

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 9044 OF 2016

Shri. Prakash Shamrao Jamdade

...Petitioner

Versus

Shri. Jaikrishna Shinde

...Respondent

....

Mr.Dormaan Dalal, Advocate for the Petitioner.

Mr. Kuldeep U. Nikam, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 19th JANUARY, 2017

P.C.

1. Heard Mr.Dormaan Dalal, learned counsel for the petitioner and Mr.Kuldeep Nikam, learned Counsel for the respondent, at length.

2. Rule. Mr.Nikam waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 16.6.2016 passed

by the learned 2nd Jt. Civil Judge, Junior Division, Pune below Exhibit-15 in Misc.Application No.903/2014 By that order, the learned trial Judge rejected the application Exhibit-15 filed by the defendant for staying execution proceedings till the decision of Misc. Application.

4. In support of this Petition, Mr. Dalal submitted that the respondent, hereinafter referred to as the 'plaintiff' has instituted Summary Suit under Order XXXVII of C.P.C. on 19.12.2013. On 22.7.2014, the suit was decreed exparte and the defendant was directed to pay Rs.60,000/- to the plaintiff together with future interest @ 6% per annum on Rs.60,000/- from 19.12.2013 till its realization.

5. The defendant filed application under Order XXXVII Rule 4 of C.P.C. on 11.9.2014 for setting aside exparte decree. On 30.9.2014, the defendant filed application for condonation of delay of 19 days in filing the application under Order XXXVII Rule 4 of C.P.C. Pending hearing of that application, the defendant also filed application Exhibit-15 for staying execution proceedings. By the impugned order, the learned trial Judge rejected the application. Mr. Datar submitted that by rejecting

the application under Order XXXVII Rule 4 as also application for condonation of delay is rendered infructuous. Upon taking instructions from the defendant, he states that the defendant will deposit the entire decretal amount in the trial Court under intimation in writing to the plaintiff's Advocate within four weeks from today. It was further assured that he will not apply for further extension of time for depositing this amount.

6. On the other hand, Mr. Nikam submitted that the decree was passed on 22.7.2014 and the learned trial Judge may be directed to dispose of the proceedings under Order XXXVII Rule 4 as expeditiously as possible.

7. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. In the case of ***P.N. Films Ltd and another v Overseas Films Corporation Ltd., AIR 1958 BOMBAY 10***, the Division Bench of this Court in paragraph-2 has held that “looking to the provisions of Order IX, Rule 6, it seems to us clear that those provisions do not apply to a decree passed in a summary suit and that an application to set aside a decree in a summary suit is not regulated by Order IX, Rule 13

but by Order XXXVII Rule 4. In other words, Order XXXVII, Rule 4 is a self-contained Order which deals not only with the right of the defendant to appear in a summary suit in which a decree has to be passed if leave to defend is not given to him, but also with the procedure to be followed if the defendant wishes to have a decree passed in a summary suit set aside.

8. Division Bench in paragraph-3 observed thus :

“(3) It is then urged by Mr. Gupte that even assuming the present application of the appellant does not fall under Order 9, Rule 13 and even assuming that no ex-parte decree was passed as contemplated by Order 9, Rule 6, Article 164 does not in terms limit the application covered by that article to an application made under Order 9, Rule 13, and Mr. Gupte says that although the decree that we have before us may not be an ex parte decree within the meaning of Order 9, Rule 6 it is still an ex parte decree as generally understood and there is no reason why the connotation of an ex parte decree in Article 164 be restricted and limited to an ex parte decree as understood by Order 9, Rule 6. Now that seems to be a little more difficult contention to decide. It is true that

in one sense the decree was passed against the defendant in his absence, but that absence was an enforced absence and it was enforced by law. In our opinion, even giving to the expression 'ex parte' its plain natural meaning, the expression 'ex parte' does carry with it the connotation that a Court or a Judge or a Tribunal has proceeded in the absence of other party when it could have had the other party before it or when it was not prevented by law from having the other party before it. But perhaps it is better to decide this point on the other aspect of the matter. Both the Law of Limitation and the Civil Procedure Code are procedural laws and we must try and give the same meaning to expressions used in these two laws. If the Civil Procedure Code has understood an ex parte decree in the particular definite sense, there is no reason why we should take the view that the Limitation Act has understood it in a different sense. Apart from that, the Limitation Act must always be construed strictly against the party who sets up the plea of limitation. The Limitation Act deprives a party of a valuable right and unless the provision in the Limitation Act was clear and beyond doubt, a benevolent construction, a construction favourable to the party whose valuable right is being taken away, must always be given and therefore in our

opinion Article 164 does not apply to an application made by a defendant against whom a decree has been passed in a summary suit when he was precluded from appearing by reason of the fact that leave to defend was not given. In our opinion, such an application falls under Order 37, Rule 4 and the Limitation Act has not dealt with any such application. Therefore, the article that would apply would be the residuary Article 181.”

9. In view of the decision of Division Bench of this Court in **P.N. Films Ltd.** (supra) in my opinion for setting aside decree passed in Summary Suit under Order 37, the period of limitation would be governed by new Article 137 of the Limitation Act, 1963.

10. Even assuming that the period of limitation prescribed for filing application is under Article 123, having regard to the fact that the delay is of only 19 days, I am satisfied that same deserves to be condoned. Having regard to the fact that the defendant is ready to deposit the entire decretal amount within four weeks even stay deserves to be granted subject to that condition. In view thereof, the petition is disposed of in following

terms :

- i) Impugned order is set aside.
- ii) Application Exhibit-15 as also application for condonation of delay stand allowed subject to the defendant depositing entire decretal amount in the trial Court under intimation in writing to the plaintiff's Advocate within four weeks from today. The defendant shall not apply for further extension of time for depositing the amount.
- iii) The amount shall be invested in any Nationalized Bank pending disposal of application under Order XXXVII Rule 4 of C.P.C. While deciding application under Order XXXVII Rule 4, the learned trial Judge will pass appropriate order in relation to the amount so deposited by the defendant.
- iv) Parties are at liberty to request the learned trial Judge to decide the proceedings under Order XXXVII Rule 4 expeditiously. If such an application is taken out, the learned trial Judge will pass appropriate order.
- v) Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)