

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

WRIT PETITION NO.13083 OF 2016

Shri Ghanshyam Laxmanseth Alshi ...Petitioner
vs.
Smt. Pratibha Ramgopal Aishi & Ors. ...Respondents

Mr. Ajai Fernandes a/w Mr. Mohan Salian & Mr. Sadanand Shetty
i/b MSG Legal for the Petitioner.
Mr.Yogesh Dabke for the Respondent Nos.1 to 12 & 14 to 17.

**CORAM : R.G.KETKAR, J.
DATE : 23rd FEBRUARY 2017.**

P.C.:

. Heard Mr. Fernandes, learned counsel for the
Petitioner and Mr.Yogesh Dabke, learned counsel for the
Respondent Nos.1 to 12, 14 to 17.

2. Mr. Fernandes orally seeks leave to delete rest of the
Respondents on the ground that the Respondents No.1 to 12, 14
to 17 are the only contesting Respondents. Leave as prayed for is
granted. Amendment shall be carried out forthwith.

3. By this petition under Article 227 of the Constitution
of India, the Petitioner (hereinafter referred to as the Defendant
No.1) has challenged the judgment and order dated 24/8/2016
passed by the learned Civil Judge Senior Division, Link Court,
Bhiwandi below Exhibit 5 in Miscellaneous Application
No.217/2014 filed by the Defendant No.1 for staying the
execution and operation of the ex-parte decree dated 7/11/2008

passed by learned 2nd Joint Civil Judge, Senior Division, Thane in Spl. C.S. No.304/2001, pending Application at Exh.1 filed by the Defendant No.1 for condonation of delay in filing application under Rule IX Order 13 for setting aside the ex-parte decree.

4. Rule. Mr. Dabke waives service. Having regard to the narrow controversy raised in the petition as also at the request and by consent of the parties rule is made returnable forthwith and the petition is taken up for final hearing.

5. In support of this petition, Mr. Fernandes submitted that the learned Trial Judge was not justified in deciding the Application Exhibit 5 without first deciding the Application Exhibit 1. Defendant No.1 has filed an Application Exhibit.1 for condonation of delay in filing an Application under Order IX Rule 13 for setting aside the ex-parte decree. He submitted that without first considering the Application for condonation of delay Exhibit 1, the learned Trial Judge was not justified in passing the impugned order. He submitted that by Application Exhibit 1, the Defendant No.1 has prayed for condonation of the delay of 149 days in terms of prayer clause (a) as also for stay of the execution of the ex-parte decree in terms of prayer clause (b).

6. Mr. Dabke for the Respondents supported the impugned order. He invited my attention to paragraphs No.14 and 16 of the impugned order wherein the learned Trial Judge found that that no case was made out by the Defendant No.1 for

condoning the delay. He further submitted that the delay is of more than 5 years and not of 5 months as claimed by the Defendant No.1. He submitted that the Defendant No.1 was represented by a Advocate in the Trial Court. In other words, the Defendant No.1 was duly served with the suit summons and, therefore, an application under Order IX Rule 13 has to be made within 30 days from 7/11/2008 being the date of passing of the decree.

7. 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 No.1 has filed an Application under Order IX Rule 13 of C.P.C. on 20/3/2014 for setting aside the ex-parte decree passed on 7/11/2008. Defendant No.1 has filed Application Exh.1 for condonation of the delay as also for staying the execution of the said ex-parte decree on 20/3/2014. According to the Defendant No.1, he acquired knowledge of passing of ex-parte decree on 22/10/2013 and, therefore, there is delay of 5 months. As against this, it is a case of the Respondents that there is delay of 5 years and 5 months.

8. I need not go into this aspect. The question that falls for consideration is whether the learned Trial Judge was justified in deciding Application Exh.5 for stay without first deciding the application for condonation of delay. In fact, while deciding the Application Exh.5, the learned Trial Judge also dealt with the

question of condonation of delay in paragraphs 14 and 16. The learned Trial Judge has virtually decided Application Exhibit 1 filed by the Defendant No.1 for condonation of delay.

9. In my opinion, the learned Trial Judge was not justified in finally disposing of the Application Exhibit 5 without first deciding Application Exhibit 1. Unless the learned Trial Judge condones the delay, he will have no jurisdiction to decide Application below 5. On this ground alone, the impugned order is liable to be set aside and, is accordingly set aside. The Petition is allowed on the following terms:

- i) The impugned order dated 24/8/2016 is set aside;
- ii) The learned Trial Judge shall decide Misc. Application No.217 of 2014 filed by the Petitioner for condoning the delay. While deciding that Application, the learned Trial Judge shall consider the prayer clauses (a) and (b) made therein;
- iii) As the Petitioner has already prayed for stay of execution of the decree in terms of prayer clause (b) in application Exhibit 1, the Application Exhibit 5 does not survive and the same stands disposed of accordingly;
- iv) The department is directed to transmit the R & P forthwith to the Trial Court;

v) The parties agree that they will appear before the Trial Court on 16/3/2017 and for that purpose no fresh notice be issued to them. The learned Trial Judge is requested to decide the application for condonation of delay within 4 weeks from the date of appearance of the parties;

vi) All the contentions of the parties on merit are expressly kept open.

(R.G.KETKAR, J.)