

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2485 OF 2018

Shri. Lalji P. Gogri (since deceased)

Thorugh L.R

1-A. Mr. Ritin Lalji Gogri

...Petitioner

Versus

Hastimal C. Bedsa

...Respondent

....

Mr. Raj Patel i/b. K.P. Tiwari & Co. Advocate for the Petitioner.

Mr.D. Brijesh, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 05th MARCH, 2018

PC.

1. Heard Mr. Raj Patel, learned counsel for the petitioner and Mr.D. Brijesh, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 6.2.2016 passed by the learned Judge, Court Room No.8 of the Court of Small Causes at Mumbai in Marji Application No.649/2013 arising from R.A.E. & R. Suit No.500/850 of 2001 as also the judgment and order dated 13.2.2018 passed by the Appellate Bench of the Small Causes Court in Marji Application No.216/2017 in Appeal (St.) No.875/2017. By order dated 6.2.2016, the learned trial Judge rejected the application

made by the petitioner for condonation of delay in filing application under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for setting aside the exparte decree dated 30.9.2005 passed by the learned trial Judge.

3. Aggrieved by that decision, the petitioner instituted appeal before the Appellate Bench of the Small Causes Court. Pending that appeal, the petitioners took out Marji Application No.216/2017 for condonation of delay in filing the appeal. By order dated 13.2.2018, the Appellate Court rejected the application. It is against these two orders, the petitioner has instituted present Petition.

4. In support of this Petition, Mr. Patel has taken me through the Marji Application No.649/2013 and in particular paragraph-9. He submitted that the petitioner's father Lalji was originally impleaded as defendant. He was the eldest member of the family. The petitioner's father was not in a condition to attend the Court on regular basis and was unable to keep track of the matter. The petitioner's father was a heart patient and was not keeping good health. He was required to undergo various medical tests in order to cure his illness. He was also advised to move out of Mumbai. Due to medical problems he was mostly confined at his native place from the period 2005 to 2010. His

father used to visit Mumbai seldomly and only for obtaining treatment for his medical problems. He came to Mumbai in October for Diwali of 2010 and expired on 18.11.2010.

5. Mr. Patel submitted that on 23.9.2011 petitioner's wife received application for joining him as the proposed respondent in Execution Application. She, however, forgot to give that application. Only on 1.7.2013, she handed over said application to him. In other words, the petitioner acquired knowledge about the execution proceedings for the first time on 1.7.2013. He, therefore, submitted that the learned trial Judge should have considered the application for condonation of delay liberally in filing Marji application for setting aside exparte decree.

6. Mr. Patel submitted that after the trial Court rejected the application on 6.2.2016, the petitioner filed appeal and as there was delay in filing the appeal, he took out application for condonation of delay. The application was also rejected by the Appellate Court. He submitted that by dismissing the applications for condonation of delay, the exparte decree stands confirmed against the petitioner. The decree is not passed on merits and is passed on technical ground. In order to do substantial justice between the parties, the impugned orders may be set

aside and the delay in filing Marji application for setting aside exparte decree may be allowed and the proceedings under Order IX Rule 13 of C.P.C. may be decided on its own merits.

7. On the other hand, Mr. Brijesh submitted that the petitioner did not challenge the order dated 6.2.2016 in Appeal (St.) No.875/2017. He submitted that the petitioner challenged only the exparte decree dated 30.9.2005. On merits, he submitted that no case is made out for interfering with the impugned orders.

8. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the record indicates that in the suit instituted by the respondent, the petitioner's father Lalji was served. In fact it is the case of the petitioner that he could not appear in the suit as his late father was looking after the matter. It is not in dispute that the exparte decree was passed on 30.9.2005. There is no explanation as to why the petitioner's father was prevented from participating in the suit as also filing written statement. Be that as it may. Exparte decree was passed on 30.9.2005. The petitioner's father died on 18.11.2010.

9. There is no explanation as to why the petitioner's father could not file appeal during his lifetime. Though the explanation is sought to

be given in paragraph-9 of the Marji Application No.649/2013, no documents substantiating the contentions raised in paragraphs-9(a) and (b) were placed on record.

10. That apart, it has also come on record that copy of the application for impleading the petitioner as defendant in execution application was received by his wife on 23.9.2011. The petitioner claims that she handed over copy of the application on 1.7.2013. The Courts below rightly found no substance in that contention.

11. Not only that after the application was rejected on 6.2.2016, the petitioner did not file appeal within the prescribed time and took out application for condonation of delay of 475 days. A perusal of the application for condonation of delay does not disclose any reason much less any sufficient reason for condoning the delay. In other words, the petitioner was indolent in prosecuting the proceedings.

12. The Courts below were, therefore, justified in rejecting the applications. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)