

Riyaz Ismail Shaikh and another	...	Petitioners
Vs.		
Mehboob Yusuf Shaikh and another	...	Respondents

Mr. Satyavrat Joshi a/w. Mr. Balwant Salunkhe for Petitioners.
Mr. Amit Borkar for Respondents.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 14, 2016

P.C. :

Heard Mr. Joshi, learned Counsel for petitioners and Mr. Borkar, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 23.08.2016 passed by the learned Ad-hoc District Judge-2, Pune in Civil Miscellaneous Application No.133 of 2015. By that order, the learned District Judge rejected the application made by the petitioners for condonation of delay of 1048 days in filing the substantive appeal against the judgment and decree dated 28.11.2011 passed by the learned 5th Additional Judge, Small Causes Court, Pune in Civil Suit No.535 of 2004.

3. In support of this Petition, Mr. Joshi submitted that petitioner's father - Ismail Valuddin Madaki (defendant No.1) had filed written statement opposing the Suit on 19.07.2006. Defendant No.1 Ismail was suffering from various ailments and problems. On 03.10.2007, right leg of defendant No.1 was amputated. In the year 2009, left leg of defendant No.1 was amputated. Because of this, his mental and physical condition was very weak. Defendant No.1 did not inform pendency of

Suit to the other family members. As such, defendant No.1 or the petitioners could not lead evidence in support of their case.

4. He further submitted that the petitioners are the legal representatives of defendant No.1, who died in the year 2013. They were not party to the Suit instituted by the respondents, and therefore, had no knowledge of passing of the decree on 28.11.2011. They received notice of Darkhast No.22 of 2012 on 17.07.2013 and approached Advocate Awekar, who in turn assured them that he will take necessary steps and the petitioners need not worry. Petitioners received summons on 25.09.2014 and approached another Advocate who in turn informed status of the matter as also passing of the decree on 28.11.2011. It is at that stage, petitioners acquired knowledge of passing of the decree on 28.11.2011, and therefore, have filed the appeal challenging the ex-parte decree. He submitted that delay of 1048 days in filing the appeal is neither deliberate nor intentional. He has taken me through the evidence of petitioner No.2 as also the findings recorded by the learned District Judge in paragraph 13. He submitted that in paragraph 13, the learned District Judge considered the so called admissions given by petitioner No.2 during the cross-examination. He submitted that the findings recorded in paragraph 13 are contrary to the material on record and in particular, he submitted that petitioners produced documents along with list at exhibit-38 dated 20.01.2016. He submitted that the petitioners relied upon the Advocate Awekar and because of negligence on his part, they should not suffer eviction decree. He submitted that while considering the application for condonation of delay, the Court has to consider the same liberally so as to advance substantial justice. He relied upon following decisions:

- a. ***Ram Nath Sao @ Ram Nath Sahu Vs. Gobardhan Sao*, AIR 2002 SC 1201;**
- b. ***M. K. Prasad Vs. P. Arumugam*, AIR 2001 SC 2497(1);** and

c. *Shivaji Vs Chief Officer, Municipal Council, Kannad, 2005(2) Mh.L.J. 681.*

5. Mr. Joshi submitted that the Court may consider imposing costs so as to mitigate hardships to the respondents-plaintiffs. He submitted that by not condoning the delay, the substantive appeal preferred by legal representatives of defendant No.1 stood dismissed on technical grounds and not on merits. He, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr. Borkar submitted that defendant No.1 Ismail was served with Darkhast on 06.07.2012 during his life time. Though petitioners contended that the right leg and left leg of defendant No.1 Ismail was amputated, they did not substantiate the said plea and the said fact is considered by the learned District Judge in paragraph 13. That apart, defendant No.1 Ismail died in the year 2013. The notice in Darkhast was served on the present petitioners on 17.07.2013. However, no steps were taken immediately for setting aside the decree or challenging that decree. Thereafter, second notice was issued on 25.09.2014. In the application, petitioners contended that they acquired knowledge on 25.09.2014 but still they filed the application and appeal on 31.12.2014. He, therefore, submitted that for the reasons recorded in paragraphs 13 to 15 of the impugned order, no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the record depicts that after filing of the written statement by defendant No.1 on 19.07.2006, he did not participate in the trial and eventually, the Suit was decreed on 28.11.2011. The learned trial Judge passed the ex-parte decree as defendants neither cross-

examined plaintiffs' witness neither adduced any evidence. Defendants also were not present at the time of arguments in the Suit. Judgment of the trial Court shows that it was an ex-parte decree.

8. Against the ex-parte decree, defendants have four options, namely, filing of (i) application under Order 9, Rule 13 of C.P.C.; (ii) substantive appeal under Section 96 of C.P.C.; (iii) review petition before the trial Court and lastly (iv) suit challenging the decree on the ground of fraud. In the present case, defendants exercised option of filing substantive appeal under Section 96. In view thereof, petitioners cannot rely upon the provisions of Order 9, Rule 13 so as to make out sufficient cause for non-appearance of defendant No.1 in the trial.

9. That apart, perusal of the application shows that petitioners specifically contended about the amputation of right and left leg of defendant No.1 in the year 2007 and 2009. In support of this plea, petitioner No.2 examined himself himself. Perusal of paragraph 3 of the cross-examination shows that he did not submit any medical certificate substantiating his contentions that defendant No.1's right leg was amputated on 03.10.2007. He also did not produce any medical certificate substantiating his contention that the left leg of defendant No.1 was amputated in the year 2009. He also did not produce any medical certificate to show that the operation took place in the year 2009. The learned District Judge has considered this aspect in paragraph 13 of the impugned order and after going through the entire evidence adduced by the petitioners, the learned District Judge observed that petitioners have not produced any documentary evidence about amputation of legs in 2007 and 2009.

10. The learned District Judge also considered the fact that on

06.07.2012, defendant No.1 was served with the Darkhast. Defendant No.1 died in the year 2013 and after that, Darkhast notice was served on the petitioners firstly on 17.07.2013 and secondly on 25.09.2014. Even thereafter, they did not take any steps till 31.12.2014.

11. Mr. Joshi submitted that petitioners had approached Advocate Awekar who assured petitioners that he will take necessary steps and petitioners need not worry. It is however material to note that petitioners neither examined Advocate Awekar nor filed his affidavit. In the absence of this, it cannot be held that the petitioners have substantiated the said plea. What emerges from the aforesaid discussion is that defendant No.1. / petitioners did not file appeal after service of Darkhast either on 06.07.2012 or on 17.07.2013, 25.09.2014 and filed appeal only on 31.12.2014, resulting into delay of 1048 days.

12. Mr. Joshi relied upon decision of the Apex Court in **Ram Nath Sao's case** (*supra*). In that case, the Apex Court held that application for condonation of delay should receive a liberal construction so as to advance substantial justice **when no negligence or inaction or want of bonafide is imputable to the party**. In the present case, petitioners have not established that no negligence or inaction is attributable to them as also want of bonafide is imputable to them. In the case of **M. K. Prasad** (*supra*), in paragraph 9, the Apex Court on facts found that the conduct of the appellant on the whole does not warrant to castigate him as an irresponsible litigant. In my opinion, the same cannot be said about the petitioner. There is negligence writ large on the part of the petitioners. In the case of **Shivaji** (*supra*), there was a delay of 139 days in filing the appeal due to illness and on facts, it was found that petitioner was prevented by sufficient cause from filing the appeal against the decree. The said decision is also not applicable to the facts

of the present case. The learned District Judge has properly exercised the discretion. It cannot be said that the discretion exercised by the learned District Judge is either perverse or arbitrary or capricious. 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.)

Minal Parab