

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Writ Petition No.4286 of 2018

(Anant Kaushalkishor Tiwari .vs. Mahesh Devkisan Sharma and ors.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders.
and Registrar's orders

Mr. N.B. Raut, Advocate for Petitioner.
Mr. Jaideep J. Chandurkar, Advocate for Respondent Nos.1,2, 4 & 5.
Mr. P.S. Gavai, Advocate h/f Mr. S. Alaspurkar, Advocate for
Respondent No.8.

CORAM : Manish Pitale, J.
DATED : March 18, 2019.

By this writ petition, the petitioner has challenged order dated 29.06.2018 passed by the Court of District Judge-7, Amravati (appellate Court) in Misc. Civil Appeal No. 99 of 2018, whereby the appellate Court has refused to condone delay of 8 years 9 months and 23 days on the part of the petitioner in filing first appeal before the appellate Court, as a consequence of which the appeal filed by the petitioner has also stood rejected.

2. The petitioner was defendant no.2 in a suit for declaration, partition and separate possession filed by respondent nos. 1 to 5 (original plaintiffs). In the said suit, the petitioner appeared and filed written statement but thereafter neither his counsel nor he appeared before the Court of Civil Judge, Senior Division, Amravati (trial Court). As a consequence, on 08.06.2009, the trial Court decreed the suit in favour of the said plaintiffs and

against the petitioner and other defendants.

3. It has come on record that on 16.09.2009, the petitioner filed an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (CPC) for setting aside the *ex parte* decree. Even this proceeding was not pursued diligently by the petitioner, as a result of which, on 06.12.2013 the said application under Order 9 Rule 13 of the CPC stood rejected. Thereafter, the petitioner failed to take any steps in the matter and it was only in the year 2018 that the petitioner filed appeal before the appellate Court along with an application for condonation of delay to challenge the judgment and decree dated 08.06.2009 passed by the trial Court. In this application, entire blame was placed on the advocates engaged by the petitioner before the trial Court. There was no reference made to the application under Order 9 Rule 13 of the CPC filed on behalf of the petitioner. The said application for condonation of delay came up for consideration before the appellate Court and by the impugned order dated 29.06.2018, the appellate Court rejected the application for condonation of delay.

4. It has been vehemently contended on behalf of the petitioner in this writ petition that the petitioner ought not to suffer because of the mistake of the counsel and further that if chance was given to contest the matter on merits, it would meet the ends of justice. It was also contended that the petitioner had also filed a complaint against the advocates who represented him in the trial Court. On this basis, it was contended that the

petitioner should not suffer due to the mistakes of his counsel and that the impugned order deserved to be set aside so that the appeal filed by the petitioner could be considered on merits.

5. A perusal of the impugned order in the present case shows that the appellate Court has taken into consideration the sequence of events, as also the position of law as regards the approach to be adopted by the Courts while considering the question of condonation of delay. The appellate Court has found that the petitioner herein deliberately suppressed facts, particularly filing of application for setting aside of *ex parte* order under Order 9 Rule 13 of the CPC and that, therefore, the delay of more than 8 years in filing the appeal did not deserve to be condoned. It is to be examined whether the findings rendered by the appellate Court can be upset on the basis of contentions raised on behalf of the petitioner.

6. A perusal of the application for condonation of delay filed on behalf of the petitioner shows that there is no whisper about the earlier application filed on his behalf under Order 9 Rule 13 of the CPC. Much emphasis has been placed on helplessness of the petitioner in view of the mistakes committed by the counsel engaged by him. But, a perusal of the complaint filed by the petitioner against two advocates before the State Bar Council shows that the complaint is filed not only against the advocate who was representing the petitioner before the trial Court in the

suit but also against the advocate who had filed an application under Order 9 Rule 13 of the CPC. The said complaint seeks to narrate the shock and surprise of the petitioner when he came to know about the mistakes and misdeeds of the said advocates.

7. But, a perusal of the same further fortifies the findings rendered by the appellate Court in the present case that the petitioner was guilty of suppression of facts while seeking condonation of delay. Nothing prevented the petitioner from stating the facts about filing of the application under Order 9 Rule 13 of the CPC and dismissal of the same on 06.12.2013 before the appellate Court while seeking condonation of delay. The entire story that was built up by the petitioner emphasising on the alleged mistakes and misdeeds of the advocates representing him does not inspire confidence. It is strange that the petitioner who had appeared before the trial Court, filed his written statement and engaged advocates, did not care to even once inquire about the true status of the proceedings before the trial Court in the suit or of the subsequent application for setting aside *ex parte* order under Order 9 Rule 13 of the CPC filed by him. In fact, the petitioner feigned ignorance about filing of the application under Order 9 Rule 13 of the CPC, while making allegations against the advocate who filed the same. In this scenario, the appellate Court was justified in disbelieving the contentions of the petitioner that he first became aware about the *ex parte* decree dated 08.06.2009 passed against him when measurement of

the property was sought to be undertaken in the year 2018, in order to remove alleged encroachment of the contesting respondents. The appreciation of the material on record by the appellate Court in the present case cannot be said to be erroneous or that they were rendered perverse due to erroneous appreciation of the material on record. The conclusion rendered by the appellate Court that there was clear suppression of facts by the petitioner in the present case cannot be found fault with and in that backdrop it cannot be said that the appellate Court has committed any error in refusing to condone the delay of 8 years 9 months and 23 days in filing the appeal before the appellate Court.

8. In view of the above, the present writ petition is found to be without merit and it is dismissed.

JUDGE

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