

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

WRIT PETITION NO. 8763 OF 2018

Kuldeep S/o Amarnath Kalra
Aged about 48 years, Occ. Business
R/o Shastri Nagar, Mul Road,
Chandrapur

...Petitioner

// VERSUS //

1. Narendra Civil Project and Contract Pvt. Ltd., a company registered under the provisions of the Companies Act having its office at Badami Sadan Bhagat Singh Colony, Post Singrauli Colliery, District Singrauli (M.P.) through its Director Mr. Narendra Bahadur Singh

... Respondents

Shri Rahul Bhangde, Advocate for the petitioner.
Shri S.M.Bhutada, Advocate for the sole-respondent.

CORAM : ANIL S. KILOR, J.

DATED : 1st AUGUST, 2023.

ORAL JUDGMENT :

Heard. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. In this writ petition, the challenge is raised to the Order Below Exhibit 1 dated 9th October, 2018 passed by learned District Judge-2, Chandrapur in Misc. Civil Application No. 115 of 2016 thereby allowing the application for the condonation of delay of 926 in filing the appeal against the judgment and order dated 3rd May, 2014 passed by the 8th Joint Civil Judge (Junior Division), Chandrapur.

3. The petitioner filed a summary suit for recovery which was subsequently treated as a regular suit as the Court had no power to exercise or to try and decide the summary suit. In the said proceeding, the notices were held to be served on the respondent as the notice was unclaimed. Thereafter, the decree was passed on 3rd May, 2014.

4. In pursuance to the said decree, a decree holder filed an execution proceeding. In the said execution proceeding, the notice was served on the respondent sent through post, on 8th September, 2014 and though notice published in daily News Paper Navbharat on 1st August, 2014. Thereafter, the application for attachment was filed and in the said proceeding the warrant of possession of the immovable property was served upon the respondent through bailiff.

5. On 1st October, 2014, the possession of the property was given to the decree holder on supratnama. Thereafter, on 10th May, 2016 a notice of auction was served upon the respondent. Thereupon, first time he appeared before the executing court on 16th June, 2016 by filing an application for grant of time of three months to pay the decretal amount.

6. The respondent further filed an affidavit on the same day disclosing his intention to satisfy the decree by making the payment. He has further stated in the affidavit that, in case, he fails to abide by the undertaking given on affidavit, the necessary action for recovery of the amount, as prescribed by law may be initiated against him.

7. From the application for grant of time of three months to pay decretal amount as well as undertaking on affidavit filed by the respondent, it is evident that the respondent wanted to satisfy the decree and not to challenge the same on any ground.

8. Relying upon such undertaking and application, the Executing Court passed the order below Exhibit 30 on 16th June, 2016, which read thus:

ORDER

1. The order passed below application (Exh.24) on 25.04.2014 be kept at abeyance till two months from today.

2. The judgment debtor is directed to deposit 40 percent amount of the decretal amount on 16th August, 2016. In the event of his failure, the order passed below Exh.24 dated 25.04.2016 will be carried out.

3. In case the judgment debtor pays 40 percent of the decretal amount on 16.08.2016 he would be granted time of one month thereafter to pay the remaining decretal amount.

9. In compliance with the above referred order, the respondent paid Rs.1,30,000/- on 18th June, 2016 and Rs.50,000/- on 17th September, 2016 and thereafter he did not make the payment. Accordingly, movable property was sold out in auction and certificate to that effect issued on 30th June, 2018.

10. In the meantime, on 17th November, 2016, the respondent filed an application for condonation of delay along with the appeal under

Section 5 of Limitation Act, which came to be allowed vide impugned order dated 9th October, 2018.

11. On perusal of the impugned order, it is evident that the learned Lower Appellate Court has dealt with the application as if the Court was deciding the appeal and thereby made observations on merit of the matter and came to the conclusion that the decree was illegal and not sustainable in the eyes of law. After observing so the learned lower Appellate Court has observed that the Court is well aware of the law that the mistakes if any, made while deciding a suit are not at all required to be considered in the application seeking the application in condonation of delay in filing the appeal.

12. Undisputably, there is no findings recorded by the learned Lower Appellate Court about any satisfactory explanation given by the respondent for condonation of delay.

13. Admittedly, the decree was passed on 3rd May, 2014 and as per the request of the respondent, time was granted to him to satisfy the decree. However, on failure of him to comply the undertaking given to the Court as regards the payment of decretal amount, the application for condonation of delay along with appeal was filed.

14. In the said backdrop at the first instance, the learned Appellate Court ought not to have entertained the application at the instance of the respondent who has breached the undertaking given to the Court as regards satisfaction of the decree.

15. Furthermore, in absence of sufficient cause shown by the respondent for delay, the application ought to have been rejected by the learned Appellate Court. Instead of that the learned Appellate Court has entered into merit and recorded the findings as if the Court is deciding the appeal.

16. In the above referred backdrop, I am of the opinion that the learned Appellate Court has committed grave error in allowing the application for condonation of delay.

17. In the circumstances, I do not find favour with the argument made by the learned counsel for the respondent that if the delay is not condoned, the respondent will lose his right to contest the matter and to seek restitution of property, for the reason that rights have already been crystallized in favour of the petitioner. Moreover, the record shows that the respondent was not diligent through out the proceeding and he has breached an undertaking given to the Court on affidavit with clear understanding that in case if he fails to fulfill the undertaking necessary action for recovery of amount as prescribed by the law may be initiated against him.

18. In the circumstances, the impugned order dated 9th October, 2018 passed by the District Judge-2, Chandrapur in Misc. Civil Application No. 115 of 2016 needs to be quashed and set aside. Accordingly, I pass the following order.

i. Writ Petition is allowed.

ii. Order dated 9th October, 2018 passed by the District Judge-2, Chandrapur in Misc. Civil Application No. 115 of 2016 is hereby quashed and set aside.

[ANIL S. KILOR, J.]

SACHIDANAND
KUTTAN NAIR

Digitally signed
by
SACHIDANAND
KUTTAN NAIR
Date:
2023.08.09
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