

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1174 OF 2017

Jineshwar Associates

.Petitioner

Vs.

M/s. Leo Builders, a partnership firm
through its partner Mr. Nitinbhai Patel

.Respondent

Ms Anjali Neel Helekar, Advocate, for the Petitioner
Mr. Hardik Desai, Advocate, for the Respondent

CORAM : R.G.KETKAR, J.

DATE : 07.03.2017

P.C.

. Heard Ms Helekar, learned counsel for the Petitioner and
Mr. Desai, learned counsel for the Respondent.

2. By this Petition under Article 227 of the constitution of India, the Petitioner, hereinafter referred to as 'Plaintiff' has challenged the Judgment and Order dated 06.12.2016 passed by the learned Ad hoc Judge, City Civil Court, Borivali Division, Mumbai below Exh.7 in Summary Suit No.331 of 2015. By that order, the learned trial Judge allowed the Application made by the Respondent, hereinafter referred to as 'Defendant' for extension of time for complying the Order dated

03.08.2016. By Order dated 03.08.2016, the learned trial Judge has allowed the Defendant's Chamber Summons for condoning the delay of 14 days in filing Vakalatnama in the Summary Suit subject to payment of costs of Rs.700/- to be paid to the Plaintiff within 10 days.

3. In support of this Petition, Ms Helekar submitted that the Defendant did not pay the costs to the Plaintiff within 10 days as per the Order dated 03.08.2016. The Defendant took out an Application Exh.7 on 29.09.2016. In this Application, the Defendant contended that owing to some confusion of Junior Advocate of the Defendant, it was not within the knowledge of the Defendant about payment of costs of Rs.700/- to be paid to the Plaintiff within 10 days. She submitted that in the Application, the Defendant did not make out any exceptional circumstance. She relied on Section 35-B of the Code of Civil Procedure, 1908 (For short "CPC") as also the decision of the Apex Court in the case of **MANOHAR SINGH Vs. D. S. SHARMA and another, 2010(2) Mh. L. J. 515**. She submitted that extension of time for payment of costs can be granted by the Court in exercise of discretion under Section 148 only in exceptional circumstances. In the present case, the Defendant did not make out any exceptional circumstance. The learned trial Judge was, therefore, not justified in

granting extension.

4. On the other hand, Mr. Desai, supported the impugned Order. He submitted that in pursuance of the impugned Order, the Defendant has paid total costs of Rs.1,200/- on 06.12.2016 and the Vakalatnama was taken on record on 13.02.2017. He also submitted that the decision in MANOHAR SINGH's case (Supra) is not applicable to the facts of the present case.

5. I have considered the rival submissions advanced by the learned counsel for the parties. I have also perused the material on record. It is not in dispute that the Defendant did not file Vakalatnama within 10 days from the service of writ of summons. There was delay of 14 days and accordingly, the Defendant took out Chamber Summons No. 847 of 2015. By Order dated 03.08.2016, Chamber Summons was allowed subject to payment of costs of Rs.700/- to be paid to the Plaintiff within 10 days. It was also clarified that in case, the Defendant fails to pay the costs as ordered, the Order dated 03.08.2016 will automatically stand cancelled without further reference to the Court. It is not in dispute that the Plaintiff did not challenge that Order.

6. It is not in dispute that the Defendant did not deposit costs within the stipulated period. On 29.09.2016, the Defendant filed an Application Exh.7. In that Application, the Defendant contended that due to some confusion at the end of the Junior Advocate of the Defendant, the fact of the Chamber Summons being allowed subject to payment of costs of Rs.700/- to be paid to the Plaintiff within 10 days from the date of the Order was not within the knowledge of the Defendant. Owing to some confusion at the end of Junior Advocate of the Defendant, the Defendant was under the impression that order on the Chamber Summons will be passed 13.09.2016. On 13.09.2016, holiday was declared. After checking the next date of the captioned matter on the website of the District Court, Maharashtra, the Defendant's Advocate came to know that Chamber Summons was allowed on 03.08.2016 subject to payment of costs of Rs.700/- to be paid to the Plaintiff within 10 days from the date of the order.

7. The Plaintiff filed a reply opposing the Application. By the impugned Order, the learned trial Judge allowed the Application. In the Order, the learned trial Judge noted that in order to give a fair opportunity of trial, time for payment of costs needs to be extended with further costs for the delay. Accordingly, the learned trial Judge extended

the time for payment of costs subject to payment of further costs of Rs.500/- . Thus, the trial Court directed the Defendant to deposit costs of Rs.1,200/- immediately to the Plaintiff or deposit it in the Court on 06.12.2016.

8. Ms Helekar relied upon the decision in MANOHAR SINGH's case. Perusal of paragraph 2 of that decision shows that the Defendants' evidence was commenced and on 06.01.2004, the suit was listed for further evidence of the Defendants. (DW 2) S. Joseph was present in Court for being cross-examined by the Plaintiff. On the request of the Plaintiff that his counsel was busy elsewhere, the matter was adjourned to 07.01.2004. Again on 07.01.2004, Plaintiff sought adjournment on the ground that his counsel was otherwise busy. When the Court asked the Plaintiff to cross-examine the said witness, as he had earlier cross-examined DW-1 without the assistance of a counsel, Plaintiff refused to do so. S. Joseph, (DW-2) had come all the way from Durgapur for giving evidence. The Court, therefore, adjourned the matter to 09.02.2004, subject to payment of costs of Rs.5000/- by the Plaintiff. On 09.02.2004 also, S. Joseph (DW-2) was present, but the Plaintiff sought an adjournment on the ground that he wanted to move an Application for transfer of the suit. The request for adjournment was

opposed on the ground that the witness had come from Durgapur by air. . The suit was, however, adjourned to 09.03.2004. On 09.03.2004, Plaintiff submitted that he had already moved an Application for transfer (alleging that he had lost faith in the Presiding Officer). The suit was adjourned from time to time on the ground that the transfer Application filed by the Plaintiff was pending before the District Judge.

9. On 24.03.2005, the transfer Petition filed by the Plaintiff was allowed and the suit was assigned to the file of another Additional District Judge, with a direction to the parties to appear on 01.04.2005. On that day, the new trial Judge directed the Plaintiff to deposit Rs.5000/- towards the travel expenses of DW-2 before he could cross-examine DW-2. On 27.04.2005, the Plaintiff filed an Application for waiver of costs. The Application was dismissed and the case was posted to 27.07.2005 for further evidence. On 27.07.2005, the Plaintiff failed to deposit the costs. The Court recorded that costs were not paid in spite of repeated opportunities. Relying upon section 35B of the Code of Civil Procedure (for short 'the CPC'), the trial Court dismissed the suit. In paragraph 9, the Apex Court noted that the Plaintiff harassed Defendants and its witness by seeking repeated adjournment.

10. In my opinion, the decision in MANOHAR SINGH's case is not applicable to the facts of the present case. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and is dismissed. However, it is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proceedings as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)