

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9126 OF 2024

Mahavir Ginning and Pressing Factory

.. Petitioner

Versus

M/s. Darshan Group & Anr.

.. Respondents

-
- Mr. Kunal R. Kumbhat i/by Ms. Sunanda Kumbhat for Petitioner
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CORAM : MILIND N. JADHAV, J.

DATE : JULY 09, 2024

P. C.:

1. Heard Mr. Kumbhat, learned Advocate for Petitioner.
2. Present Writ Petition takes exception to the order dated 23.04.2024 passed by the learned Trial Court while rejecting Notice of Motion No. 4703 of 2023 in Summary Suit No. 1232 of 2015.
3. Notice of Motion was filed by Defendant No. 2 (Petitioner herein) seeking to condone delay of 382 days and to set aside the order dated 06.03.2017 directing the Suit to proceed exparte against Defendant No. 2 passed by the Trial Court. The Suit is filed by the Plaintiff (Respondent No. 1) herein against Defendant Nos. 1 and 2.
4. Mr. Kumbhat has drawn my attention to the reliefs prayed for in the Suit plaint whereby relief is sought against "Defendant" only. He would submit that in the entire Suit plaint, there is no cause of action stated or alleged against Defendant No.2. He would inform the Court

that after Summary Suit No. 1232 of 2015 was filed, admittedly Writ of Summons was received and served on Defendant No. 1 on 02.01.2016 but after due inquiry with the Plaintiff, Defendant No. 2 was informed by Plaintiff that the Suit would be proceeded against Defendant No. 1 only. In support of this submission, Mr. Kumbhat would draw my attention to the contents of paragraph nos. 2 and 3 of the affidavit in support of Notice of Motion and would submit that it was all along the belief of Defendant No. 2 that the Plaintiff would proceed only against Defendant No. 1 and therefore that was the only reason why no steps were taken by Defendant No. 2 in respect of the Suit summons. It is seen that parties give various reasons for non-compliance with the writ of summons but in the present case, Defendant No. 2 has given the specific reason as argued by Mr, Kumbhat which is enumerated in paragraph No. 2 of the affidavit in support of Notice of Motion. Now what compelled the Petitioner i.e. Defendant No. 2 to file the Notice of Motion is the fact that the same party i.e. Plaintiff next called upon the Defendant No. 2 and informed him that there was a likelihood of adverse orders being passed against the Defendant No. 2 also. Those contents are pleaded in paragraph No. 3 of the affidavit in support of the Notice of Motion.

5. On the strength of the above, Mr. Kumbhat would submit that admittedly the delay is writ large on the face of record. He would

urge the Court to consider condoning the delay in filing the Notice of Motion as also in approaching the learned Trial Court for setting aside the order to proceed ex parte against Defendant No. 2 by putting the Defendant No. 2 to appropriate terms. He would submit that rejection of Defendant No. 2's Notice of Motion would virtually not-suit the Defendant in view of the fact that there is no cause of action whatsoever alleged against Defendant No. 2 in the pleadings in the entire Suit plaint. The reasons returned by the learned Trial Court while rejecting the Notice of Motion and more specifically in paragraph No. 6 of the impugned order show that the learned Trial Court has opined that Defendant No.2 has not explained the delay satisfactorily and properly and hence there is no cogent reason. He would submit that this is the sole ground for rejection of the Notice of Motion filed by Defendant No. 2.

6. I have perused the impugned order dated 23.04.2024 and the Suit plaint. At the outset it is seen that from 02.11.2016 when the writ of summons was required to be answered until the date of filing of the Notice of Motion i.e. 13.03.2023, excluding the Covid-19 pandemic period which stood arrested by virtue of the Supreme Court order in Suo Moto Petition 3/2020, there is a delay of 5 years and 2 months. That apart from the date on which the said order dated 06.03.2017 was passed to proceed with the Suit ex parte against

Defendant No. 2, there is delay of approximately 4 years and 1 months. Perusal of the affidavit in support of Notice of Motion if read holistically mentions the delay and seeks condonation of the said delay by Defendant No. 2. Undoubtedly delay is writ large on the face of record. In fact learned Trial Court in paragraph No.5 of its impugned order has correctly calculated the delay of 5 years and 11 months and rejects the submission of Defendant No. 2 that there was a delay of only 382 days. Be that as it may, Defendant No. 2 has accepted the delay. That apart Mr. Kumbhat has made a dent while submitting that the contents of the Suit plaint do not indict or allege the liability of Defendant No. 2 and in that view of the matter, after considering the material on record, I am inclined to accept the submissions made by Mr. Kumbhat and condone the delay in the interest of justice subject to payment of costs.

7. In view of the above, the delay of 5 years, 11 months and 8 days as computed by the learned Trial Court stands condoned subject to Defendant No. 2 paying costs of Rs. 10,000/- to **A.K. Munshi Yojana's J.T. Sheth Mandbuddhi Vikas Kendra**, a Special School imparting education and training to the needs of 150 special children in the field of Education (Classes for 6 to 18 years), early intervention(upto 6 years) and vocational training (18 years above) having its school address and building at A.K. Munshi Yojana Chowk, 3rd Panjarapole

Lane, C.P. Tank, Mumbai – 400 004 [Contact Nos. 22425513 / 22423654] registered under the Society Registration Act, XXI of 1980 under No. : 387/81 GBBSD and the Public Trust Act, XXIX of 1950 under No. F-6809. RCI Reg. No. 0163 within a period of two weeks from today. Subject to payment of costs, the delay in filing the Notice of Motion for setting aside the order dated 06.03.2017 is also condoned. In the interest of justice and so as not to non-suit the Defendant No. 2, the order dated 06.03.2017 directing the Suit to be proceeded exparte against Defendant No. 2 is also quashed and set aside. Resultantly allowing Defendant No. 2 to file reply to the Summons for Judgment before the learned Trial Court which shall be filed within a period of four weeks from today. Receipt of payment of costs shall be placed before the Trial Court for enabling the Petitioner to filed the reply to Summons for Judgment.

8. With the above directions, order dated 23.04.2024 stands quashed and set aside resultantly allowing Notice of Motion No. 4703 of 2023 in the above terms.

9. Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

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Digitally signed
by RAVINDRA
MOHAN
AMBERKAR
Date: 2024.07.10
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