

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9989 OF 2015

Shesh Narayan Ram Murat Mishra through his
Constituted Attorney Umesh Shesh Narayan Mishra ... Petitioner
Vs.
Rajiv Hansraj Savla and others ... Respondents

Mr. V. E. Pereira for Petitioner.
Mr. Mohit Bhansali i/b. Mr. S. C. Kekane for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 8, 2018

P.C. :

Heard Mr. Pereira, learned Counsel for the petitioner and
Mr. Bhansali, learned Counsel for the respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the judgment and order dated 13.08.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in 2(b)(iv) Miscellaneous Appeal No.467 of 2014. By that order, the Appellate Court allowed the appeal preferred by respondents No.1 to 4 herein and quashed and set aside the order dated 18.03.2014 passed by the learned trial Judge, Court Room No.23 of the Court of Small Causes at Mumbai in Marji Application No.237 of 2013. The Appellate Court allowed the Marji Application and set aside the judgment and decree dated 13.03.2012 passed by the learned trial Judge in R.A.E.&R. Suit No.652/1181 of 2004. The matter was remitted to the trial Court for fresh trial under Order XLI, Rule 21-A of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. By order dated 29.06.2016, notice was issued to respondents No.2 to 4 for final disposal. Office remark shows that respondents No.2 to 4

are duly served. Despite service, they have neither appeared nor entered appearance. Rule. Mr. Bhansali waives service for the respondent No.1. In view of the orders dated 29.06.2016 and 08.08.2016, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. Respondent No.1 filed Marji Application No.237 of 2013 under Order IX, Rule 13 of C.P.C. in March 2013 for setting aside ex-parte decree dated 13.03.2012. In unnumbered paragraph 3, respondent No.1 contended that after adding him as defendant No.1(a), he had prepared written statement and affirmed on 10.03.2010. He filed application for condonation of delay of 41 days on the same day. In unnumbered paragraph 4, it was contended that due to demise of his mother and business problem, he and his family are mentally disturbed. His only son left home forever for joining the organization of Jain monks. This shattered all his dreams and due to his poor health, he is suffering from depression. His wife is in continuous touch and contact with his Advocate Ms A. G. Ganatra who told him that she will regularly attend the Court and assured him not to worry about case and that she would take proper care. Respondent No.1 relied upon the medical certificate dated 11.03.2013 issued by Dr. B. N. Vora indicating that respondent No.1 is under his care since August 2010.

5. The Constituted Attorney of plaintiff, Mr. Umeshchandra Shesh Narayan Mishra filed reply opposing the Marji application. Affidavit in rejoinder was filed by the respondent No.1. Affidavit in surrejoinder was also filed. After considering the material on record, by order dated 18.03.2014, the learned trial Judge rejected the application. In paragraph 13, the learned trial Judge dealt with the medical certificate dated 11.03.2013 issued by Dr. B. N. Vora. The learned trial Judge disbelieved that certificate on two grounds. Firstly, the certificate is issued by a physician and not a psychiatrist and secondly, though respondent No.1

has taken treatment for long time, he did not produce the medical papers. The learned trial Judge, therefore, did not accept the contention about illness and family problems of the respondents. Aggrieved by that decision, respondents No.1 to 4 preferred Miscellaneous Appeal. By the impugned order, the Appellate Court allowed the appeal, as indicated earlier. In paragraph 16, the Appellate Court dealt with medical certificate dated 11.03.2013 and observed that the reasons given by the defendant is supported by the medical certificate. A perusal of the impugned order does not indicate that the Appellate Court recorded any finding as regards production of medical papers in support of the contention of the respondent No.1 that as he is suffering from depression since August 2010, he was taking medical treatment. The impugned order does not record production of medical papers to substantiate the claim of the respondent No.1 to that effect.

6. During the course of hearing, Mr. Bhansali submitted that application was filed before the Appellate Court for permission to produce medical papers to substantiate that respondent No.1 is taking treatment since August 2010. The impugned order does not refer to any such application. Be that as it may. The Appellate Court relied upon the medical certificate dated 11.03.2013 and accepted the case made out by the defendants. In my opinion, the Appellate Court was not justified in solely relying upon the medical certificate when it records that respondent No.1 is under treatment since August 2010. Respondent No.1 ought to have produced medical papers to substantiate the said aspect. On this ground alone, the impugned order cannot be sustained, and as such, is liable to be set aside and the Miscellaneous Appeal deserves to be restored to the file of the Appellate Court for deciding it afresh. The Appellate Court will also verify whether in fact written statement affirmed on 10.03.2010 is filed on record. If at all respondent No.1 has filed any application seeking permission to produce documents in the

Appellate Court, the same shall also be disposed of along with the appeal keeping in mind the parameters laid down under Order XLI, Rule 27 of C.P.C. Hence, the following order:

- a. Impugned order dated 13.08.2015 is set aside and 2(b) (iv) Miscellaneous Appeal No.467 of 2014 is restored to the file of the Appellate Court for deciding it afresh;
- b. Parties assure that they will appear before the Appellate Court on 20.08.2018 and for that purpose, no fresh notice be issued to them;
- c. The Appellate Court shall fix the suitable date and is requested to dispose of the appeal within 8 weeks from fixing such suitable date;
- d. All contentions of the parties on merits are expressly kept open;
- e. The petitioner is permitted to withdraw the amount deposited by the respondent in the Small Causes Court, unconditionally;
- f. Rule is made absolute in the aforesaid terms with no order as to costs.

7. All parties to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

Minal
Sandip
Parab

Digitally signed
by Minal
Sandip Parab
Date:
2018.08.08
08:14:34 +0400

Minal Parab