

Mr. Sanjay @ Sanjiv Ishwarlal Desai | Petitioner

Vs.

Mr. Naishad Mehta(since deceased)

1a. Mrs. Asha Naishadh Mehta and others.] Respondents

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Mr. Jaydeep Deo, for petitioner.

Mr. Atul G. Damle, Sr. Advocate a/w Ashish J. Dubey, for
Respondents No.1(a) to 1(c).

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CORAM : R.G. KETKAR, J.

DATE : 1ST MARCH, 2018.

P.C.

Heard Mr. Deo, learned Counsel for the petitioner and Mr. Damle, learned Senior Counsel for respondents No.1(a) to 1(c).

2. On the oral application made by Mr. Deo, leave to delete respondent No.2 is granted. Amendment shall be carried out forthwith.

3. Rule. Mr. Dubey waives service on behalf of respondents No1(a) to 1(c) . Having regard to the narrow controversy raised in the Petition and at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 15th January, 2018 passed by the Appellate Court of Small Causes Court, Bandra in MARJI Application No.46 of 2017 in Appeal No. 318 of 2006 arising out of R.A.E. Suit No. 262/571 of 1999. By that order, the Appellate Court rejected the application filed by the petitioner for setting aside the order dated 26th April, 2017, whereby the Appeal came to be dismissed.

5. Matter was heard on 27th February, 2018. Assurance given by Mr. Deo that the petitioner will deposit costs of Rs. 10,000/- in this Court on or before 28th February, 2018 was recorded. Mr. Deo submits that the petitioner has complied the order by depositing Rs. 10,000/- on 28th February, 2018.

6. A perusal of the record shows that the petitioner had filed Application Exhibit 32 for framing additional issues and remanding the matter to the trial Court. After hearing both the sides, the Appellate Court rejected the application and imposed costs of Rs. 5000/- payable to the contesting respondent No.1. Costs was to be paid or deposited within 15 days. After compliance of the costs, the matter was ordered to be fixed for final hearing.

7. The petitioner did not deposit costs of Rs. 5,000/- and filed Application Exhibit 33 on 26th April, 2017 for setting aside the order of dismissal and permitting him to deposit costs. On the same day, the Appellate Court allowed the petitioner to deposit costs subject to additional costs of Rs. 5000/-. The petitioner was directed to deposit in all costs of Rs. 10,000/- on the same day. As the petitioner could

not deposit costs on the same day, the appeal was dismissed in default on 26th April, 2017. Mr. Deo submitted that the appeal was dismissed at 5.00 p.m when he was ready to deposit costs. The petitioner, therefore, filed application Exhibit 34 on the same day for setting aside order of dismissal and seeking permission to deposit costs of Rs. 10,000/-. The Appellate Court passed the impugned order on the ground that the appeal was already dismissed.

8. The petitioner thereafter filed MARJI Application No.46 of 2017 in April, 2017 for setting aside order dated 26th April, 2017 dismissing the appeal in default. By the impugned order, the Appellate Court rejected the application. As noted earlier, the petitioner has deposited costs of Rs. 10,000/-in this Court within the stipulated period.

9. In view thereof, the impugned order dismissing the appeal in default is set aside, Appeal No. 318 of 2006 along with interim order is restored to file of Appellate Court of Small Causes Court at Bandra. As the Appeal was fixed for final hearing, the Appellate Court is requested to decide the appeal within four weeks from production of this order. Rule is made absolute accordingly. Parties including the Appellate Court to act upon authenticated copy of this order.

[R.G. KETKAR, J.]