

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2989 OF 2023

Sangeeta Traders
and another

.... Petitioners

Versus

Mr. Mahesh Shambhulal Bhanushali
@ Gouri
Through Power of Attorney
Rakesh Pameshchandra Mehta

.... Respondent

.....

Ms. Sheetal V. Salunke, Advocate for the Petitioners
Mr. Abhaykumar Apte, Advocate a/w Shantaram R. Dheple,
Advocate for Respondent

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 16th MARCH, 2023

ORDER :

1. Petitioners are aggrieved by the order dated 22/03/2022, passed below Exhibit-1 and order dated 20/02/2023 passed below Exhibit-85, in Commercial Suit No.08/2019, by the learned District Judge, Ahmednagar.

2. Petitioner No.2 is proprietor of petitioner No.1. Petitioner No.1 is liquor shop. Respondent/plaintiff is authorized Octroi agent of Municipal Corporation, Ahmednagar.

3. Respondent/plaintiff filed Special Civil Suit No.67/2015 against the petitioners for recovery of

Rs.1,57,49,498/- on 25/03/2015. Suit summons were served on the petitioners/ defendants on 10/06/2015, which were duly served. However, defendants failed to appear before the trial Court on the date of hearing. The trial court passed *ex parte* order against the defendants on 08/09/2015. Thereafter, the suit was re-registered as Special Civil Suit No.4 of 2017 as commercial suit. After the said conversion, notice was served on defendants under Order XI Rule 14 on production of original documents by the plaintiff through RPAD, which were duly served as per track consignment report (Exhibit-16). In spite of this service, the defendants remained absent.

4. In view of specified value of the dispute, the suit was again re-registered as commercial suit No.8 of 2019. Again, suit summons were served on defendants on 09/12/2021. Thereafter, the matter was adjourned from time to time. On 29/01/2022, the defendants filed application Exhibit-39 for filing *Vakalatnama* and written statement. From 07/02/2022 to 15/03/2022, the matter could not be taken up by the trial Court as it was busy in other work. On 22/03/2022, *ex parte* order was passed against defendants and the matter was kept on 13/04/2022.

5. On 01/02/2023, the defendants filed application Exhibit-85 for setting aside *ex parte* order dated 08/09/2015, claiming that though the summons was served on them after the suit was transferred to Commercial Court, but due to death of close relative, and since defendant No.2 was ailing, they could not attend the proceeding. Just now they have received information about the suit, and they are filing their written statement along with application. If their written statement is not accepted, they will suffer irreparable loss.

6. The plaintiff strongly opposed the application by filing following say:

"That; the suit is filed in the 2015 and notice accordingly was issued by this court which was served upon the defendant long back. The maximum Limit for appearance is 14 days for date of service. The appearance was not marked by the defendants. No w.s. has been filed. The suit then converted to commercial suit & transferred to this court with bailiff report stating that the Notice is served upon the defendants. In spite of service the defendant failed & neglected to appear before this Court. After passing of ex-party order in Feb-Mar 2022 the defendants have again failed to mark its appearance & file application for setting aside ex-party order.

At the end the defendants appeared and sought liberty to set aside the ex-parte order. The w.s. is annexed to this application. However; in view of the provisions of the Commercial Courts act & CPC that no w.s. would be taken on record for any reason of whatsoever nature. The application is vague. In view of the judgment of the Supreme Court reported in (2019) 12 SCC 210, the period of 120 days in filing the w.s. is mandatory. Moreover, application for condonation of delay in filing w.s. has also not been filed. The reason for setting aside ex-parte order is also not just and proper. Hence no case is made out for any order in favour of the defendants. Hence application kindly be rejected with heavy cost."

6. The trial Court, after hearing the parties, rejected the application. Hence, the present petition.

7. Heard the learned advocate for the petitioners and the learned advocate for the respondent at length. Perused the grounds raised in the petition, documents annexed therewith, and the impugned orders.

9. It is a matter of record that after Special Civil Suit No.67 of 2015 was filed, the suit summons were served on the defendants on 10/07/2015, which were duly served on

defendants. The defendants have chosen to remain absent. Thereafter, from time to time the suit was adjourned, and on 08/09/2015 *ex parte* order was passed against the defendants. The defendants have consistently remained absent on subsequent dates till the year 2017, when the suit was converted into Special Civil Suit (Commercial) No. 4 of 2017. After conversion, again suit summons were served on defendants on 19/06/2017. Thereafter, vide order passed below Exhibit-1 in Special Civil Suit NO.67/2015 on 04/09/2017, the learned 7th Joint Civil Judge, Senior Division, Ahmednagar held that the Commercial Court of Ahmendagar has jurisdiction to entertain, try and decide the suit. The parties were directed to appear before the Commercial Court on or before 19/09/2017. Accordingly, the suit was registered as Special Civil Suit No.4 of 2017 in the category of Commercial Suit. During the pendency of this suit, notice under Order XI Rule 14 on production of original documents by the plaintiff was issued to the defendants through RPAD, which was duly served as per track consignment report (Exhibit-16). Even after this service, the defendants have remained absent. Thereafter, show cause notice was also issued to the defendants and as per bailiff report at Exhibits 45 and 46, the defendants were served. This time also the defendants

remained absent. It is also clear from the record that the defendants are served on 09/12/2021, but they did not care to appear.

10. Thereafter, on 29/01/2022, the defendants have filed an application Exhibit-39 for filing *Vakalatnama* and written statement. The trial Court passed *ex parte* order against the defendants on 22/03/2022, and the matter was adjourned to 13/04/2022. Then, application Exhibit-85 is filed by the defendants for setting aside *ex parte* dated 08/09/2015.

11. It is clear from the record that when the matter was taken up for final hearing by the trial Court on 08/01/2023, and after entire submissions of the learned advocate for the plaintiff were complete, the learned advocate for the defendants moved application Exhibit-83 requesting that he only wanted to produce written notes of argument in the matter. Thereafter, the trial Court adjourned the matter twice, and on 01/02/2023, application Exhibit-85 is filed seeking permission to file written statement. Defendants and their advocate remained absent on the previous date i.e. 15/02/2023, for hearing of application Exhibit-85. On 20/02/2023, when application Exhibit-85 was heard, the

defendants and their advocate remained absent since morning till 3.45 p.m.

12. It is, therefore, clear that though three time notices were served on the defendants, they did not follow to remain present as per the Commercial Courts Act. The defendants are required to appear and file written statement within 14 days from the date of service of summons. In spite of this, the defendants, for the reasons best known to them have remained absent. After 7 years and 6 months, and after passing of *ex parte* order on 08/09/2015, the defendants moved the present application for setting aside *ex parte* order and for accepting their written statement. No plausible, sufficient and convincing reasons assigned in the application Exhibit-85, explaining the delay and negligence on the part of the defendants appearing in the suit.

13. No sufficient reason is made out by the defendants for condoning the delay and 7 ½ years, except the illness of defendant No.2. No documents are placed on record in support of the said ground. Vague contentions of the defendants cannot be accepted in the facts of the present case.

14. Lapses on the part of defendants in not diligently prosecuting the matter is writ large on the fact of record. The defendants even failed to prosecute application Exhibit-39 filed on 29/01/2022, for filing *Vakalatnama* and written statement.

15. In the light of above facts, the learned trial Court is justified in passing the impugned order by elaborate reasons, which cannot be faulted with. There is no illegality or perversity in the order impugned in the present petition, and the conduct of the petitioners dis-entitles them from exercising discretion in their favour.

16. The writ petition being devoid of substance is dismissed with cost of Rs.25,000/-, which shall be paid by the defendants to the plaintiff in the trial Court.

[NITIN B. SURYAWANSHI]
JUDGE

S.P Rane