

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

WRIT PETITION NO.5657 OF 2016

Madhavrao Chintaman Kinkhede, Bharat Nagar, Nagpur

-vs-

Kinkhede Layout Plot Owner's Association Ltd. Bharat Nagar Nagpur by Manohar Ramchandra
Waikar and ors.

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

Court's or Judge's Orders.

Shri Masood Shareef, Advocate for petitioners.
Respondents served.

CORAM : A.S.CHANDURKAR, J.

DATE : August 28, 2019

Notice for final disposal has been duly served on all the respondents. On 21/08/2019 as there was no appearance on behalf of the respondents the matter was adjourned with a view to grant one opportunity to the respondents. Accordingly, I have heard the learned counsel for the petitioners by issuing **Rule** and making the same returnable forthwith.

2. The order dated 27/06/2016 passed by the appellate Court in Misc. Civil Appeal No.243 of 2011 thereby dismissing the said appeal is the subject matter of challenge in the present writ petition.

The respondents are the original plaintiffs who had filed R.C.S. No.2351 of 1994 for the relief of declaration of title as

owners along with possession of the suit property. The said suit came to be decreed ex-parte on 30/04/2004. On 21/10/2005 the petitioner-defendant filed an application for condonation of delay in filing the application to set aside the ex-parte decree. The trial Court by its order dated 18/07/2008 condoned the delay of about 500 days by accepting the explanation furnished by the petitioner that the petitioner's counsel could not remain present due to illness of the said counsel's father. That order condoning delay was not challenged by the original plaintiffs. Thereafter the application for setting aside the ex-parte decree was taken up for consideration. The petitioner examined himself at Exhibit-10. No evidence was led by the original plaintiffs. The trial Court by the order dated 22/08/2011 refused to set aside the ex-parte order on the ground that reasons furnished in that regard were not sufficient. The appellate Court dismissed the Misc. Civil Appeal on the ground that since the aspect of delay put forth by the petitioner was already taken into consideration while condoning the delay, the same reason could not be further adjudicated as it would amount to *res judicata*. Being aggrieved the present writ petition has been filed.

3. Shri M. Shareef, learned counsel for the petitioner submitted

that the fact that the delay in moving the application for setting aside the ex-parte decree having been accepted by the trial Court and the very same reasons also having been assigned for setting aside the ex-parte decree, the appellate Court ought to have accepted the same and set aside the ex-parte decree. The petitioner had examined himself and had clearly stated that since his counsel remained absent due to the ailment of the counsel's father, the petitioner as defendant could not be blamed. In that deposition it was also stated that as per the instructions of the counsel the petitioner was not required to contact him frequently. As knowledge of the proceedings was obtained on 03/07/2005 the application was moved immediately after receiving the certified copy which was a sufficient cause for consideration. What was relevant was the period prior to and as on 30/04/2004 and not subsequent thereto. Considering the nature of decree as passed it was submitted that a contest on merits ought to be permitted. He referred to the decision in ***Barkat Ali and anr. vs. Badrinarain (Dead) By LRs (2008) 4 SCC 615*** in support of his submissions.

4. As stated above the respondents have not chosen to contest the writ petition. I have perused the documents on record and I

have given due consideration to the submissions as urged. It is not in dispute that the suit as filed by the respondents was decreed ex-parte on 30/04/2004. The period of delay till 21/10/2005 in making a prayer for setting aside the ex-parte decree has already been condoned. The only relevant question therefore was whether on 30/04/2004 and shortly prior thereto the petitioner was unable to attend the proceedings in the civil suit. From the deposition of the petitioner it is clear that he had instructed his counsel to represent him. However on account of illness of the counsel's father, the said counsel could not remain present in the civil suit. The period after 30/04/2004 having been condoned after accepting the explanation, the said explanation also held good in so far as accepting absence before the trial Court on 30/04/2004 is concerned. The Courts have however given undue importance to the subsequent period and the fact that knowledge was obtained on 02/07/2005 which was much after passing of the ex-parte decree. The delay in that regard having already been condoned, it was not necessary to go into that aspect of the matter. The explanation furnished earlier ought to have been accepted.

5. Accordingly in the light of the deposition of the petitioner it is found that there was sufficient cause for not remaining present

on 30/04/2004 when the ex-parte decree was passed. Accepting the said explanation and subject to the petitioner paying costs of Rs.5,000/- to the respondent-Association within period of four weeks from today, the proceedings in R.C.S. No.2351 of 1994 shall stand restored. After such costs are paid to the respondent-Association the trial Court shall proceed to adjudicate the said suit from the stage of the petitioner's evidence.

Rule is made absolute in aforesaid terms with no order as to costs.

JUDGE