days for restoration of Suit from the date of dismissal. Thus, defendants ought to have filed the application within

30 days from 26.06.1990, which is not admittedly done in the present case. That apart, there is also no prayer for condoning the delay in filing the application. In view thereof, I do not find that the Courts below committed any error in passing the impugned orders. Once there is no prayer for condoning the delay, the Court does not get jurisdiction to enter into merits of the case. On this short ground alone, Petition is liable to be dismissed and is accordingly dismissed.

(R. G. KETKAR, J.)

Minal Parab