IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4054 OF 2018

Tejas G. Ajugia and others … Petitioners
Vs.
Sethi Builders … Respondent

Mr. A. Y. Sakhare, Senior Advocate a/w. Mr. Vijaykuar S. Shetty for Petitioners.
Ms N. A. Bharwani i/b. Mr. Rupesh Karia for Respondent.

**CORAM : R. G. KETKAR, J.**
**DATE : APRIL 5, 2018**

**P.C.** :

Not on Board. At the request of Mr. Sakhare, taken up for admission.

2. Heard Mr. Sakhare, learned Senior Counsel for the petitioners and Ms Bharwani, learned Counsel for the respondent at length.

3. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the order dated 05.02.2018 passed by the learned Judge, Court Room No.32 of the Court of Small Causes at Mumbai (Bandra Branch) below exhibit-49 in T.E. & R. Suit No.75/95 of 2003. By that order, the learned trial Judge allowed the application exhibit-49 and set aside the order dated 27.02.2009 passed below exhibit-23 subject to payment of costs of Rs.2,000/- by the respondent, hereinafter referred to as 'plaintiff'.

4. In support of this Petition, Mr. Sakhare submitted that defendant No.6 filed application exhibit-23 under Order XII, Rules 1 and 6 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for dismissing the Suit

instituted by the plaintiff. The plaintiff sought time for filing repoly on various dates. However, plaintiff did not file reply. On 27.02.2009, the learned trial Judge passed the following order:

> " ORDER
> This application is pending since long.
>
> No say filed by the plaintiff. Today advocate for the defendant to argue the application. The case is very old one. This application is kept for order on next date as defendant failed to argue this application. Advocate for plaintiff present if he want to make any legal submission on this application, he may do it today itself.
>
> 27.02.2009 sd/-
> Judge "

5. He submitted that plaintiff filed application exhibit-49 on 28.07.2017 for setting aside the order dated 27.02.2009 and for permitting the plaintiff to file reply to the application exhibit-23. Defendant No.6 filed reply dated 27.09.2017 opposing the application. By the impugned order, the learned trial Judge has allowed the application and set aside the order dated 27.02.2009 subject to payment of costs of Rs.2,000/-. He submitted that there is a delay of 8 years and 5 months in taking out the application for setting aside the order dated 27.02.2009. He has invited my attention to paragraphs 2 and 3 of the application exhibit-49 as also paragraph 8 of the impugned order. He submitted that no sufficient cause is made out for condoning the huge delay of 8 years and 5 months in filing the application exhibit-49 for setting aside the order dated 27.02.2009. He, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Ms Bharwani supported the impugned order. She submitted that defendant No.6 has received cost of Rs.2,000/- on 23.02.2018. Reply filed by the plaintiff is also taken on record. She, therefore, submitted that no case is made out for interfering with the

impugned order.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, defendant No.6 has filed application exhibit-23 under Order XII, Rules 1 and 6 of the C.P.C. for dismissal of the plaint. It further appears that plaintiff sought time on various occasions for filing reply. On 27.02.2009, the learned trial Judge passed order below exhibit-23. I have already extracted that order in the earlier part of this order. A perusal of that order does not indicate that the learned trial Judge passed the conditional order to the effect that plaintiff is precluded from filing say to the application exhibit-23.

8. Mr. Sakhare submitted that parties proceeded on the footing that the learned trial Judge has not permitted the plaintiff to file reply to application exhibit-23 and accordingly application exhibit-49 was made. I have perused paragraphs 2 and 3 of the application as also the order dated 27.02.2009 below exhibit-23. A fair reading of the order does not even remotely indicate that the learned trial Judge precluded the plaintiff from filing say. All that the learned trial Judge recorded on 27.02.2009 is that no say was filed. It does not mean or it does not imply that the learned trial Judge precluded the plaintiff from filing reply. In view thereof, basically application exhibit-49 filed by the plaintiff for setting aside the order dated 27.02.2009, itself, was misconceived as the order was not conditional. That apart, perusal of paragraph 8 of the impugned order also shows the developments that took place pending application at exhibit-23. It is also not disputed that application exhibit-23 was filed by the defendant No.6 on 06.05.2006 and till date, the same is pending.

9. That apart, it does not appear that defendant No.6 accepted the

costs of Rs.2,000/- under protest or without prejudice to the rights and contentions. In other words, defendant No.6 accepted the costs. For all these reasons, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed.

7. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

**(R. G. KETKAR, J.)**

*Minal Parab*