

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Writ Petition No.4977 of 2015
[Tushar Dhananjay Bhuyar Vs. Sunita Dhananjay Bhuyar & others]

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's orders

Ms. R. Dewani, Adv., for the petitioner.
Mr. V.A. Dhabe, Adv., for respondent nos. 1 to 3.

CORAM : A.S. CHANDURKAR, J.
DATE : 10th August, 2016

Heard.

The challenge in the present writ petition is to the order dated 1st August, 2015 passed by the Trial Court, thereby setting aside the ex parte judgment and decree dated 11th September 2012 and granting an opportunity to the respondents to contest the suit on merits.

The petitioner is the original plaintiff who has filed a suit for partition and separate possession of a joint family property. The respondents did not contest the said suit, as a result of which, the suit proceeded ex

parte and was decreed on 11th September, 2012. The petitioner thereafter filed execution proceedings, in which the respondents were served. During pendency of those proceedings, the respondents applied for a certified copy of the judgment and decree passed by the Trial Court, and thereafter moved an application for setting aside the ex parte judgment and decree. The respondent no.1 examined herself and the Trial Court, by the impugned order, allowed the said application and set aside the ex parte judgment and decree. Being aggrieved, the original plaintiff has filed the present writ petition.

Ms. Dewani, the learned counsel for the petitioner, submitted that the reasons furnished by the respondents in their application for setting aside the ex parte decree were not sufficient to allow the said application. Though it was pleaded that on 29th August, 2013, a notice was issued by the respondents to their counsel, said notice was not exhibited in the deposition of the respondent no.1. Despite the ground that the counsel had neglected their case, the same counsel came to be appointed in the execution proceedings. It was submitted that the Trial Court, without assigning any justifiable reasons, allowed the application and set aside the ex parte decree. It was, therefore, submitted that the impugned order was liable to be set aside.

Shri Dhabe, the learned counsel for the respondents, supported the impugned order. According

to him, sufficient details were furnished in the application for setting aside the ex parte decree. He submitted that though the letter dated 29th August, 2013, had been placed on record, the same had not been exhibited. He then submitted that the delay in filing the application for setting aside the ex parte decree had been condoned and, therefore, the Trial Court was justified in setting aside the ex parte decree. According to him, the Judgment passed by the Trial Court was not the one passed by invoking the provisions of Order-VIII, Rule 5 or Rule 10 of Civil Procedure Code. He, therefore, submitted that the respondents are entitled to contest the proceedings on merits.

Learned counsel for the parties have been heard at length. I have perused the documents on record.

It is not in dispute that the Trial Court proceeded ex parte against the respondents and decreed the suit. The documents on record indicate that after due service in the execution proceedings, the respondents had appeared before the Executing Court. Thereafter, on 29th August, 2013, the respondents issued a notice to their counsel. Subsequently, on 21st September, 2013, certified copy was applied for and it was received on 19th October, 2013. The application, in question has been moved on 20th January, 2014. The delay caused in moving the application has been condoned by a separate order.

In the application moved by the respondents, the reasons for inaction on the part of the respondents have been stated. It has been pleaded that the counsel engaged by them did not file his Vakalatnama in the suit, due to which, the matter proceeded ex parte. The subsequent averments are with regard to the developments after passing of the aforesaid decree. Perusal of the deposition of the respondent no.1 again indicates that enquiries were made with the concerned counsel; but no details were furnished. Merely because the same counsel had been engaged in the execution proceedings, it would not be a ground to disbelieve the stand taken by the respondents. The trial court has found that though the respondents were proceeded ex parte on 9th March, 2008, the decree was passed on 11th September, 2012. It has, therefore, held that the Judgment was not one passed under the provisions of Order-VIII, Rule 5 or Rule 10 of Civil Procedure Code. Once this finding is recorded, then the application for setting aside the ex parte decree was liable to be allowed in these circumstances. Though it is true that the Trial Court has not assigned detailed reasons in para 14 of its order, the discussion in para 13 of the said order indicates the satisfaction recorded by the Trial Court for setting aside the ex parte decree.

In view of aforesaid, and as the suit is for partition and separate possession, I do not find any case made out to interfere in writ jurisdiction. In the facts of

the case, the proceedings in Regular Civil Suit No. 1033 of 2008 are expedited and the Trial Court shall decide the same on its own merits by the end of March, 2017.

ORDER

Writ Petition is **dismissed**. No costs.

Judge

|hedau|

CERTIFICATE

I certify that this Judgment/Order uploaded is a true and correct copy of original signed Judgment/Order.

Uploaded by : R.B. Hedau,
Pvt. Secretary.

Uploaded on : 11th Aug., 2016

-0-0-0-0-