

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10943 OF 2013

Rajgonda Appa Wadge & Anr. ... Petitioners
Vs.
Raosaheb Dhulgonda Patil & Ors. ... Respondents

Mr. Chetan G. Patil, for the petitioners
Mr. Vijay Killedar, for respondents Nos. 1 to 5.

CORAM: SMT.SADHANA S.JADHAV, J.

DATE : 9th October, 2017.

P.C.

Heard. Rule. Rule made returnable forthwith with consent of the parties.

2. The present petitioners happen to be the added defendants in Special Civil Suit No.33 of 2004. The suit is of the year 1998. The suit was transferred to the Court of Civil Judge, Senior Division at Jaysingpur after the establishment of the Court of Civil Judge, Senior Division, Jaysingpur in the year 2004 and therefore, the suit was re-numbered as Special Civil Suit No.33 of 2004.

2. In the year 2004, the plaintiff filed an application contending therein that during the pendency of the suit, the defendant No.1 had sold the property to defendant Nos. 4 and 5 and, therefore, they would be necessary parties since the plaintiff was seeking restoration of possession also. Accordingly, the application was allowed and the present petitioners were

arraigned as defendant Nos. 4 and 5 to Special Civil Suit No.33 of 2004.

3. It appears from the records that the defendant Nos. 4 and 5 had executed a general power of attorney in favour of their father Rajgunda Appa to prosecute the suit on their behalf. Their father had engaged an advocate to prosecute the suit. Defendant Nos. 4 and 5 had filed the written statement which was taken on record. Issues were framed and the suit had proceeded against the present petitioners as they were subsequently added. They had also engaged an advocate to represent them in the said suit. It appears from the records that Rajgunda Appa expired in the year 2004. However, thereafter, the petitioners had not consulted their Advocate and, therefore, the suit was proceeded on its own merits.

4. It appears that on 27.1.2011, the plaintiffs and the original defendant Nos. 1 to 3 had arrived at a compromise and had filed consent terms before the Court. The original defendant No.6 was also a party to the said consent terms and, therefore, the suit had proceeded only against the defendant Nos. 4 and 5. The matter was kept on 28.11.2011 for the purpose of leading evidence by the defendant Nos. 4 and 5.

5. The petitioners, who were original defendant Nos. 4 and 5, had chosen to remain absent without sufficient cause and it also appears that the Advocate engaged by them did not remain present before the Court. The

learned Civil Judge, S.D.Jaysingpur had kept the matter for final arguments. The matter was fixed on 29.1.2011 and was reserved for judgment on 1.2.2012. The judgment was delivered on 1.2.2011.

6. The learned counsel for the petitioners vehemently submits that the petitioners herein had no knowledge about the passing of the judgment or the decree in Special Civil Suit No.33 of 2004. It also appears from the records and submissions advanced across the bar that the petitioners had not contacted the Advocate engaged by them. In view of this, the execution petition was filed and a notice to that effect was sent to the present petitioners in October 2011. The petitioners had then approached the Court on 8.12.2001 by filing an application requesting the Court to set aside the ex-parte decree. The said application was accompanied by an affidavit to that effect. The petitioners had also demonstrated before the Court that the purported consent terms were not legal and the same was filed only to frustrate the sale deed between the defendant No.1 and the added defendant Nos. 4 and 5 since the property was sold by defendant No.1 during the pendency of the suit. It was also urged that in fact, the defendant No.1 had the knowledge that the suit is pending in respect of the said property and had sold the property to the added defendants, thereby cheating them. The notices were issued to the

original plaintiff and defendant Nos. 1 to 3. They had filed their reply and had submitted that in fact the suit was decreed on merits also besides the consent terms and, therefore, since the petitioners had voluntarily chosen to remain present and not prosecute the suit, the said ex-parte decree cannot be set aside. On 21.7.2012, the learned Civil Judge, Senior Division, Jaysingpur, had rejected the said application.

7. The petitioners were constrained to file Writ Petition No.9544 of 2012 before this Court challenging the order passed by the learned Civil Judge, Senior Division, Jaysingpur without assigning any justifiable reasons. This Court by an order dated 3.7.2013, had directed the parties to appear before the trial Court on 15.7.2013 and had directed the Court to decide the issues on or before 31.7.2013. The execution proceedings were stayed till the disposal of the application filed under Section 5 of the Limitation Act as well as under Order IX Rule 9 of the C.P.C.

8. The learned Civil Judge, Senior Division, Jaysingpur had taken up the matter for hearing. The impugned order is dated 31.7.2013. The learned counsel for the petitioners vehemently submit that the learned Civil Judge has failed to consider the sufficient cause shown by the petitioners for the delay caused in filing the application seeking the relief of setting aside the ex-parte decree and, therefore, the same has resulted in

miscarriage of justice. The learned Court has also considered that Vakilpatra of the Advocate Mr. Magdoo was on record. That after filing of the written statement, they had not taken any step to prosecute the said suit, although it was their legal and bounden duty to keep their Advocate present or at least to communicate with their Advocate. It appears from the impugned order that the petitioners had not acted diligently. In fact, the petitioners are in possession of the suit properties since the date of the sale deed executed between the defendant No.1 and defendant Nos. 4 and 5. It is also considered that Rajgoonda Appa Wadge had expired on 16.6.2003 i.e. even prior to the matter being transferred to the Court of Civil Judge, Senior Division, Jaysingpur. It is also considered that the summons were duly served upon the respondents and they had also caused their presence. Even after the matter was transferred, the Vakilpatra of Advocate Magdoo was continued by the petitioners. It was admitted by the petitioners that from 2004 to 2011, he and his brother Narasgonda had not even attended the Court at Jaysingpur nor made any enquiries about the proceedings in the suit. A notice was sent to the petitioners' Advocate Mr. Jamadar. The said notice was replied through Advocate Kalyanwar on behalf of the petitioners on 29.7.2010 which is on record at Exh.29. The petitioner No.1 was cross-examined by the plaintiff on 33.7.2013 and it is

admitted that they had received the notice in October, 2011. It is specifically admitted by the petitioner No.1 that Advocate Magdoom had filed Vakalatnama on their behalf on 17.9.2009 i.e. hardly 1-1/2 year prior to the passing of the judgment and decree. It would clearly indicate that they were in contact with their Advocate till September 2009. It was in view of this, the evidence on behalf of the petitioner No.1 that the learned Civil Judge has rightly rejected the application for stay and condonation of delay by the impugned judgment. The reasons assigned by the learned Judge call for no interference.

9. The learned counsel for the petitioners vehemently submits that in the interest of justice, the suit ought to have been revived and the issues ought to have been kept open. In fact, the petitioners were not without any remedy and the said judgment and decree could have been challenged by way of filing an appeal before the District judge. However, the petitioners have chosen to file Writ Petition before this Court.

10. It appears that the petition was filed on 9.10.2013 and the CMIS date was 6.1.2014 on which date the learned counsel for the petitioners had sought an adjournment. Due to paucity of time, the matter could not reach. Finally, on 8.4.2014, this Court (Coram: R.M.Savant, J.) had issued notice to the respondents, returnable on 29.4.2014 and had

granted ad-interim relief in terms of prayer clause (b). i.e. the execution of the decretal part of the suit against respondent Nos. 4 and 5 was stayed. Thereafter, on 25.3.2014, the matter was adjourned at the request of the learned counsel for the petitioners. The respondent i.e. original plaintiff had filed his appearance. The matter was adjourned by consent on a few occasions and therefore due to paucity of time, the matter could not be disposed of finally.

11. In a suit of 2004 in which the judgment and decree is passed in February 2011, it would not be appropriate to revive the status of the suit and keep the issues open. Since the impugned order does not call for any interference by this Court, I am inclined to dismiss the petition as being sans merits.

12. The learned counsel for the petitioners submits that it is not the case that the petitioners are without any remedy and they will prefer First Appeal before the District Judge at Jaisingpur. This Court cannot be oblivious of the passage of time, the time spent in this Court and therefore, delay if any in filing the appeal needs to be condoned.

13. The learned counsel for the respondents vehemently opposed that the time spent in prosecuting this Writ Petition deserves to be condoned in the eventuality that the appeal is filed on or before 30.11.2017. The

learned counsel for the petitioners submits that the petitioners would challenge the ex-parte decree by filing appropriate proceeding by way of First Appeal before the District Judge in execution of the decree for stay till 30.11.2017. The petitioners shall file an application seeking condonation of delay challenging the order passed in this Writ Petition with the Memorandum of First Appeal and the learned District Judge shall consider the First Appeal on its own merits as the petitioners have a statutory right to file an appeal against the impugned judgment and order. The learned District Judge shall also consider that the execution of the decree was stayed by this Court vide order dated 8th April, 2014 and the same was in force till today. The same may be considered while considering the application seeking stay to the execution of the decree. The learned counsel for the respondents submits that the respondents would be at liberty to file an application seeking expeditious hearing of the appeal and the same shall also be considered on its own merits.

14. With these observations, the Petition stands dismissed. Rule is discharged. The order dated 8.4.2014 passed by this Court shall remain in force till 5.12.2017.

[SMT. SADHANA S.JADHAV, J.]