

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 602 OF 2016
IN
WRIT PETITION NO. 9242 OF 2012

Baban Tukaram Virkar .. Applicant
(Ori. Respondent No. 1)

In the matter of :

Shavir Francis Wegas -

since deceased through legal heirs

Sau. Santana Antona Fernandes & Anr. .. Petitioners

vs.

Baban Tukaram Virkar & Ors. .. Respondents

Ms. Nirmala Bhosale for Applicant in CA.

Mr. Rohit Joshi i/b. Ms. Gauri Godse for Petitioners in WP.

CORAM : M. S. SONAK, J.

DATE: 27 JUNE 2017

P.C :

1] Heard Ms. Bhosale for the applicant in civil application and Mr.

Rohit Joshi i/b. Ms. Gauri Godse for the petitioners in writ petition.

2] By this civil application, the applicant, seeks for the following

relief :

“(a) that this Hon'ble Court be pleased to condone the delay in depositing the amount of Rs.75000/- as per the order dated 16.04.2015 passed by His Lordship Mr. Justice M. S. Sonak and allow the Applicant to deposit the said amount of Rs.75000/- as per the said order dated 16.04.2015 and allow the Applicant to file its Written Statement proceed Regular Civil Suit No. 15 of 2012 (Old Special Civil Suit No. 121 of 2007) on merits.”

3] This Court, by order dated 16th April 2015 had permitted the applicant herein to file written statement subject to payment / deposit of costs of Rs.75,000/- within a period of four weeks from the date of intimation of the order.

4] Admittedly, the amount of costs of Rs.75,000/- were not deposited by the applicant within the prescribed period, even though, the material on record, suggests that the applicant, was intimated of the order through his Advocate who was appearing before the trial Court.

5] The applicant, by way of this civil application, has however stated that the applicant suffered from slip disk and spondylitis and was unable to move from his home. It is submitted that it is for this reason that the applicant could not even attend the proceedings before this Court when writ petition no. 9242 of 2012 was disposed by order dated 16th April 2015.

6] In the civil application it is also pointed out that there was a communication gap between the applicant and his Advocate appearing before the trial court. This is expressed in paragraphs 6 and 7 of the civil application, which reads thus :

"6. That the said Advocate who had represented the Applicant before the Trial Court on receiving the said notice immediately asked her clerk to contact Applicant but failed to contact for which the said Advocate personally remain present on 16-10-2015 before Trial Court. However, as on the said date the Trial Court was not sitting for which the said Advocate only collected date of 20-11-2015 in order to communicate the same to Applicant and accordingly, the said Advocate representing the Applicant in Trial Court immediately send her clerk to the address of the Applicant wherein for first time it came to know that the Applicant was suffering from slip disk and spondylitis since February 2013 for which he could not keep track of the above said matter. However, on 20-22-2015 as the Advocate appearing for Applicant was in personal difficulty for which she asked Applicant to attend the matter personally and the Applicant thereafter on telephonic call informed the said Advocate that the mater is now kept on 04-12-2015.

7. That however, on 04-02-2015 when the Advocate appeared before Hon'ble Trial Court wherein it was made to the knowledge by the Hon'ble Trial Court of passing the order dated 16-04-2015 passed by His Lordship Mr. Justice M.S. Sonak and as the Applicant had not complied with the said order dated 16-04-2015 for which the Hon'ble Trial Court by its order dated 20-11-2015 dismissed Exh.103. Hereto annexed and marked Exhibit "C" is the copy of the said order dated 20-11-2015."

7] It is further the case of the applicant that on account of the aforesaid, there was some delay in depositing costs of Rs.75,000/-. The applicant, applied to the learned trial Judge for extension of period to deposit the costs. However, the learned trial Judge observed that since the order dated 16th April 2015 is a self operative order, the trial court, was powerless to extend the time. Soon thereafter, i.e. on 16th December 2015, the present civil application came to be taken out.

8] Ms Bhosale, learned counsel for the applicant submits that the delay in deposit of costs was for reasons beyond the control of the applicant. She points out that the delay was for sufficient cause and *bona fide*. She submits that the applicant will now pay costs of Rs.1,00,000/- instead of Rs.75,000/- awarded by this Court in the order dated 16th April 2015, if, this Court, considers grant of extension.

9] Mr. Joshi, learned counsel for the original respondent no. 1 submits that the order dated 16th April 2015 was a self operative order. He submits that opportunities were granted to both, the applicant as well as his Advocate but despite such opportunities, there was a default. He points out that for reasons attributable to the applicant, the proceedings in the suit have been inordinately delayed. He submits that the present application may be dismissed with costs.

10] Upon due consideration of the submissions made by the learned counsel for the parties, and upon perusing the civil application, and the reply thereto, this is a case where some further indulgence can be granted to the applicant. The applicant, has explained the circumstances arising out of the status of his health as also the communication gap between him and his Advocate

before the trial court. The applicant, had in fact, offered to deposit the amount of Rs.75,000/- by way of costs, though, after some delay. Thereafter, the applicant, did apply to this Court for extension of time. No doubt, the grant of such indulgence will occasion some prejudice to the respondent no. 1. However, such prejudice, in the facts and circumstances of the present case, be compensated by award of increased costs, which the applicant has offered to pay. In fact the learned counsel for the applicant states that the demand draft in an amount of Rs.1,00,000/- is ready and can be paid at this instant.

11] Upon cumulative consideration of the aforesaid, the civil application is allowed. The applicant to pay costs of Rs.1,00,000/- to the respondent no. 1. Learned counsel for original respondent no. 1, on basis of instructions from the respondent no. 1, accepts the demand draft in an amount of Rs.1,00,000/- now tendered by the learned counsel for the applicant.

12] The learned trial court to take on record the written statement of the applicant, if, the same is filed within a period of two weeks from today. It is made clear that there will be no further extension in this regard. Upon written statement being filed, the learned trial Judge is directed to dispose of the suit as expeditiously as possible

and in any case within a period of nine months from today.

13] The civil application is disposed of in the aforesaid terms.

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

(M. S. SONAK, J.)

Chandka