

Presented on : 31.10.2009
Registered on : 16.12.2011
Decided on : 19.03.2014
Period required for disposal
02 Years 04 Months 19 Days

**IN THE COURT OF SMALL CAUSES AT MUMBAI
(BANDRA)**

**Misc. Appeal No. 79 of 2011
in
Misc. Application No. 211 of 2009
in
Exh. 6
in
R.A.E. & R. Suit No. 368/1220 of 1984**

1. Shankar Pandurang Gogate (deleted) Orig. Defendant.
Smt. Shakuntala Shankar Gogate (since deceased)
2. Shri Anil Shankar Gogate,
Age – 50 years, Occ. - Unemployed.
3. Shri Sunil Shankar Gogate,
Age – 48 years, Occ. - Unemployed.
4. Shri Nitin Shankar Gogate,

Age – 40 years, Occ. - Service,
All residing at Room No. 11.
Chawl No. 1, Dhananjay Sadan,
Shiv Tekdi, Majas Village,
Jogeshwari (East), Mumbai – 400060.

... Appellants
(Orig. Defendants)

Versus

Smt. Mandakini Sadanand Pednekar,
Age – 60 years, Occ. - unemployed,
of Bombay, Hindu Inhabitant,
residing at Shiladevi Chaurasiya Chawl,
Majasgaon Tekdi,
Jogeshwari (East), Mumbai – 400060.

... Respondent
(Orig. Plaintiff)

A.A. Patel, Advocate for Appellants.
Ms. Sangita Nagpal, Advocate for Respondent.

Coram: Shri M.M. Sayed, Addl. Chief Judge,
&
Shri D. P. Shingade, Judge.
C. R. No.39.
Date: 19.03.2014.

Oral Judgment : (Per D. P. Shingade, Judge)

1. This appeal is directed against the judgment and order rendered in Misc. Application No. 211 of 2009 in Exh. No. 6 in R.A.E. & R. suit no. 368/1220 of 1984 on 07.08.2009. By the impugned judgment and order, the trial Court rejected the application filed by the appellants / original defendants for condonation of delay in filing the application for setting aside ex-parte decree and for setting aside the ex-parte judgment and decree passed on 04.10.2005, in the aforesaid suit. The parties are hereinafter referred to as per their nomenclature in the

suit i.e. the 'plaintiff' and the 'defendants'.

2. Briefly stated, the facts leading to the appeal, are as under :-
 - a. The plaintiff filed the aforesaid suit against the original defendant Shankar Gogate for recovery of possession and arrears of rent on the grounds available under the erstwhile Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short the 'Bombay Rent Act'). The suit came to be decreed ex-parte against the original defendant on 19.12.1991. Thereafter, the said ex-parte decree came to be set aside by order dated 05.08.1992 in Misc. Notice No. 332 of 1992 taken out by the original defendant. Thereafter, during pendency of the suit, the original defendant expired, therefore, his heirs and legal representatives were brought on record. The appellants / defendants are the legal representatives of the deceased defendant. Once again the suit decreed ex-parte on 04.10.2005 against the appellants / original defendants (legal representatives of the original defendant).
 - b. The plaintiff took out Notice before Execution of the decree being Misc. Notice No. 172 of 2006. After service of the notice before execution, the defendants appeared and objected the execution of the decree. Thereafter, the appellant no. 1 / original defendant no. 1 therein filed Misc. Application No. 211 of 2009 and moved an application (Exh. 6) for condonation of delay as well as for setting aside ex-parte

decree dated 04.10.2005. The defendants contended that, the original defendant filed written statement in the suit and thereafter sufficient time has been elapsed and the original defendant succeeded in getting ex-parte decree set aside and got possession from the plaintiff. After the death of the original tenant / defendant, the defendant nos. 2 to 4 being his sons, who were serving somewhere else had got information from the original defendant from time to time and were also attending the matter. Thereafter, after prolonged litigation, the original defendant got possession of the suit premises back on valid and sufficient grounds and particularly the suit premises have been covered under the Slums Act and the same was one of the defences in the original suit. The original defendants / appellants still are in possession of the suit premises. After the death of the original defendant, the advocate of the defendants Mr. Pathare did not look after the matter and the defendants were informed that, notice will be served upon them after the death of their father and thereafter, after the death of their mother. Hence, the appellants / original defendants did not take interest in the matter. Notice was served on the defendants along with name of their mother, who had died and thereafter, the defendant no. 2 has intimated to the plaintiff about the death of his mother and in spite of it, it appears that, the plaintiff / respondent has obtained the decree against their mother and

also against the original defendants without any justification and cause. The aforesaid facts came to the knowledge of the defendants when the application to execute the decree was taken out by the plaintiff, which is contested by them on the ground that, the application is not maintainable in law on account of death of their mother and thereafter sufficient time has been elapsed as the notice is of 2006. Hence, there was sufficient delay on the part of the plaintiff to complete the formalities and compete the application, which is now kept for hearing and to avoid any multiplicity of the proceedings, the present application is taken out for setting aside the ex-parte decree. It is further contended that, the original defendant nos. 2 and 3 were attending the matter therefore, they are advised to file the application for setting aside the ex-parte decree passed on 04.10.2005, which is liable to be set aside on following grounds :-

- (i) The suit premises are covered under the Slums Act. On this ground alone the decree is liable to be set aside.
- (ii) Name of their mother Shakuntala is shown as alive person, although she is no more and her medical certificate is also placed before the Hon'ble Court. In spite of death of their mother, the decree is obtained by the plaintiff for the reasons best known to her. On that ground also the decree is liable to be set aside.
- (iii) On account of the proceedings filed by the plaintiff,

which took long time, hence, the present application is made to avoid any further misunderstanding and complication in the matter.

(iv) In view of the above the defendants are interested in contesting the suit on merits.

c. The plaintiff opposed the application by filing her reply at Exh. 2 and denied all adverse allegations in the application. She denied that, she obtained the decree by concealing the facts and contended that, she was not aware that three sons of the original defendant were residing somewhere else. She contended that, as per the record, after the death of original defendant, the defendants never bothered to appear in the suit though they were brought on record and neglected to defend the suit until the notice for execution of decree was served upon them. After taking out notice for execution of the decree, she came to know regarding death of mother of the defendants and therefore, she made an application for amendment of the application. The defendants failed to show any sufficient ground to condone the delay and they never bothered to remain present in the Court. The present application is an afterthought and strategy to deprive the plaintiff of her rights to execute the decree. She prayed to reject the application.

d. The defendant no. 2 Sunil Gogate filed affidavit-in-rejoinder (Exh. 3) and denied all the contentions raised in the

affidavit-in-reply.

e. The trial Court after hearing both the parties, rejected the application by passing impugned judgment and order. The said judgment and order is assailed by preferring this appeal.

3. We heard ld. Advocates for both the parties at length. In view of their submissions canvassed before us, following points arise for our determination and we record our findings thereon for the reasons given thereunder :-

POINTS

FINDINGS

- | | | |
|---|--|--|
| 1 | <i>Whether the trial Court has committed an error in holding that, the defendants failed to show 'sufficient cause' to condone the delay in filing the application for setting aside ex-parte decree ?</i> | No. |
| 2 | <i>Whether the impugned judgment and order is according to facts and law ?</i> | Yes. |
| 3 | <i>What order ?</i> | <i>Appeal is dismissed with costs.</i> |

REASONS

As to Point No. 1 :

4. The learned advocate for the defendants during the course of arguments submits that, the trial Court has ignored the fact that, the amended plaint with summons was not served upon the appellants / original defendant nos. 3 and 4 personally. The trial Court has also ignored the important fact that, the deceased defendant and his widow

i.e. the defendant no. 1 Shakuntala were looking after the matter during their lifetime the trial Court has also erred in recording finding that, the defendant no. 3 i.e. Sunil was present in the Court on 06.11.1995. There was nobody to identify him as his advocate was not present there. The trial Court ought to have held that, the present defendants totally relied upon their advocate and their earlier advocate did not attend the matter in spite of assuring of attending the same. The trial Court also erred in recording finding that, the defendants made false statement that, their father and mother were attending the matter. The impugned judgment of the trial Court is against the catena of the judgments of Hon'ble Apex Court on the point of setting aside ex-parte decree. The trial Court ought to have taken a liberal approach in condoning the delay for setting aside ex-parte decree, so as the suit could have been heard on merits and by giving full opportunities to both the parties. Lastly, the learned advocate for the defendants submits that, the suit was pending for long time. It appears from the Roznama dated 23.01.2004 that, both the parties and their advocates were absent but the trial Court issued Court Motion Notice only to the plaintiff and not to the defendants. The trial Court ought to have issued Court Motion Notice to the defendants also.

In support of his submission that, the Court should adopt liberal approach in condoning the delay, the learned advocate for the defendants placed reliance upon the following judgments :-

- a. **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others (AIR 1987 SUPREME COURT**

1353), wherein Hon'ble Apex Court held that, “3. *The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts....”*

b. **R.K. Sharma and others Vs. Ashok Nagar Welfare Association and Co. (AIR 2001 DELHI 271)**, wherein it is observed that, *the delay in filing the appeal can be condoned on sufficient ground.*

c. **Laxman Piraji Kumbhar Vs. Smt. Rahnabai Shaikh and another [1991(1) ALL INDIA RENT CONTRO JOURNAL 57]**, wherein Hon'ble Bombay High Court has held that, “4... *It is true that the tenant was guilty of negligence in not remaining present but the negligence should not be visited with such a heavy penalty of decree of eviction....”*

d. **Ratilal s/o. Jivanbhai Lalji Vs. 1(a) Kuvarben wd/o. Chabildas Patel & Ors. [2009(1) ALL MR 654]**, wherein Hon'ble Bombay High Court has held that, *in case of application for setting aside ex-parte decree the non-communication of transfer of matters from one Court to another*

and further proceeding and no communication from the Advocate, if causes injustice and results into such ex-parte decree of eviction need to be considered as sufficient ground / reason to condone the delay and to set aside the ex-parte decree in the interest of justice.

5. On the other hand, the learned advocate for the plaintiff / respondent submits that, the plaintiff has fighting litigation since 1984. The original defendant despite of service of summons also did not file his written statement. Therefore, the suit was decreed ex-parte. The said ex-parte decree came to be set aside and the suit was proceeded further. During pendency of the suit, the original defendant died and as such, his widow and other legal representatives i.e. appellants / defendants were brought on record. Despite service of the amended plaint, the defendants failed to appear and contest the suit, hence, again the trial Court was required to pass ex-parte against them. The plaintiff / respondent took out notice before execution to execute the decree passed on 04.10.2005. The plaintiff did not know that, the defendant no. 1 i.e. widow of the original defendant died during pendency of the suit. For the first time, the plaintiff came to know about her death when the defendants disclosed the said fact when the notice was served in the notice before execution. Therefore, immediately the plaintiff / respondent took out an application to delete the name of the widow of the original defendant. The appellants / defendants are not residing in the suit premises. Even though the defendants were parties to the suit proceeding they did not bother to appear and contest the suit.

They are merely blaming their previous advocate for their own negligence. The defendants despite having been served with notice before execution and filed their reply, they have moved present application for condonation of delay for setting aside ex-parte decree in 2009. The defendants have not shown any sufficient cause to condone the delay and the trial Court has therefore, not committed any error of facts and law in rejecting the application. The plaintiff is a senior citizen of 85 years of age and therefore, when the valuable right is accrued in her favour by passing the decree in the aforesaid suit, that cannot be taken away lightly and more particularly when the defendants / appellants are not due diligent in prosecuting with the suit. Therefore, she submitted to dismiss the appeal with costs.

6. Bearing in mind the principles laid down in the above cited judgments on the point of condonation of delay under Sec. 5 of the Limitation Act, we have to consider the case in hand.
7. Admittedly, the suit came to be decreed ex-parte against original defendant on 19.12.1991. It appears that, the said ex-parte decree dated 19.12.1991 was set aside in Misc. Notice No. 332 of 1992 dated 05.08.1992 in C.R. No. 16 and the suit was restored to file. It appears from the cause title of the plaint that, in R.A.E. Suit no. 368/1220 of 1984 the original defendant died during pendency of the suit and his widow and sons i.e. defendant nos. 1 to 4 were brought on record by carrying out amendment in the cause title of the plaint on 16.11.1995. Thereafter, the suit was again decreed ex-parte against the legal representatives of the original defendants i.e. defendant nos. 1 to 4

on 04.10.2005. From perusal of the judgment of the trial Court in para no. 3, it has been observed that, *“In spite of service of summons, the original defendant as well as on amendment the present defendants did not file the written statement, suit therefore, proceeded ex-parte against them”*.

Thus, it is clear that, the decree came to be passed ex-parte against the appellants / original defendants i.e. legal representatives of the original defendant. It is seen that, while decreeing the suit ex-parte the trial Court directed the plaintiff to take out notice before execution of the decree. Accordingly, the plaintiff took out notice before execution i.e. Misc. Notice No. 172 of 2006. Admittedly, the notice before execution was served on the defendants and they appeared in the said notice. During pendency of the appeal, the appellants / defendants through their advocate furnished copy of death certificate of defendant no. 1 and also informed to the Court that, the defendant no. 1 has expired on 06.05.2005, therefore, the plaintiff made an application for deleting the name of the original defendant no. 1 i.e. widow of the original tenant and the application came to be allowed by order dated 30.10.2007. Thereafter, the defendant nos. 1 to 3 / appellants no. 1 to 3 took out Misc. Application No. 211 of 2009 for condonation of delay in filing the application for setting aside the ex-parte decree and for setting aside the ex-parte decree dated 04.10.2005, on 17.10.2008.

8. Considering the aforesaid facts of the proceedings, it may be noted that, as per Order 9, Rule 13 of the Code of Civil Procedure, in any case in which the decree is passed ex-parte, the defendant can apply to the Court by which the decree was passed for and order to set it aside

and if he satisfies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. It is provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also. It is further provided that, no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his willful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim. It may also be noted that, such an application can be filed within 30 days as provided under Article 123 of the Limitation Act, 1963. The Article 123 of the said Act provides that, to set aside the decree passed ex-parte or to re-hear the appeal decreed or heard ex-parte, the period of limitation is 30 days from the date of the decree of where the summons or notice was not duly served, when the applicant had knowledge of the decree.

It is also further to be mentioned that, in the case of delay in filing such an application, the defendant can avail of the benefit of Section 5 of the Limitation Act, 1963 and seek its condonation by satisfying the Court regarding the existence of circumstances which prevented him from approaching the Court within the limitation prescribed by Article 123 of the Act. It is also well settled as stated

above that, in construing Section 5 of the Act, the Court has to keep in mind that discretion in the section has to be exercised to advance substantial justice. The Court has a discretion to condone or refuse to condone the delay.

9. In the instant case, if we consider the contentions raised by the defendants in their Misc. Application No. 211 of 2009, it can be seen that, the defendants in para no. 3 of the application have stated that, their father i.e. the original defendant filed the written statement in the suit and thereafter sufficient time has been elapsed and their father succeeded in getting ex-parte decree set aside and got possession from the plaintiff. It may be noted that, from perusal of the judgment and decree which passed ex-parte on 19.12.1991, it is seen that, the original defendant had not filed the written statement and hence, the suit came to be decreed ex-parte. However, the defendants / appellants are claiming that, their father had filed the written statement. The trial Court has observed in the impugned order that, the defendants / appellants have made such false statement and it is rightly so. However, it is pertinent to note that, since the judgment and decree passed on 19.12.1991 has been set aside and the suit has been restored to the file, it is material to know whether the original defendant had filed the written statement. It is significant to note that, admittedly, after restoration of the suit to the original file, the original defendant died during pendency of the suit and the appellants as well as their mother were brought on record being legal representatives of the original defendant. As noticed above, it is clear from the judgment and

decree of the trial Court dated 04.10.2005 that, the legal representatives of the original defendant / appellants did not file their written statement, therefore, the suit proceeded ex-parte against them. It is not contention of the defendants / appellants that, the summons of the amended plaint were not served on them. The defendants have also not made out any case as to whether they were prevented from any sufficient cause to appear before the Court when the suit was called on for hearing. Since, the fresh judgment and decree has been passed on 04.10.2005 and when the summons of the amended plaint was admittedly duly served on the defendant, as per Article 123 of the Limitation Act, 1963 the application for setting aside ex-parte decree ought to have been filed within 30 days from the date of the decree i.e. on or before 04.11.2005. As noticed above, the present application has been filed on 17.10.2008, therefore, it is clear that, the application has been filed after 35 months from the date of the decree.

10. It is the contention of the defendants that, after their father expired, their advocate Mr. Pathare did not look after the matter and he informed them that, notice will be served upon them after death of their father and thereafter after the death of their mother, he did not take interest in the matter.

In this connection, it may be noted that, their father expired in the year 1995 and thereafter appellants / defendants were brought on record in the year 1995. It was for the appellants / defendants to attend and defend the suit according to law. Therefore, this ground put forth by the appellants / defendants is not sufficient cause.

11. Another contention of the defendants / appellants is that, notice before execution was served on them along with name of their mother, who had died. Thereafter appellant no. 2 / original defendant no. 2 had informed death of his mother and in spite of the same the plaintiff / respondent has obtained decree against their mother.

In this connection, it is to be noted that, after their mother expired, it was their duty to remain present in the Court and report about the same before the suit was decreed. In our opinion, this is not sufficient cause to condone the delay in filing the application for setting aside ex-parte decree.

12. The learned advocate for the defendants / appellants during the course of his arguments has vehemently submitted that, from the *Roznama* dated 23.01.2004, it appears that, the trial Court should have issued notice to both the parties. However, the Court merely issued notice to the plaintiff / respondent and failed in its duty to issue notice to the defendants / appellants.

In this connection, it may be noted that, the defendants have also filed certified copy of the said *Roznama* on record. We have perused the *Roznama* dated 23.01.2004. It appears that, the trial Court observed that, both the parties and their advocates were absent, hence, the Court Motion Notice was issued only to the plaintiff and not to the defendants.

The learned advocate submitted that, when the matter is transferred from the one Court to another, hence, it is the duty of the

Court to issue notice to both the parties and if such notice is not issued and any party did not appear before the Court, the same is a sufficient cause to condone the delay in taking out any application and in support of his submission he has relied upon the judgment in the case of *Ratilal s/o. Jivanbhai Lalji (cited supra)*.

However, it may be noted that, in the instant case, it is not the case of the defendants / appellants that, the suit was transferred from one Court to the other and the Court without issuing notice to the defendants / appellants proceeded to decide the suit. Therefore, in our view, the authority is not applicable to the present case.

13. It is not out of place here to mention that, the defendants / appellants have taken out an application (Exh. 8) for permitting them to lead additional oral evidence of defendant no. 4 Nitin Gogate on the point that, the Roznama dated 23.01.2004 mentioning that, the trial Court had sent Court Motion Notice to plaintiff / respondent only and not to the defendants / appellants. It may be noted that, the defendants / appellants have produced certified copy of the said Roznama along with Exh. 11 and the said Roznama is relied upon by the defendants / appellants is taken into consideration by us in the previous part of this judgment. Hence, we dispose of the application Exh. 8 simultaneously along with this appeal.

14. In view of the totality of the facts and circumstances of the case, we are of the view that, the defendants / appellants were not litigating the matter with due diligence and it can be said that, they are

irresponsible litigants. This is so because despite having brought on record in place of deceased defendant and service of summons they failed to contest the suit. They even did not appear to attend the Court and defend the suit, hence, ex-parte decree came to be passed on 04.10.2005. They have not assigned any 'sufficient cause' for condonation of delay in filing the application and also for setting aside the ex-parte decree. In our view, the trial Court has rightly considered all the aspects of the matter and has come to the right conclusion that, the defendants / appellants have failed to show sufficient cause to condone the delay in filing the application for setting aside ex-parte decree. We affirm the findings of the trial Court. Therefore, the impugned judgment and order is according to the law and facts and needs no interference. There is no merit in the appeal and the same is liable to be dismissed. We answer the points accordingly. We proceed to pass following order :-

ORDER

The appeal is hereby dismissed with costs.

I agree,

(M.M. Sayed)
Addl. Chief Judge,
C.R. No. 39
Dt. 19.03.2014

Dictated on : 19.03.2014
Transcribed on : 19.03.2014
Checked & signed on : 25.03.2014

(D. P. Shingade)
Judge,
C.R. No. 39
Dt. 19.03.2014

(D. P. Shingade, Judge)