

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5465 OF 2015

Shri Bhaga Bala Holgunde and Anr. ... Petitioners

Vs

Shri Nanabhau Kisan Thorat ... Respondent

...

Mr. Jaydeep Deo for the Petitioners.

Mr. Vilas B. Tapkir for the Respondent.

CORAM : SANDEEP K. SHINDE J.

DATE : JULY 8, 2019

P.C. :

Heard.

2 The petitioners were the defendants in the Special Civil Suit No.473 of 2004 instituted by the respondent (plaintiff) for specific performance of agreement dated 15th May, 1998 then executed by the defendant no.1 in favour of plaintiff for total consideration of Rs.1,35,000/-. It is the plaintiff's case that defendant no.1 sold the suit property to defendant no.2 vide sale deed dated 5th January, 2004 and, therefore, besides decree for specific performance of the agreement dated 15th May, 1998, sought

declaration that the sale deed dated 5th January, 2004 is not binding on him. Suit was instituted on 19th April, 2004.

3 Though the suit summons were served, it appears that the trial Court proceeded with the suit in absence of the defendants and the ex-parte decree was passed on 19th March, 2005.

4 Petitioners thus filed an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 ('CPC' for short) to set aside the ex-parte decree and requested the Court to condone the delay caused in preferring application. It is petitioners' case that though they had engaged advocate Mr. S.S.Lokhande and signed vakalatnama, he neither appeared in the suit nor informed them about ex-parte decree. It is their case that upon receiving notice from the advocate for the plaintiff, they came to know in September, 2005 about the ex-parte decree. It is their case that they had applied for the certified copy and soon thereafter filed an application under Order IX Rule 13 of the CPC along with application for condonation of delay.

5 The learned trial Judge rejected the said application on

25th January, 2010 against which Miscellaneous Civil Appeal No.470 of 2012 was preferred along with an application for condonation of delay of one year and four days occurred in preferring appeal. The learned appellate Court condoned the delay subject to cost of Rs.6,000/- vide order dated 18th September, 2012; however, dismissed the appeal vide order dated 29th January, 2015. Aggrieved by order dated 29th January, 2015, this writ petition is preferred under Article 227 of the Constitution of India.

6 Mr. Deo, the learned counsel for the petitioners, submits that reasons put-forth by the defendants for condoning delay caused in preferring application under Order IX Rule 13 of the CPC were identical, on the basis of which he requested the Court to set aside the ex-parte decree. He has brought to my notice evidence of advocate, who was examined in the proceedings of condonation of delay. In examination-in-chief, witness says that "Today I have gone through the record of the case. It did happen that applicant and his witness came to me, he engaged me as advocate and pays fees as

alleged in the application.”

. It appears that trial Court upon consideration of evidence of the witness, condoned the delay but application for setting aside the ex-parte decree was not entertained. Mr. Deo, therefore, submits that the learned Court was not justified in rejecting the application made under Order 9 Rule 13 of the CPC.

7 Mr. Tapkir, the learned counsel for the respondent, submits that petition deserves no consideration in-as-much as petitioners in the proceedings for condonation of delay caused in preferring Miscellaneous Civil Appeal. has equally alleged that advocate engaged by him did not inform him, that his application for setting aside the ex-parte decree has been dismissed by the trial Court. The learned counsel has also brought to my notice the deed dated 22nd November, 2007 executed by petitioner no.1 in favour of petitioner no.2 during the pendency of the suit. He, therefore, submits that petitioners are interested in protracting the suit proceedings on one count or another and/or in habit of making

allegations against the advocate. It is, therefore, submitted the writ petition may kindly be dismissed.

8 It is not in dispute that identical reasons were put-forth for setting aside the ex-parte decree and for condoning the delay caused in preferring application for setting aside the ex-parte decree. In the proceedings of condonation of delay, plaintiff had examined the witness and upon consideration of his evidence, delay was condoned. However, on the same set of facts, application for setting aside the ex-parte decree has been rejected by the trial Court and appellate Court in Miscellaneous Civil Appeal No.470 of 2012. Admittedly, the order dated 6th September, 2007 whereby delay was condoned has not been carried in the appeal and, therefore, it has attained finality. In view of this fact, both the Courts below were not justified in rejecting the application for setting aside the ex-parte decree.

9 Be that as it may, fact cannot be ignored or overlooked that delay occurred in filing Miscellaneous Appeal proceedings, was sought to be condoned on the ground that their advocate engaged in the proceedings filed for setting aside the ex-parte decree did not inform them the order passed by the learned Trial Court. The same cause/reason was put-forth at the first instance. It cannot be overlooked and ignored that pending suit, petitioner no.1 executed a registered sale deed of the suit property in favour of petitioner no.2 on 22nd November, 2007 and registered it. This conduct of the petitioners, therefore, cannot be ignored and though the impugned order is set aside and the petitioners are permitted to contest the suit on merits, in my view, it is fit case to impose the cost quantified at Rs.35,000/-.

10 That for the reasons stated here-in-above, petition is allowed. The impugned order dated 29th January, 2015 passed by the District Judge, Pune in Miscellaneous Civil Appeal No.470 of 2012 is quashed and set aside and the application below Exhibit 35 filed in

the Court of Civil Judge, Senior Division, Pune in the Special Civil Suit No.473 of 2004 is allowed subject to cost of Rs.35,000/- which the petitioners shall deposit in the Trial Court within four weeks from today. It is made clear that the cost is condition precedent and if it is not deposited within four weeks, petition shall stand dismissed without further reference to this Court. The trial Court shall permit plaintiff to withdraw the said amount unconditionally. Writ petition is allowed in the aforesaid terms and disposed of accordingly. Taking into consideration facts of the case that the suit is pending in the Court since 2004, trial in the suit is expedited.

(SANDEEP K. SHINDE, J.)