

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

WRIT PETITION NO. 115/2019

- 1] Shri Vitik Rajendra Raut,
Aged about 15 years, Occ. Nil.
- 2] Rutuja Rajendra Raut,
Aged about 13 years, Occ. Nil.
Both applicants (petitioners) being minor through
their natural guardian mother
Smt. Rekha Rajendra Raut.
- 3] Smt. Rekha Rajendra Raut,
Aged about 40 years, Occ. Household
ALL R/o Rajive Nagar, Hingna, Nagpur
- **PETITIONERS**

...VERSUS...

- 1] Shri Dhanraj Shripat Gote.
Aged about 51 years, occ. Service.
R/o.35 Empress Mill Quarter, Bezanbagh,
Nagpur.
- 2] Smt. Leelabai w/o Haridas Kolhe,
Aged about 67 years. Occ. Household.
R/o Amar Jyoti Nagar, Nagpur.
- 3] Shri Pankaj s/o Vishnuji Kalamkar,
Aged about 35 years. Occ. Service
R/o Plot No.209, HUDCO Colony,
Behind Police Station Kalmeshwar,
Tah. Kalmeshwar, District Nagpur.
- 4] Smt. Pradnya w/o Babarao Bagde,
Aged about 37 years. Occ. Household,
R/o. Nandagomukh, Tah. Saoner,
District Nagpur.
- **RESPONDENTS**

Shri Shriram Deoras, Advocate for petitioners.
 Shri Abhijeet Deshmukh, Advocate with Shri Ulhas Aurangabadkar, Advocate
 for respondents.

CORAM : A.S.CHANDURKAR, J.
DATED : 25.06.2021

JUDGMENT

Rule. Rule made returnable forthwith. Heard the learned counsel for the parties.

2. The order dated 07.09.2018 passed in M.J.C.No.29/2018 refusing to condone delay in filing the application for setting aside the *ex parte* decree passed in R.C.S.No.50/2016 is the subject matter of challenge in this writ petition.

3. The respondents herein are the original plaintiffs who had filed R.C.S.No.50/2016 for a declaration that the petitioners-defendants had no right to encroach upon the suit property which was land bearing Survey No.210 Mouza Khairi, Taluka Hingna, District Nagpur. A decree for permanent injunction seeking to restrain the defendants from committing any encroachment and disturbing the possession of the plaintiffs was also prayed for. The trial Court by its judgment dated 31.03.2018 found that the evidence led by the plaintiffs remained unchallenged and therefore after accepting the same decreed the suit as prayed for. It is the case of the defendants that on the basis of a report lodged by the plaintiffs on 17.06.2018 with Hingna Police Station they were restrained from taking possession and getting the suit land measured. On that day the defendants got knowledge of passing of the

judgment by the trial Court. After obtaining certified copy of the said judgment on 18.06.2018, they filed proceedings for setting aside the *ex parte* decree under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908 (for short, the Code) along with an application for condonation of delay. This application was opposed by the plaintiffs and by the impugned order the trial Court rejected that application holding that there was no sufficient explanation for the delay caused in moving the application for setting aside the *ex parte* decree. Hence this writ petition.

4. Shri Shriram Deoras, learned counsel for the petitioners submitted that in the application for condonation delay the defendants had stated that they had not contacted their counsel when the suit was pending with the Civil Court as a result of which the written statement could not be filed. The defendants got knowledge about the aforesaid decree only on 17.06.2018 when they were summoned to the police station with regard to the dispute relating to the measurement of the land in question. The application was filed immediately on 22.06.2018 stating that though the decree was passed on 31.03.2018, the defendants got knowledge only on 17.06.2018 and hence there was no intentional delay. The trial Court despite observing that the Court should adopt liberal view wrongly held that no reason for the cause of delay was mentioned in the application. Placing reliance on the decision in *Videocon International Ltd. Vs. Video Links and others 2006 (5) Mh. L J 425*

it was submitted that the decree as passed was *ex parte* in nature and hence the delay as caused ought to have been condoned to grant an opportunity to the defendants to contest the proceedings on merits. It was therefore prayed that the impugned order was liable to be set aside and the delay in seeking setting aside of the *ex parte* decree ought to be condoned.

5. On the other hand, Shri Abhijeet Deshmukh learned counsel for the respondents supported the impugned order. He submitted that the trial Court rightly found that that no sufficient reasons had been assigned for having the delay condoned. The defendants were negligent and had failed to prosecute the suit when it was pending before the Civil Court. Moreover since the suit summons had been duly served on the defendants and they having failed to participate in the suit, the decree could not be said to be *ex parte* in nature. In that regard, he placed reliance on the decision in ***CliniRX Research Pvt. Ltd. Vs. Bicare Limited and others 2018(3) BCR 388*** and submitted that when the decree itself was not *ex parte* there was no question of seeking condonation delay in filing such application before the trial Court. It was thus submitted that no interference with the impugned order was called for.

6. Having heard the learned counsel for the parties and after giving due consideration to the rival submissions, I am of the view that the order passed by the trial Court is liable to be set aside and the delay in filing the application for setting aside the *ex parte* decree deserves to be condoned.

Taking the second contention raised by the learned counsel for the respondents that the decree as passed was not *ex parte*, it is seen that that admittedly the defendants were duly served with the suit summons and thereafter were granted opportunity to file their written statement. However as the written statement was not filed the suit proceeded without their written statement. The plaintiff no.1 led his evidence which remained unchallenged after which the trial Court proceeded to decree the suit. In this regard, it is to be noted that before the trial Court it was only the plaintiffs who had led the evidence. The defendants did not lead any evidence whatsoever and therefore as held in ***Videocon International Ltd.*** (supra) the course adopted by the trial Court of proceeding further with the matter was referable to the provisions of Order XVII Rule 2 of the Code. It has been further held in the aforesaid decision that the decree passed in such a case would be *ex parte* in nature.

7. Reference in this regard can be made to the decision in ***Regal Talkies, Aurangabad and ors. Vs. State Bank of India, Aurangabad 2011(2) Mh L J 564*** wherein it has been held that if the defendant does not appear on the date of hearing and no evidence has been led on behalf of the defendant the judgment and decree passed by the Court on the uncontroverted evidence of the plaintiff would be an *ex parte* decree and not an order on merits. In such situation it has been held that an application under the provisions of

Order IX Rule 13 of the Code for setting aside such decree is maintainable.

The decision in ***CliniRX Research Pvt. Ltd.*** (supra) relied upon by the learned counsel for the respondents is clearly distinguishable in view of the facts of that case. The question considered therein was whether failure of the defendant to appear before the transferee Court and whether the pronouncement of the judgment by such Court without hearing the defendant would render the decree *ex parte* ? The facts of the said case indicate that the trial Court heard arguments of the plaintiff. The Advocate for the defendant despite being present in the Court did not advance any argument. The trial Court therefore posted the suit for judgment on 01.12.2015. It was then adjourned to 28.12.2015 after which the suit was transferred to another Court. The transferee Court heard the plaintiff and decreed the suit on 28.07.2016. In this context after referring to the provisions of Order XVIII Rule 15 of the Code, it was held that the decree passed in such circumstances would not be an *ex parte* decree. In the light of the facts stated herein above this decision is clearly distinguishable and therefore does not support the stand of the respondents. Thus in view of the decisions in ***Videocon International Ltd.*** and ***Regal Talkies Ltd*** (supra), it is held that the decree passed by the trial Court on 31.03.2018 was an *ex parte* decree.

8. Coming to the aspect of delay in applying for setting aside such decree, it is seen that the defendants had pleaded that they had not contacted

their counsel when the suit was pending before the trial Court as a result of which the written statement could not be filed. They have then pleaded about the date of getting knowledge of the decree on 17.06.2018 and filing of application under Order IX Rule 13 of the Code on 22.06.2018. The averments made in the application were denied by the plaintiffs in view of the fact that the trial Court on 06.08.2016 had passed no written statement order against the defendants. The trial Court while refusing to condone the delay has observed that the application did not disclose a single reason as to what precluded the defendants from consulting their lawyer for getting knowledge of the decree. It is seen that the defendants had prayed for setting aside the *ex parte* decree passed on 31.03.2018 and hence the delay in making such application from 31.03.2018 ought to have been taken into consideration. The defendants had stated that they had failed to contact their counsel when the suit was pending and that they got knowledge only when they were summoned to the police station. Their conduct prior to passing of the decree on 31.03.2018 could be a relevant consideration when the application under the provisions of Order IX Rule 13 of the Code would be considered. Since it is pleaded that on 17.06.2018 the defendants got knowledge of the passing of the decree and the lodging of the police complaint on that date was not denied by the plaintiffs, it is found that the delay of 53 days in filing the application for setting aside the *ex parte* decree is liable to be condoned subject to imposing costs on the defendants. The trial Court committed an

error in holding that no reason was mentioned in the application for condonation of delay, when it was a specific case of the defendants that there was failure on their part to contact their counsel. This could indicate some negligence on the part of the defendants for which the plaintiffs are liable to be compensated with costs. Moreover considering the nature of decree as passed, an opportunity to prosecute the application under the provisions of Order IX Rule 13 of the Code on merits is liable to be granted to the defendants.

9. In the light of the aforesaid discussion, the order dated 07.09.2018 passed below Exhibit 1 in M. J. C. No.29/2018 is set aside. The delay of 53 days in filing the application for setting aside of the *ex parte* decree is condoned subject to the defendants paying costs of Rs.5,000/- (Rs. Five thousand) to the plaintiffs within a period of four weeks from today. If such costs are paid within the aforesaid period the trial Court would be free to proceed with the adjudication of the application filed under the provisions of Order IX Rule 13 of the Code. It is made clear that if such occasion arises the application under the provisions of Order IX Rule 13 of the Code shall be decided on its own merits without being influenced by the present order. Rule is made absolute in aforesaid terms.

JUDGE

Andurkar..