

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 1094 OF 2004

Mrs. Chandangauri A. Doshi
(since deceased through
Sole Executor Mr. Bharat A. Doshi) .. Appellant
vs.
Amar Apartments Co-operative Housing
Society Ltd. and anr.. .. Respondents.

Mr. S.P. Kanuga i/b H.P. Vyas for the Appellant.
None for the Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Order : 20 JANUARY 2017.
Date of Pronouncing the Order : 24 JANUARY 2017.

ORDER :

1] Heard Mr. S.P. Kanuga, learned counsel for the Appellant. The respondents, though served, absent.

2] This appeal challenges the order dated 23 September 2004, by which, the trial court has dismissed the appellant's notice of motion to set aside the decree dated 23 August 1999 in S.C. Suit No. 6806 of 1999.

3] Mr. Kanuga, learned counsel for the appellant, submits that in the present case the *ex-parte* decree was made under Order 9 Rule 6 of the Code of Civil Procedure, 1908 (CPC) and not under Order 8 Rule 5 or Rule 10 of the CPC. For this reason, he submits that an application under Order 9 Rule 13 of CPC was maintainable and learned trial court erred in dismissing such application as not maintainable. In support of such proposition, Mr. Kanuga relied

upon the following decisions:

- (a) *Shree Varun Trading Co. v. Mahesh Associates and ors.*¹;
- (b) *Lalit N. Singh v. The President, Religious Trust Board and anr.*²; and
- (c) *Anupam B. Nemani vs. Arun B. Saraf and ors.*³

4] Mr. Kanuga further submitted that even when there is omission to file written statement, learned trial court was not justified in mechanically passing a decree. Learned trial court was obliged to satisfy itself that the suit deserves to be decreed and further, the court must give reasons for passing a judgment and decree, however, short such reason may be. Mr. Kanuga submitted that in the present case since this is not been done, the *ex-parte* decree is liable to be set aside. For such proposition, learned counsel placed reliance upon the decision in *Shantilal G. Mutha v. Tata Engineering and Locomotive Company Limited and anr.*⁴.

5] In this case, the suit was instituted in the year 1996. Despite several opportunities, the appellant, i.e., original defendant failed to file any written statement. Accordingly, the suit was decreed on 23 August 1999. For a period of almost four years, the appellant, i.e., original defendant did not even bother to take any steps to set aside decree.

6] The notice of motion was taken out only on 4 November 2003 seeking set aside of decree dated 23 August 1999. Although, the application was clearly barred by law of limitation, the appellant, i.e. original defendant did not even bother to file any application

1 2012(5) Mh.L.J.874

2 AIR 2006 PATNA 23

3 Appeal No. 176 of 2015 decided on 14/9/2016

4 (2013) 4 SCC 396

seeking condonation of delay. Upon an objection being raised such an application was belatedly filed.

7] By the impugned order, learned trial Judge has dismissed the notice of motion, *inter alia*, on the ground that such an notice of motion was not maintainable under Order 9 Rule 13 of CPC, since, the decree made in the exercise of powers conferred by Order 8 Rule 5 read with Rule 10 of CPC. At this stage, there is no necessity to go into the issue as to whether the application under Order 9 Rule 13 of CPC was maintainable or not in the facts and circumstances of the present case. The impugned order refers to several decisions, which have taken the view that an application under Order 9 Rule 13 is not maintainable. However, there are other decisions which have taken the view that in a situation of this kind the decree made can be regarded as an *ex-parte* decree and therefore, application under Order 9 Rule 13 of CPC may be maintainable.

8] In *Shantilal G. Mutha (supra)*, however, the Hon'ble Supreme Court left this issue open by clarifying that the issue whether an application under Order 9 Rule 13 of CPC in such a case is maintainable or not is not being decided in the matter.

9] Assuming, therefore, that an application under Order 9 Rule 13 of CPC was maintainable, it was for the appellant to explain the inordinate delay of over four years in taking out the notice of motion, leave alone the reason which prevented the appellant from filing his written statement, despite lapse of almost three years since the date of the institution of suit. In the present case, neither is there

any good explanation for the inordinate delay of 4 years in taking out the notice of motion nor is any good reason cited for not filing the written statement in suit for almost three years since the date of the institution of the suit.

10] The reason stated is that the original defendant was quite old and therefore, unable to remain present in the court. At the stage at which the suit was posted, there was really no necessity for the original defendant to remain present in court. Therefore, a circumstance that the original defendant was 82 years old, is not so relevant for explaining delay. Besides, the record indicates that an advocate was engaged, who had, from time to time applied for adjournments. The reason that since this was a family dispute, the original defendant was unable to concentrate upon such dispute is also a reason which is far from convincing. Taking into consideration the inordinate delay, some semblance of explanation was necessary, which is completely lacking. The reasons for delay are far from convincing and the appellant, i.e., original defendant has failed to make out any sufficient cause.

11] Therefore, even assuming that the application under Order 9 Rule 13 of the CPC was maintainable, there was no question of entertaining the same unless, there was any sufficient cause to explain the inordinate delay. There is no merit in the contention of Mr. Kanuga that the matter should be remanded to the trial court at this stage for reconsideration. The suit was instituted in the year 1996 and decreed in the year 1999. In the absence of any convincing reasons for the inordinate delay, it will not be appropriate at this

point of time to simply remand the matter for fresh reconsideration.

12] In this case, if the impugned judgment and decree is perused, it cannot be said that the same is bereft of any reasons or that learned trial judge has not applied his mind before passing decree. In this case, it is recorded that the plaintiffs tendered compilation of the original documents, which was taken on record. It is recorded that in absence of written statement, the averments in the plaint remain un-controverted. It is also noted that the documents produced on record by the plaintiffs support their case upon such basis the decree has been issued. In such circumstances, there is compliance with the law laid down by the Hon'ble Supreme Court in *Shantilal Mutha (supra)* and the Division Bench of this court in *Anupam Nemani (supra)*. There is accordingly, no merit in the second contention of Mr. Kanuga as well.

13] For the aforesaid reasons, this appeal is dismissed with costs quantified at Rs.10,000/-.

14] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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