

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 6183 OF 2005

Ganpati Panchayatan Sanstha
through its trustee Vijaysingh Raje
Madhavrao Patwardhan,
Age 63 years, Occ. Business
residing at Ganpati Mandir,
Ganpati Peth, Sangli

... Petitioner
(Original Plaintiff)

Vs.

Sangli Miraj Kupwad Municipal Corporation
(Erstwhile Sangli Nagar Parishad)
through the Municipal Commissioner,
Sangli

... Respondent
(Original Defendant)

Mr. Uday Warunjikar, Advocate for the petitioner.
Mr. Sudhir Prabhu, Advocate for respondent no. 1.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 13th July, 2017.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. By consent, the Writ Petition is heard finally and decided at the stage of admission.

2. This Writ Petition is directed against the order dated 4th July, 2005 passed below Exhibit 1 in Miscellaneous Application No. 96 of 2002 by the learned Civil Judge Senior Division, Sangli. The petitioner is a original plaintiff. The Special Civil Suit No. 579 of 1996 is filed for possession. However, the suit was dismissed for default

on 11th April, 2002. Therefore, an Application for restoration of the suit along with the Application for condonation of delay of 13 days were filed. The trial Court has directed to lead evidence on the point of delay. However, the Manager, i.e., witness of the plaintiff, did not remain present on 4th July, 2005. The Court has observed that on that day, the Application for adjournment filed was for the seventh time. The trial Court relied on the proviso to Order 17 Rule 1 of Code of Civil Procedure wherein it is mentioned that "Provided that no such adjournment shall be granted for more than 3 times to a party during the hearing of the suit". The learned Judge has mentioned in the order that all the parties absent when duly called out and therefore, dismissed the application under Order 9 Rule 3 of the CPC for setting aside the dismissal of the suit. Thus, the order dated 4th July, 2005 is under challenge.

3. The learned counsel for the petitioner/original plaintiff has submitted that the Application under Order 9 Rule 3 of the CPC was made by the petitioner for setting aside the order of dismissal of the suit. There was delay of 13 days and hence, the Application for condonation of delay was also filed. He submitted that though the Application for condonation of delay was not allowed, yet the trial

Court fixed the matter for leading evidence on Application under Order 9 Rule 3 of the CPC. The learned counsel further submitted that on 4th July, 2005 the petitioner has filed the Application praying for adjournment on the ground that the evidence of Manager of the petitioner-trust cannot be recorded and time be granted to record his evidence, as he is away at Mumbai. However, the said Application was rejected. The learned counsel has further submitted that the trial Court ought to have appreciated the ground for adjournment. The learned counsel prays that the said order is to be set aside.

4. Per contra, the learned counsel for the respondent/original defendant has submitted that the petitioner's application under Order 9 Rule 3 of the CPC was dismissed and instead of moving the Application asking for review of the order, he should have moved the Application under Order 9 Rule 4 for setting aside the said order on the same day. The learned counsel further submitted that the Application for review is also rejected on the same day and the order passed by the learned Judge by invoking the powers under Order 17 Rule 1 of CPC is justified and there is no illegality in the said order.

5. Heard the submissions. Perused the records, impugned applications and the order. Though under proviso of Order 17 Rule 1

of the CPC, the Court has power to reject the adjournment after more than 3 time if asked for during the hearing of the suit and though the word “shall” is used, it is not to be understood as mandatory and not to be applied *stricto sensu*. An adjournment is a discretionary power of the Court which is to be used considering the facts of the case and genuine difficulties of the parties. Hence, the order dated 4th July, 2005 passed below Exhibit 1 in Miscellaneous Application No. 96 of 2002 by the learned Civil Judge Senior Division, Sangli is set aside.

6. Rule is made absolute in terms of prayer clause (a) of the Writ Petition.

7. As the suit is of 1996, the trial Court to take up the matter on board on 24th July, 2017. The parties to appear before the trial Court on 24th July, 2017 at 11 a.m. The trial Court shall hear the matter on day-to-day basis and dispose of the suit.

8. Parties to act upon the authenticated copy of the order.

(MRIDULA BHATKAR, J.)