

Dusane

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13667 OF 2017

Shri. Sham Kondopant Kulkarni Petitioner

V/s.

Zeta Cosmetics Pvt. Ltd. & Ors. Respondets

Mr. Prathamesh B. Bhargude for the petitioner

Mr. Prasad Kulkarni i/by Prasad Kulkarni & Associates for Respondent no. 2

CORAM : NITIN W. SAMBRE, J.

DATE: 30th AUGUST, 2021.

P.C.:

1. In Small Cause Suit No. 240 of 2009, an exparte decree passed against Respondent no. 2- Defendant No. 6 was sought to be set aside by invoking provisions of Rule 4 of Order XXXVII of the Code of Civil Procedure, 1908. (hereinafter referred to as 'C.P.C.' for the sake of brevity) said Application, Exhibit 1 came to be allowed vide impugned order dated 22nd September, 2017 thereby ordering setting aside ex-parte decree, as such this Petition.

2. The order impugned is questioned by the original Plaintiff-Petitioner on two counts; (a) while invoking the provisions of Order XXXVII Rule 4 of C.P.C. for setting aside an ex-parte decree dated 31st March, 2011, the least that was expected under the procedural law was to move an application for condonation of delay accompanying with prayer for setting aside an exparte decree; (b) this Court while dealing with a similar issue against co-defendant in Writ Petition No. 5888 of 2013 has already made an observation that Respondent no.2 was duly served with summons in the suit.

3. According to learned counsel for the petitioner, both these issues are lost sight of by the Court below, particularly when findings are not recorded by the Court below on the issue of failure in filing an application for condonation of delay and effect thereof. According to him, order passed by this Court on Writ Petition No. 1427 of 2016 was misread.

4. On last occasion, when this Court was about to pass an order, Respondent no. 2 stepped in and sought an adjournment. It appears that

Respondent no.2 or his Counsel have chosen not to attend present proceedings.

5 Before the order could be signed by this Court, which was dictated in open Court, learned counsel appearing for Respondent No. 2, Mr. Kulkarni mentioned the matter on the next date i.e. 18th August, 2021 and expressed his regret for not attending the Court on 17th August, 2021 for personal reasons.

6. With the assistance of learned counsel for the Petitioner, I have perused the order impugned so also orders passed by this Court in Writ Petition No. 1427 of 2016 and Writ Petition No. 5888 of 2013. In Writ Petition No. 5888 of 2013, in para 12 of the order, it is specifically observed that Respondent no. 2 i.e. Defendant no. 6 was duly served for Exh. 20. The effect of these observations by the High Court, are not dealt with by the Court below while passing impugned order. Even if the Order XXXVII Rule 4 of C.P.C. does not speak of limitation within which the Defendant can invoke remedy of setting aside ex-parte decree, however,

such steps must be taken in reasonable period. Limitation Act also prescribed limitation in the eventuality like the one by virtue of residuary Clause / Article.

7. Apart from above, this Court in Writ Petition No. 1427 of 2016 has dealt with an issue as to whether application preferred under Order IX Rule 13 of C.P.C. was required to be proceeded without there being an application for condonation of delay in very same proceedings.

8 In the wake of this background and in view of no objection given by learned counsel appearing for the Petitioner, I have re-heard Shri. Kulkarni in the matter. According to him, the petition suffers from suppression of material facts and he intends to bring the same to the notice of the Court by filing affidavit. According to him, the petition can be dismissed on the same count. The fact remains that this Court since intends to remand the matter, in absence of specific material supporting such plea of suppression, it will not be appropriate to accept the plea raised by the learned counsel appearing for the Petitioner thereby making out a case for remand.

9. So far as the issue about suppression by the Petitioner is concerned, it is always open for Respondent No. 2 to canvass the same before the trial Court, which ofcourse if so canvassed will be looked into by the appellate Court.

10. In the aforesaid background, order impugned passed by the Court below, in my opinion, is not sustainable and as such is quashed and set aside. Said application Exh. 1 in Misc. Civil Application No. 577 of 2015 stood restored to the file of Court below which is directed to be decided expeditiously and in any case within a period of twelve weeks from the date of production of this order.

11. The Writ Petition stands partly allowed in above terms.

(NITIN W. SAMBRE, J.)