

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 176 OF 2015
IN
NOTICE OF MOTION NO. 2258 OF 2011**

Anupam B. Nemani .. Appellant
V/s.
Arun Banwarilal Saraf and ors. .. Respondents.

Mr. S.P. Kanuga for the Appellant.
Mr. A.Daver with Mr. Suraj Iyer i/b M/s. Ganesh & Co. for
Respondent No.1.

**CORAM: DR. MANJULA CHELLUR, C.J.
AND M.S.SONAK, J.**

DATE : 14 SEPTEMBER 2016.

P.C.

1] Admit. With the consent of learned counsel for the parties,
appeal is heard and disposed of finally.

2] The challenge in this appeal is to the following
orders/decrees:

- (a) Order dated 9 December 2014, by which the learned
Single Judge has dismissed notice of motion seeking setting
aside of the *ex parte* order dated 23 March 2005; and
- (b) The *ex parte* decree dated 23 March 2005 in Suit No.
3579 of 1992.

3] Mr. S.P. Kanuga, learned counsel for the appellant, submits that sufficient cause was shown by the appellant for absence on 23 March 2005. Therefore, the impugned order/decreed dated 9 December 2014 which relies mainly upon alleged antecedent negligence in the matter of non-filing of written statement, is in excess of jurisdiction or in any case illegal. Mr. Kanuga submitted that the suit had in fact been dismissed as abated in the year 1999 itself. The delay of over four years in seeking restoration of the suit was condoned without proper notice to the appellants. There is nothing on record to establish that the appellant was furnished notice that the matter was posted on 23 March 2005, on which date, *ex parte* decree came to be made. Mr. Kanuga further submitted that *ex parte* decree dated 23 March 2005 records no discussion or reasoning whatsoever. All that the *ex parte* decree states is that the suit is being decreed, on account of failure on the part of the appellant to file written statement. Mr. Kanuga submits that this is contrary to law laid down by the Hon'ble Supreme Court in ***Shantilal G. Mutha Vs. Tata Engineering and Locomotive Company Limited and another – (2013) 4 SCC 396.***

4] Learned counsel for the respondent No.1 submitted that the conduct of the appellant in the present case, has been gross. There is no explanation as to what prevented the appellant from filing written statement in the suit which was instituted in the year 1992. Despite several opportunities, since the appellant did not file written statement, the suit has been decreed under Order 8 Rule 10 of CPC. Learned counsel for the respondent No.1 further

submitted that the delay in seeking setting aside of *ex parte* decree is inordinate and the same has not been suitably explained. The material on record does establish that necessary notices were served upon the appellants. For all these reasons, learned counsel for the respondent No.1 submitted that there is no case made out to interfere with the impugned orders/decrees.

5] The rival contentions now fall for our determination.

6] Although, in the present case, the suit was instituted in the year 1992, the record indicates that the sole plaintiff expired on 29 April 1999 and thereafter, no steps were taken within prescribed period of limitation for bringing on record the legal representatives. Accordingly, the suit stood abated in the year 1999 and at least upto 29 March 2004, no steps were taken seeking setting aside of abatement and restoration of suit.

7] The legal representatives of original plaintiff vide Chamber Summons dated 29 March 2004 applied for condonation of delay of over four years and set aside of abatement. There is no clarity with regard to service of notice in such chamber summons to the appellant. However, even if it is assumed that there was a valid service through courier, there is really no material on record to establish that the notice that the suit was fixed for hearing on 23 March 2005 was in fact served upon the appellants.

8] In absence of proper material that valid service was indeed effected upon the appellant, there is no reason to disbelieve the cause shown by the appellant explaining the delay in taking out notice of motion seeking setting aside of *ex parte* decree dated 23 March 2005. The cause shown is that the appellant derived knowledge of the *ex parte* decree only upon served with the process in the execution proceedings.

9] There is yet another issue which needs to be addressed. If the *ex parte* decree dated 23 March 2005 is perused, it is clear that there is no discussion on merits of the case. The *ex parte* decree has been made only by recording that since the appellant has failed to file the written statement, such decree is being made. There is neither any discussion nor any reasoning, however minimum, reflected in *ex parte* decree made in exercise of powers conferred by Order 8 Rule 10 of CPC.

10] The relief in Order 8 Rule 10 of CPC is discretionary, and court has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the court must be satisfied that there is no fact which needs to be proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the court proceeded, and under what reasoning the suit has been decreed. In the facts and circumstances of a case,

the court must decide the issue of limitation also, if so, involved.

11] In this case, as noted earlier, learned Single Judge has not examined whether suit was filed within limitation and whether on the basis of pleading, the relief which is granted, could have been granted. In passing *ex parte* decree, it is apparent that the learned Single Judge has not applied law laid down by the Hon'ble Supreme Court in *Shantilal G. Mutha (supra)*.

12] There is no doubt, some negligence on the part of the appellant. However, the negligence in the facts and circumstances of the present case, is not of such magnitude that the appellant suffers an *ex parte* decree, which even otherwise does not satisfy parameters of Order 8 Rule 10 of CPC. In our judgment, therefore, this is an appropriate case where the impugned order/decreed is liable to set aside, subject however to the appellant paying costs of Rs.1 Lac to respondent No.1.

13] This appeal is accordingly allowed on the following terms:

(a) The appellant to pay costs of Rs.1 Lac to respondent No.1 within a period of four weeks from today;

(b) In case, respondent No.1 refuses to accept the costs, the appellant shall be at liberty to deposit the same in this Court within a period of four weeks from today, after furnish of necessary notice/intimation to respondent No.1. The

costs, if and when deposited, may be withdrawn by respondent No.1 without necessity of any further orders from this Court;

(c) On payment/deposit of costs as aforesaid, the impugned order dated 9 December 2014 and *ex parte* decree dated 23 March 2005 shall stand set aside. Further, the appellant shall be entitled to file written statement within a period of two weeks thereafter;

(d) However, if the appellant fails to pay/deposit amount of costs as aforesaid, the appellant shall not be entitled to benefit of present order. Instead, this appeal shall be deemed to have been dismissed; and

(e) Considering that the suit was instituted in the year 1992, parties are at liberty to seek early hearing of the suit.

(CHIEF JUSTICE)

(M.S.SONAK, J.)