

VAISHALI
ANIL
TIKAM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15230 OF 2022

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Mr. Dhakalu Chudappa Patil ... Petitioner

Versus

Mr. Pratap Balasaheb Desai and Ors. ... Respondents

.....

Ms. Vishakha Shelar i/b. Suryajeet Chavan for Petitioner.

.....

CORAM : MILIND N. JADHAV, J.

DATED : 22nd APRIL, 2024

P.C. :-

1. Not on Board. Upon producing Praecipe, the matter is taken on board.

2. The present Writ Petition takes exception to the judgment dated 28th June, 2022 passed by the Learned Trial Court in an application seeking condonation of delay filed under Section 5 of the Indian Limitation Act. The Writ Petitioner before me is the Defendant No.3 in the suit proceedings. Suit is filed by the Plaintiff being Special Civil Suit No. 11 of 2010 seeking specific performance of the agreement in respect of which an amount of Rs.2.50 lakhs has been advanced to the Defendant.

3. Ms. Vishakha Shelat, learned Advocate for the Petitioner would submit that when the suit was filed, the Defendant was not residing in

Mumbai. She would submit that summons was served on the Defendant's address, but the Defendant never received such summons as contended by the Plaintiff. It is seen that in that view of the matter, the Learned Trial Court allowed substituted service of the Summons on the Defendant and substituted service was effected by way of publication in the newspaper. The Writ Petitioner -Defendant No.3 would contend that he was not aware about such substituted service. Record reveals that the Learned Trial Court passed ex-parte decree against the Defendant on 18th February, 2013. Ms. Shelar would submit that the Defendant's realized and came to know about passing of the decree sometime in October, 2014 when the Plaintiff sought to execute the decree and immediately filed an application under Order IX Rule 13 for setting aside the ex-parte decree. She would submit that therefore there was a delay of about 20 months. Until the application under Order IX Rule 13 was filed, that delay was sought to be condoned by filing Civil Misc. Application No. 31/2014 below Exhibit 65/A, which came to be dismissed by the impugned Judgment dated 28th June, 2022.

4. I have perused the judgment. The reasons attributed by the Learned Trial Court in rejecting the Civil Application seeking condonation of delay are that:

(a) the Application is now preferred by the power of attorney holder and the power of attorney would not have any personal knowledge regarding reasons for the delay and therefore, his explanation for the reasons of delay cannot be accepted;

(b) The Learned Trial Court has held that the pleadings regarding the length of delay and its explanation are not happily worded and it is cursorily averred that the party did not have knowledge about the ex-parte decree;

(c) It is held by the Learned Trial Court that the application is filed merely to protract the execution of the ex-parte decree passed in Spl. C.S. No. 11 /2010 against the Petitioner;

(d) It is held that all parties to the suit proceedings are in fact relatives of each other and therefore it would not be possible to believe that the Defendant did not have knowledge about the suit and the ex-parte decree passed against him.

(e) The Learned Trial Court has rejected the application by holding that there is no proper pleading which establishes the length of the delay and reasons for the same. Hence the application is rejected and the present Petition.

5. I have perused the pleadings in the present Writ Petition. It is seen that the suit is filed for specific performance in respect of land bearing Gat No. 192 admeasuring 1 H 18.5 R regarding total consideration of Rs. 6,50,000/-. Some part of the amount has already been exchanged by the parties. It appears that there were certain terms and conditions of which breaches were caused, due to which Special Civil Suit No. 11 of 2010 i`'s filed. It is seen that the application for setting aside was filed but there is a delay of 20 months in preferring the same. The Learned Trial Court while recording the reasons in paragraph 11 stated that the delay caused in filing the application under Order IX Rule 13 is also not explained by the parties. Be that as it may, considering the facts and circumstances of the present case, the Defendant cannot be non-suited in view of the passing of the ex-parte decree against the Defendant. An opportunity in this case should be given to the Defendant to defend the suit. Admittedly, there is delay of 20 months in filing the application for setting aside of the ex-parte decree. However, that application for condonation has been rejected. The Application for setting aside of the ex-parte decree is yet to be heard by the Learned Trial Court.

6. In view of the above and in view of the application seeking condonation and in view of the averments made in Civil Misc.

Application No. 31 of 2014 and also the fact that the learned Trial Court has itself taken more than 8 years to determine the said application in the year 2022, I am of the clear opinion that the impugned order is harsh and therefore deserves to be quashed and an opportunity is required to be given to the Defendant- Petitioner to espouse its cause.

7. Hence, the impugned order dated 28th June, 2022 stands quashed and set aside. Resultantly, allowing Civil Misc. Application No. 31 of 2014, however subject to Defendant- Petitioner paying costs of Rs.15,000/- to the Plaintiffs. The costs shall be paid by the Defendant for the delay of 20 months in filing the application under Order IX Rule 13 for setting aside of the ex-parte decree. The costs shall be paid within a period of two weeks from today. Failing to pay costs shall revive the Order dated 28th June, 2022 automatically without reference to this Court. Hence this is a conditional order. If the costs are paid, the learned Trial Court shall confirm the acknowledgment on the receipt of payment of costs by the Plaintiffs and hear the application under Order IX Rule 13 for setting aside the ex-parte decree, on its own merits and strictly in accordance with law.

8. Needless to state that the Learned Trial Court shall not be influenced by any observations made in the impugned order or even in

this Order when the Application under Order IX Rule 13 is heard.

9. All contentions of both parties are expressly kept open.
10. Writ Petition is allowed and disposed of in the above terms.

(MILIND N. JADHAV, J.)