

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

WRIT PETITION NO.395/2019

Shri Ganpat S/o Shiva Vaidya through L.Rs. Chaitram S/o Ganpat Vaidya and
 others

..Vs..

Smt. Tulsabai W/o Tukaram Vaidya

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

Court's or Judge's orders

 Shri P.S. Tiwari, Advocate for the petitioners.
 Shri N.V. Fulzele, Advocate for the respondent.

CORAM : Z.A. HAQ, J.

DATED : 3.7.2019.

Heard.

Regular Civil Suit No.67/1996 filed by the respondent came to be decreed *ex parte* by judgment dated 11th November, 1998. In April 2010, the petitioners had filed an application under Order 9 Rule 13 of the Code of Civil Procedure praying that the *ex parte* judgment and decree be set aside. As there was delay in filing the application under Order 9 Rule 13 of the Code of Civil Procedure, the respondent had filed application praying for condonation of delay. By the impugned order, learned trial Judge has refused to condone delay and has rejected the application filed by the petitioners. According to the petitioners, their predecessor (original defendant) was suffering from lumbar spondylosis and, therefore, could not attend the matter. The petitioners examined Dr. Lende to support their claim that original defendant Ganpat was under treatment during the relevant period. Learned trial Judge has dealt with the

evidence of Dr. Lende in paragraph No.18 as follows:

“18] The second contention of applicant that since 1996 he was suffering from ill health. When he received the summons of R.C.S. No.69/1996 same time he was suffered from disease lumber spondylosis. He was under the treatment of Dr. Moreshwar Lende. The applicant examined Dr. Lende (A.W.4). He deposed that Ganpat Vaidya was his patient since last 15 years. The applicant was suffering from disease of lumbar spondylosis. On 12.4.2010 he was brought by his son in his hospital, he examined him and given medicine to him and issued certificate Exh.80. However, in cross-examination he admitted that before issuing certificate Exh.80 the applicant had been to his hospital since last 15 year for treatment. While treating the applicant he had not taken his medical test to find out his disease. He further admitted that when he closed his hospital at Salwa the applicant had been to his hospital at Kuhi. Sometime he came alone in hospital and sometime along with his son. From the testimony and admission of concern Doctor, it is clear that the applicant was suffering from ill health, but he was not bedridden. His disease was not serious to prevent him to come at Court.”

Explanation given by the petitioners on the ground of ill health of original defendant - Ganpat is rightly rejected by the learned trial Judge, as evidence brought on record by the petitioners is not sufficient to hold that the original defendant - Ganpat was suffering from such illness and that he was not able to move or attend the proceedings before Court.

Another submission on behalf of the

petitioners is that the present petitioners, who are legal heirs of judgment debtor - Ganpat, have shown due diligence in pursuing the matter and they filed application under Order 9 Rule 13 of the Code of Civil Procedure immediately after they received notice of execution proceedings. It is submitted that the plaintiff / decree holder is aware that the decree is in-executable as the land in question is B class land and, therefore, the plaintiff - decree holder had not taken any steps to execute the decree for period of more than 11 years and the execution proceedings are filed on 18th January, 2010.

Learned Advocate for the respondent - decree holder has pointed out that before filing of execution proceedings, the decree holder had filed other proceedings which were registered as Miscellaneous Judicial Case No.2/2001 and notice of these proceedings was also served on the judgment debtor - Ganpat. It is argued that Ganpat throughout had knowledge about the passing of decree against him and he had not taken any steps to get the *ex parte* judgment and decree set aside.

After assessing the material on record, I find that the learned trial Judge has not committed any error of jurisdiction by dismissing the application filed by the petitioners. Hence, I see no reason to interfere with the impugned order. The writ petition is **dismissed**. No costs.

JUDGE