

CNRNO.MHSI010005862017



Presented on : 22.09.2017
Registered on : 22.09.2017
Decided on : 08.04.2025
Duration : Y. M. D.
07 06 16

IN THE DISTRICT COURT, SINDHUDURG-OROS

(Presided over by Shri H.B. Gaikwad, Principal District
Judge, Sindhudurg at Oros)

MISC. CIVIL APPEAL NO.38/2017.

EXH. NO. 42

Appellant:-

Shri. Abhinandan Nilkantha Malandkar
Aged 43 yrs., Occu.:- Doctor,
R/o: At-Post-Tarale, Tal. Kankavli,
Dist. Sindhudurg.

V/s

Respondent:-

Shri. Jayram Rajaram Satam
Aged 50 yrs. Occu.:- Service
R/o. A Group, 15/4 Shivajinagar,
Vakola Breej, Santakruz (E),
Mumbai No. 400 055.

APPEAL UNDER ORDER 43 RULE (1) (r) OF THE
CODE OF CIVIL PROCEDURE.

Shri. P. B. Sawant, the learned Advocate for the appellant.
Shri. R. V. Raorane, the learned Advocate for respondent.

JUDGMENT

(Delivered on 08.04.2025)

By this appeal, the original defendant is
challenging the order below Exh-1, passed by the learned

Civil Judge, Junior Division, Kankavli, on 11.12.2015 in Civil Miscellaneous Application No.02/2012, thereby rejecting the application for setting aside ex-parte judgment and decree filed by him. **(For the sake of convenience, parties shall be referred to in their original capacity.)**

2. The brief facts, in nutshell are that, the respondent/original plaintiff had filed Regular Civil Suit No.11/2008 before the trial court for cancellation of sale-deed. In the said suit appellant appeared through his advocate and filed his Written Statement. On 04.08.2009, when the matter was kept for cross-examination of the respondent, the father of the appellant was suffering from cardiac issue. His father was suffering from said illness since last 3 to 4 years. His father was admitted in various hospitals for treatment and there was nobody to look after him. He was taking care of him and therefore, he could not appear before the court since August 2009 to December 2009. Due to the said reason, he could not contact his advocate and resultantly, on 21.08.2009, as the matter went unattended from his side, the suit was decreed in favour of the respondent.

3. On 15.01.2010, when he went to the office of the Talathi for work, at that time he learned about the suit being decreed. On 18.01.2010, when he inquired in the office of the trial court, he learned that, on 21.08.2009, the suit has been decided. On the same day, he applied for the certified copy and obtained it on the same day. Thereafter, he contacted his advocate and filed application under Order 9 Rule 13 of the

Code of Civil Procedure (**for short, “the Code”**) for setting aside ex-parte judgment and decree on 30.01.2010. According to him the reason for his absence was due to the illness of his father. He, therefore, prayed for setting aside the ex-parte judgment and decree and to restore the suit back to the file for its decision in accordance with law.

4. The respondent resisted the application by filing reply. He denied all the adverse allegations against him. He stated that, the entire conduct of the appellant clearly shows that, he was negligent. The reason tendered for his absence is unreliable and unacceptable. He stated that the judgment and decree has been passed on 21.08.2009, while the present application has been filed on 30.01.2010. There is delay in filing the application. The appellant has not filed any application for condonation of delay and therefore, there is no question of condoning the delay. The application therefore, is not tenable. He, therefore, prayed for rejection of the application with costs.

5. The appellant examined himself and two other witnesses and closed his side of evidence. The respondent did not adduce any evidence. After considering the evidence on record and hearing the parties, the learned trial court rejected the application on the ground that the appellant was negligent in defending the matter.

6. The points for determination and my findings thereon are as under:-

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether the appellant has shown : sufficient cause for the delay caused in filling application for setting aside, the ex-parte judgment and decree ?	Does not survive as matter is remanded.
2. Whether the appellant has shown : sufficient cause for his absence, when the judgment and decree was passed ?	Does not survive as matter is remanded.
3. Is the appellant entitled for condonation : of delay and setting aside the ex-parte judgment and decree ?	Does not survive as matter is remanded.
4. Whether the impugned order passed by : the learned trial court below Exh-1, calls for any interference ?	Yes.
5 . What order ?	: As per final order.

-:- REASONS -:-

AS TO POINTS NO. 1 TO 3.

7. The learned advocate for the appellant argued that the impugned order suffers from illegality. The learned trial court has totally overlooked the testimony of the appellant and the witnesses examined by him in order to substantiate his contention regarding the illness of his father and the treatment taken by him. The learned trial court has not given any importance to the testimony of the doctors, who are specialized in their respective fields and who have specifically deposed regarding the illness and treatment provided to the father of appellant. He argued that though the appellant has not filed any

application for condonation of delay, however, it is settled principle of law that the oral application for condonation of delay is tenable and the court has to consider and decide such prayer by considering the averments in the application on the point of delay. According to him, the learned trial court has ignored all these aspects and came to a wrong conclusion.

8. He urged that the rulings cited by the learned advocate for the appellant before the trial court has also not been looked into and has not been appreciated properly. He pointed out that, while considering the rulings cited, the learned trial court has discarded the same by simply mentioning that, the findings are not helpful to the applicant, but has not discussed anything to that effect in detail. This according to him amounts to non-application of mind. He argued that, the impugned order is cryptic and there is no proper reasoning given while rejecting the application.

9. In support, he relied upon the case of **Prakash Chander Manchanda and another Vs. Smt. Janki Manchanda**, reported in AIR 1987 SC 42, **Balu @ Madhavrao Shankarrao Ghorpade since deceased by his LRs. Ajay Madhavrao Ghorpade and others Vs. Radhakkabai Panditrao Ghorpade and others**, reported in 2004 (1) Mh.L.J. 323, **Videocon International Ltd. Vs. Video Links and Others**, reported in 2006 (5) Mh.L.J. 425, **B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and Others**, reported in AIR 2003 SC 3527, **K. Rudrappa Vs. Shivappa**, reported in 2004 (3) B C J 745 (SC), **Nand Singh Vs. Estate Officer and Another** reported in AIR 1993 Delhi 38, **M/s. Markland Pvt. Ltd. And Others Vs. State of Gujarat**, reported in AIR 1989 Gujarat

44 and Y. P. Lele Vs. Maharashtra State Electricity Distribution Company Ltd. And Ors., reported in AIR 2023 SC 3832.

10. As against this, the learned advocate for the respondent submitted that, the trial court ought to have rejected the application at the threshold, on the ground that the appellant has not filed any application for condonation of delay in filing the application. He pointed out that, no reason has been tendered by the appellant for condonation of delay. He submitted that the testimony of the appellant and his witnesses is inconsistent, and the appellant himself, being a doctor, with the help of his doctor friends, has created documents to succeed in restoring the suit. He urged that, the testimony of the appellant and his witnesses is by way of after thought, unbelievable and unacceptable. The learned trial court has properly appreciated the evidence on record and came to a proper conclusion, which does not require any consideration. He thus, supported the impugned order and prays for dismissal of the appeal with costs. In support, he relied upon the case of **Estate Officer, Haryana Urban Development Authority & Anr. Vs. Gopi Chand Atreja, reported in 2019 CJ(SC) 304, Smt. Varhyan wd/o. Narendra Singh Chhatwal since (D) thr. LRs. Vs. Smt. Kala wd/o. Narendra Singh Chhatwal & Ors., reported in 2015(6) ALL MR 324 and Vasant Vithal Gawand Vs. Shantaram Tukaram Gawand since (D) by his LR. & Anr., reported in 2016 (2) ALL MR 235.**

11. It is seen that, the suit filed by the respondent has been decreed on 21.08.2009. Though, the appellant appeared and filed Written Statement, however, he neither cross-examined nor adduced any evidence. As nobody appeared for the appellant, the

matter was decided on 21.08.2019. The sum and substance of the rulings viz. the case of Prakash Chander Manchanda (supra), Balu @ Madhavrao Shankarrao Ghorpade (supra), Videocon International Ltd. (supra), B. Janakiramaiah Chetty (supra) and Y. P. Lele (supra), is that, when after filing of the Written Statement by the defendants, they did not appear on the date of hearing and no evidence was laid on their behalf, the judgment and decree passed thereafter would be ex-parte and not an order on merits and consequently, as the case was covered under Order 17 Rule 2 of the Code, the application for setting the judgment and decree was tenable. In the case in hand also, the respondent appeared and filled his Written Statement, but neither cross examined the appellant and his witnesses, nor adduce any evidence and resultantly, the suit was decided. Thus, the suit was decided ex-parte and therefore, the application for setting aside the ex-parte judgment and decree is tenable.

12. A serious objection has been raised that without the application for condonation of delay, the application for setting aside the ex-parte judgment and decree is not tenable. On this aspect in the case of K. Rudrappa (supra), the Hon'ble Supreme Court held that, the technical objections should not come in the way of doing justice. In the case of Nand Singh (supra), the Hon'ble Delhi High Court held that, "In order to promote the administration of justice, the oral application of the petitioner ought to have been entertained." In the case of M/s. Markland, the Hon'ble Gujrat High Court held that, Section 5 of the Limitation Act only requires the appellant or the applicant to satisfy the court that he had sufficient cause for not preferring the

appeal or making the revision application within such period. It further observed that, the Section does not require that there should be a written application for condonation of delay.

13. On the other hand, the learned advocate for the respondent also relied upon the case of Gopi Chand (supra), Varhyan (supra) and Vasant (supra), to show that, the negligence of the advocate for the party is no sufficient ground for condonation of delay. It was also observed that, the appellant did not take steps in filing Written Statement in the suit, when pending in trial court, nor made any inquiries with his advocate about the suit and therefore, held that the conduct of the appellant is one of the gross negligence.

14. Considering the aforesaid rulings cited by both sides, it is settled principle of law that, the delay has to be construed liberally and it should be seen that no injustice should be done to the parties, only on technical grounds. In the case in hand, the appellant has cited the reason of the illness of his father during the relevant period, when the judgment and decree was passed ex-parte. Now the question arises, as to whether the learned trial court has passed any order in respect of condonation of delay in filing the application under Order 9 Rule 13 of the Code. Admittedly, the judgment and decree has been passed on 21.08.2009 and the application under Order 9 Rule 13 of the Code has been filed on 30.01.2010. The certified copy, as per the appellant, was applied on 18.01.2010, which was received on the same day. Thus, the certified copy was applied after the limitation period was over. Admittedly, there is a delay in filing the application Order 9 Rule 13 of the Code. According to

learned advocate for the appellant he has given the reason in the application under Order 9 Rule 13 of the Code, itself.

15. The learned trial court while passing the order has observed that, “The statutory period for making an application for setting aside Ex-parte judgment is thirty days. The applicant has made this application after lapse of approximately 3 months. He has not sought for the condonation of delay caused to file the application. But with a view to grant an opportunity to the applicant to put forth his side if the technicality is kept aside we have to see whether he has shown sufficient cause for the delay caused.” The impugned order thereafter does not show that the aspect of delay in filing the application has been dealt with, by the learned trial court. When a serious objection has been raised by the respondent in their reply regarding the appellant not filing application for condonation of delay and there being no sufficient cause, the learned trial court ought to have decided the said aspect, at least while passing the impugned order.

16. There is no bar for considering the oral request of the applicant for condonation of delay, in order to avoid the technicalities, when he shows the reason for the delay in the application under Order 9 Rule 13 of the Code, itself. According to the applicant, he has tendered reasons. When such is the case, it was for the learned trial court to give a specific finding on the point of condonation of delay in filing the application under Order 9 Rule 13 of the Code. However, the learned trial court has not given any findings on that aspect and from the impugned order it cannot be ascertained, whether it has condoned the delay or has rejected the same. There is no whisper to that effect in the

order. Without considering the said aspect, the learned trial court, has proceeded further to decide the application under Order 9 Rule 13 of the Code.

17. Unless the delay is condoned, the application under Order 9 Rule 13 of the Code can not be considered and decided. For if, the oral permission for condonation of delay is refused, in that case, the application under Order 9 Rule 13 of the Code does not survive and becomes redundant. Thus, the learned trial court without considering the aspect of condonation of delay, has gone further to decide the application under Order 9 Rule 13 of the Code, itself. In absence of any findings regarding the condonation of delay, the order suffers from illegality. The learned trial court has committed an error by not giving any findings regarding the aspect of delay and went ahead to decide the application under Order 9 Rule 13 of the Code.

18. It is also seen that, both the parties have relied upon various rulings of the Hon'ble Supreme Court and the Hon'ble High Courts, however, except quoting the said rulings, the learned trial court did not appreciate the said rulings. Only a single line has been mentioned while considering the rulings that, they are not helpful to the appellant. The learned trial court has not discussed the ratio laid down in the cited cases, which has caused serious prejudice to the parties. The order appears to be cryptic and without application of mind. In view of these peculiar circumstances, the impugned order can not be said to be just, legal and proper. The impugned order therefore, deserves to be set aside and the matter needs to be remanded back to the trial court for its decision in accordance with law, as the principles,

while considering the aspect of condonation of delay is missing in the impugned order.

19. As a sequel to the above discussion, the appellant has made out a case for remand of the matter to the trial court for its decision in accordance with law. As the matter is remanded, points No.1 to 3 does not survive and hence, I answer them, accordingly.

AS TO POINT NO.4

20. The learned trial court ought to have considered and decided the issue of delay caused in filing the appeal. The learned trial court has failed to appreciate the fact that without deciding the issue of delay, the application under Order 9 Rule 13 of the Code would not have decided. The findings of the learned trial court are based on erroneous consideration. The order passed by the learned trial court is thus, unsustainable, incorrect and calls for interference. Hence, I answer point No. 4 in the affirmative.

AS TO POINT NO. 5 :-

21. In view of my above findings the appeal needs to be partly allowed and the order passed by the learned trial court being unsustainable and contrary to law, the same deserves to be quashed and set aside. The matter is liable to be remanded to the trial court for deciding the same, afresh, in accordance with law by considering the aforesaid aspects. In the circumstances of the case, there shall be no order as to costs. In the result, in answer to point No.5, I pass the following order:

-:- ORDER:-

1. The Miscellaneous Civil Appeal is partly allowed.
2. The order dtd.11.12.2015 passed by the Civil Judge, Junior Division, Kankavli, below Exh.1 in Civil Miscellaneous Application No.02 of 2012 is quashed and set aside.
3. The Civil Miscellaneous Application No.02 of 2012 is remanded to the trial court for fresh consideration and decision in accordance with law, by considering the point of delay in filing application under Order 9 Rule 13 of the Code of Civil Procedure.
4. No order as to costs.
5. The trial court shall readmit the proceeding under its original number.
6. The parties shall appear before trial court on 09.06.2025.
7. Record and Proceeding be sent back to the trial court, immediately.

Oros
Date:-08.04.2025

(H. B. Gaikwad)
Principal District Judge,
Sindhudurg-Oros.

