

Ajay

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 932 OF 2024

~~Shaligram Motiram Vaity (Koli)~~
Deceased through Legal Heirs
Manda Shaligram Vaity and Ors.

.. Petitioners

Versus

~~Shrikrushna Manik Koli~~
Deceased Through legal Heirs
Kamla Shrikrushna Koli and Ors.

.. Respondents

-
- Mr. Rohan Surve i/by Mr. Dilip Keni, Advocate for Petitioners.
 - None for the Respondents.
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 23, 2024.

P.C.:

1. Heard Mr. Surve, learned Advocate for the Petitioners. None appears for the Respondents.

2. Perused the impugned order dated 02.12.2022 passed by the learned City Civil Court while disposing Notice of Motion No.934 of 2017. This Application was filed for seeking a review of the order dated 20.02.2015 passed by the City Civil Court whereby an *ex-parte* decree was passed against Defendant Nos.1 and 6.

3. Mr. Surve has drawn my attention to the operative clause No.4 of the impugned order which is at page No.156 of the Writ Petition and would submit that the reasoning given by the learned

Trial Court is contained in paragraph Nos.7 and 8 on page Nos.153 and 154 of the Writ Petition.

4. Apart from the issue of delay it is submitted by Mr. Surve that concerned, Defendant Nos.1 and 6 in fact did not have any knowledge about the transfer of the Suit from this Court to the City Civil Court and the same was also not informed to them by their Advocate. Hence there was a substantive delay. When it came to their knowledge, they approached the Court but in view of the delay involved, the learned City Civil Court dismissed their Application, resultantly and effectively non-suited the said Defendant Nos.1 and 6 as also their legal heirs. The primary consideration which weighed with the learned City Civil Court is that all Defendants including Defendant Nos.1 to 3 and 6 were having knowledge of the transfer of the case from this Court to the City Civil Court.

5. Another reason advanced by the learned Trial Court is that the unexplained delay has not been explained. It is seen that the unexplained delay is 4 months and 12 days.

6. It is further seen that substantive objections have been raised on merits of the case also. However by virtue of the impugned order and say of Defendant Nos.1 and 6 who have not filed their written statement would undoubtedly stand rejected and hence they shall lose the opportunity of defending the case.

7. It is seen that the principal Suit is filed in the year 2019 for declaration and ownership and is against the family members. *Prima facie*, I feel that the reasons returned by the learned Trial Court as enumerated in paragraph Nos.7 and 8 of the impugned order are harsh and therefore I am inclined not to accept them and sustain them in the interest of justice. All that the learned Trial Court has referred to and relied upon is the recording of the Roznama dated 21.08.2014 which mentions the word 'Defendant present'. The submissions of the Plaintiff is that mere presence of the Defendant is good enough and sufficient enough to infer that the Defendants were present before the Court on that date and therefore had knowledge of the proceedings. The learned Trial Court incidentally in paragraph No.7 has noted that on going through the Roznama after the transfer of the case to the City Civil Court till the judgment, neither the Defendants nor their Advocate were present on any of the given dates. Thereafter by order dated 01.07.2023, Sheristedar of the Court was directed to issue notices to the rival parties. It is once again noted by the learned Trial Court that there is no proof on record to show that the notices were served to all the Defendants. The very fact that Defendants were not present when the Suit was transfer to the City Civil Court and no proof of service is the answer to the question as to whether they were indeed served or had knowledge.

8. In the above facts, Defendant Nos.1 and 6 cannot be non-suited. It is also not trite that the delay has must be explained for day-to-day. The learned Trial Court has infact held that it is well settled position that delay must be explained for day-to-day. Considering the length of the delay of 4 months and 12 days having remained unexplained, I am inclined to quash and set aside the impugned order to the extent that it applies to the Petitioners before me. Petitioners are the legal heirs of Defendant Nos.1 and 6.

9. In that view of the matter, the operative clause No.4 of the impugned order dated 02.12.2022 which applies to the Petitioners is therefore quashed and set aside. Rest of the order disposing of the Notice of Motion shall remain as it is.

10. In view of the above, it is directed that the legal heirs of Defendant Nos.1 and 6 shall file their written statement within a period of four weeks from today and on such written statement having been presented before the learned Trial Court, the same shall be taken on record by the learned Trial Court and thereafter the Suit shall be proceeded with strictly in accordance with law without being influenced by any observations made in this order.

11. With the above directions, Writ Petition stands allowed and disposed.

[MILIND N. JADHAV, J.]

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