

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 968 OF 2015

Sau. Hirabai Bhikaji Payagude

.....Petitioner
(Orig. appellant)

V/s.

Smt. Vatsala Dhondiba Bhosale

....Respondent
(Orig. Defendants)

* * * *

Ms. Manjiri Sharad Parasnis a/w. Ms. Priya Shetty,
Advocate for the petitioner.

Mr. Mandar Limaye, Advocate for respondents no.1 to 4.

Mr. Ajay L. Bhise, Advocate for respondents no.5a to 5c.

CORAM : SANDEEP K. SHINDE, J.

Monday, 17th June, 2019.

P.C. :

1. Petitioner's Special Civil Suit No. 209 of 1982 for specific performance of contract dated 21st May, 1979 was dismissed for default on 4th September, 1997.

2. His application under Order 9 Rule 9 CPC has been rejected by the learned Judge on 3rd October, 2007. This order was carried in Appeal, however, the learned District Judge declined to entertain the Appeal and confirmed the order passed by the learned trial Court. It is against the order passed by the Courts below refusing to entertain the application under Order 9 Rule 9 of the CPC, this petition is preferred under Article 227 of the Constitution of India.

2. Heard learned Counsel for the parties.

3. Both the Courts found that, petitioner has not shown 'sufficient cause' for exercising the discretion under Order 9 Rule 9 Civil Procedure Code. This Court in its supervisory jurisdiction cannot sit in Appeal over the discretion exercised by the Courts below unless it is shown that the order is perverse and contrary to the settled principles of law.

4. Petitioner's suit was dismissed on 4th September, 1997 for default and application was preferred on 3rd October, 1997 i.e. 31st day from the date on which her suit was dismissed. The learned Counsel for the petitioner submits that for a single default, the petitioner cannot be non-suited and therefore the Courts below ought to have adopted a liberal approach while exercising the jurisdiction under Order 9 Rule 9 Civil Procedure Code.

5. It cannot be disputed that, party cannot be non-suited on technical grounds, however, at the same time, one cannot overlook the provisions under Order 9 Rule 9 Civil Procedure Code which contemplates that the party has to satisfy the Court that, there was, 'sufficient cause' for his non-appearance when the suit was called for hearing. In the case in hand, the suit was posted for hearing and therefore in terms of the provisions, the plaintiff was under obligation to disclose 'sufficient cause' for his/her non-appearance.

6. I have perused the application, wherein it is

stated that, the petitioner-plaintiff had appointed her nephew to attend the court proceedings and on 4th September, 1997 the suit was listed for cross-examination of the nephew. It is stated in the application that, her nephew could not remain present due to injury to his leg. This application has been verified by the petitioner. The learned trial Court, as well as, the appellate Courts found that, Sanjay Jagtap, (nephew of the plaintiff petitioner) was neither a power of attorney holder nor was representing the petitioner. More so, if at all, Sanjay Jagtap was representing the petitioner, the petitioner plaintiff ought to have filed Affidavit of Sanjay Jagtap, and placed on record explanation that due to his ill-health, he could not attend the proceedings on 4th September, 1997. It may be stated that, for the first time, the petitioner had produced the Medical Certificate issued by Dr. Avanti Biniwale, certifying that Sanjay Jagtap was admitted in Sassoon General Hospital from 10th January, 2000 to 12th February, 2000. The petitioner's suit was dismissed on 4th September, 1997 and therefore Certificate of Dr. Biniwale was rightly kept out of

consideration by the Appellate Court. Thus, taking into consideration the averments made in the application for restoration of the suit, both the Courts have rightly refused to exercise discretion for want of sufficient cause for restoration of the suit. In my view, the Courts below have not committed any jurisdictional error. That even otherwise, 'sufficient cause' has not been shown at all. In view of the facts aforesaid, no interference is called for. The petition is dismissed.

7. Mr. Bhise, learned Counsel appearing for respondent no.5 undertakes to file Vakalatnama on behalf of respondents no.5(a) to 5(c) who are the heirs of original defendant no.5.

(SANDEEP K. SHINDE, J)