IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7324 OF 2016

Shri Balkrushna Maruti Ovhal and Anr. ..Petitioners.

Vs

1. Smt. Indubai Balasaheb Thorat and Anr. .. Respondents

Mr. S.C.Wakankar, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 17/11/2016

PC:

1. Heard Mr. S.C.Wakankar, learned counsel for petitioners.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the Judgment and order dated 16.11.2013 passed by the learned 4th Joint Civil Judge Junior Division, Pune in Misc. Application No.478 of 2009. By that order, the learned trial Judge rejected the application made by the petitioner for condonation of delay of 14 days in filing application under Order IX, Rule 13 of CPC for setting aside ex-parte decree dated 16.10.2002 passed in Regular Civil Suit No. 3798 of 2000 (Old Spl. Civil Suit No. 735 of 1996).

3. In support of this petition, Mr Wakankar submitted that in

paragraph 2 of the judgment and order dated 16.10.2002 in Regular Civil Suit No.3798 of 2000, the learned trial Judge observed that in pursuance of the suit summons issued to the defendants, they appeared but failed to file written statement. Hence, suit proceeded without written statement of the defendants. He invited my attention to the application for condonation of delay filed by the petitioners on 18.6.2009 and in particular paragraph 9 thereof. That application was made for condoning delay under Order IX rule 13. In paragraph 9, it is asserted that the petitioners did not receive summons notice of old Special Civil Suit No. 735/1996 or R.C.S.No.3798 of 2000 or Regular Darkhast No.150 of 2003. Inviting my attention to paragraph 9 of that application, Mr Wakankar submitted that no notice was served on the petitioners. In view thereof, period of limitation will begin from acquiring knowledge about passing of ex-parte decree. The petitioner acquired knowledge on 02.02.2009. After acquiring knowledge of passing of the ex-parte decree, petitioners filed proceedings under Order IX, Rule13. There is delay of 14 days in filing those proceedings. The learned trial Judge, however, rejected the application for condonation of delay.

4. I have considered the submissions advanced by Mr.

Wakankar. I have also perused the material on record. Perusal of the record shows that respondent No.1, hereinafter referred to as 'decree-holder', had filed Regular Civil Suit No.3798 of 2000 against the petitioners, hereinafter referred to as defendants No.2 and 3 and defendant No.1 - Dattatraya Maruti Ovhal and defendant No.4 - Parubai Maruti Ovhal. Suit was instituted by the plaintiff for specific performance of agreement dated 05.04.1995. While decreeing the Suit ex-parte, in paragraph 2, the learned trial Judge observed that in pursuance of the suit summons issued to the defendants, defendants appeared but failed to file the written statement. Hence, Suit to proceed without written statement of the defendants.

5. Mr. Wakankar invited my attention to paragraphs 9 and 10 of the application for condonation of delay. In paragraph 9, defendants No.2 and 3 contended that defendants No.2 and 3 and defendant No.4 - Parubai Maruti Ovhal did not give any Power of Attorney to defendant No.1 - Dattatraya Maruti Ovhal. The suit property was not for sale and there was also no reason for selling the suit property. Summons of Special Civil Suit No.735 of 1996, which was re-numberd as Regular Civil Suit No.3798 of 2000, and Regular Darkhast No.150 of 2003 were not served on defendants No.2, 3 and 4. They were not aware of

these proceedings. In paragraph 10, defendants No.2 and 3 contended that before instituting the Suit, decree-holder did not issue any notice as is evident from record of the Suit as also Darkhast. Even the copy of the Power of Attorney was not produced on record. Decree-holder also did not produce copy of the Power of Attorney before the police station on 02.02.2009. In fact, deree-holder and defendant No.2 had misled the Court by representing that defendants No.2 and 3 and defendant No.4 executed Power of Attorney in favour of defendant No.1. Decree-holder and defendant No.2 obtained decree in collusion. It was further asserted that summons of Suit as also Darkhast was never served on defendants No.2, 3 and 4. Decree-holder also did not bother to effect service of Suit and Darkhast on defendants No.2 and 3. Defendants No.2 and 3 for the first time acquired knowledge of passing of ex-parte decree only on 02.02.2009.

6. Perusal of paragraphs 9 and 10 of the application for condonation of delay does not even remotely indicate that defendants No.2 and 3 have attacked the finding recorded by the learned trial Judge in paragraph 2 of the order dated 16.10.2002. This assumes importance because in paragraph 10, defendants No.2 and 3 repeatedly asserted that they have gone through the

original record of the Suit and Darkhast. If at all defendants No.2 and 3 have gone through the records of Suit and Darkhast, surely, it was expected from them to comment upon the finding recorded by the learned trial Judge in paragraph 2 of the order.

7. That apart, it has come on record that in pursuance of the ex-parte decree, sale deed was executed on 12.12.2008 and possession of the suit property was taken by the decree-holder in the year 2008.

8. Mr. Wakankar submitted that defendants No.2 and 3 are residing in Mumbai since 1979 and the suit property is situate in Pune. They were, therefore, not aware of taking over possession in the year 2008. The said contention was also raised before the learned trial Judge. In paragraph 17, the learned trial Judge noted that for the first time, defendant No.2 submitted in his evidence that since 1979 till June 2009, he was residing in Mumbai. The said evidence cannot be accepted as there is no pleading in the application. That apart, respondent No.3 is resident of Pune. Thus, it cannot be said that defendants No.2 and 3 acquired knowledge for the first time on 02.02.2009. Order IX, Rule 13 of C.P.C. lays down that where ex-parte decree is passed against the defendant, he may apply to the Court by

which decree was passed to set aside that order, if it satisfies the Court that summons was not duly served or that he was prevented by any sufficient cause from appearing when the Suit was called on for hearing.

9. In the present case, it cannot be said that the defendants were not served with the suit summons in view of the categoric finding recorded by the learned trial Judge in paragraph 2 of the order dated 16.10.2002. The said finding was never assailed by defendants No.2 and 3. If that be so, in terms of Article 123, period of limitation will begin from the date of passing of the decree. The decree was passed on 16.10.2002 and the application under Order 9, Rule 13 is presented in 2009 i.e. after nearly 7 years. In view thereof, it cannot be said that there is delay of 14 days in filing the proceedings under Order 9, Rule 13 of C.P.C. As noted earlier, the decree is executed. Sale deed was executed on 12.12.2008 and possession was taken in the year 2008. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)