

(2022) 05 BOM CK 0074
In the Bombay High Court
Case No : Writ Petition No. 4010 Of 2022

Shamrao Piraji Kadam

APPELLANT

Vs

Prakash Shivaji Chavan And Others

RESPONDENT

Date of Decision : 30-05-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Citation : (2022) 05 BOM CK 0074

Hon'ble Judges : Milind N. Jadhav, J

Bench : Single Bench

Advocate : S.S. Patwardhan, Bhooshan R. Mandlik, Surel Shah, Abhay A. Jadhavar, Sachin K. Hande

Final Decision : Allowed

Judgement

Milind N. Jadhav, J

1. Heard.

2. The Petitioner has filed the present Writ Petition to challenge the Judgment & Order dated 20.07.2021 passed by the learned District Judge - 6, Sangli in Misc. Civil Application No. 213 of 2017. The Petitioner filed application seeking condonation of delay of 30 months and 14 days in filing a substantive First Appeal before the learned Appellate Court. The date of exparte judgment & decree in Special Civil Suit No. 188 of 2013 is 05.03.2015. The Petitioner filed the First Appeal for setting aside the aforementioned exparte decree on 21.09.2017. Along with First Appeal, he filed Misc. Civil Application No. 213 of 2017 seeking condonation of delay on the ground that a fraud was committed on the Petitioner and the Petitioner came to know about the passing of exparte decree immediately before filing the First Appeal.

3. The relevant facts which are necessary for deciding the present Writ Petition are as follows:-

3.1. On 22.11.2013 Respondent Nos. 1 and 2 (Plaintiffs) filed a suit for specific performance of a contract dated 14.08.2013 against the Petitioner (Defendant No. 1). Respondent No. 3 (Defendant No.2) is the wife of the Petitioner, which the Petitioner denies. According to the Petitioner, his wife has expired long back. The summons in the aforementioned Suit No. 188 of 2013 were served by the Respondent Nos. 1 and 2 (Plaintiffs) on the Petitioner (Defendant No. 1) and Respondent No. 3 (Defendant No. 2) on an address at Village Wanleswadi. The Petitioner contends that he does not reside or has any house at this village. The Petitioner all along has been residing in Pune.

3.2. The subject matter of this suit was specific performance of agreement of sale of suit property dated 14.08.2013 between the Petitioner and Respondent No. 3 on one hand and the Respondent Nos. 1 and 2 on the other hand. The Petitioner denies knowledge of this agreement and also states that he does not know Respondent Nos. 1 and 2; further he has not executed any such agreement. The agreement is notarized by a Notary Public at Sangli. According to the Petitioner, Respondent No. 3 whom he does not know or have ever met in his life has been set up as his wife by the Respondent Nos. 1 and 2 and the three Respondents herein have colluded and conspired with each other and committed a massive fraud to usurp the suit property described in paragraph 2 of the petition at Wanleswadi. The Petitioner is a retired executive engineer from the government department; he resides in Pune with his two sons after his retirement in 1997 and is the owner of two immovable properties / land parcels situated at Wanleswadi within the geographical limits of Sangli Miraj and Kupwad Municipal Corporation being Gut No. 35/A/A/1/1/B/1/3 admeasuring 284.90 m2. and Gut No. 35/A/A/1/1/B/1/4 admeasuring 282.04 m2. In 2015 the Petitioner decided to dispose of the aforementioned two properties and executed a development agreement dated 03.03.2015 in favour of G.P. Developers, Sangli along with power of attorney dated 03.03.2015. The developers submitted a building plan on 08.07.2015; sanction was obtained from the Corporation and at present there is a multi-stored building standing on the said plots. During the construction, Petitioner executed a registered sale deed dated 07.12.2015 for consideration of Rs. 87,75,000/- in respect of both the said plots and the construction thereupon. As on date 80% of the sanctioned construction of the aforesaid plots has been completed according to the Petitioner.

3.3. According to the Petitioner sometime in the month of August 2017 he paid a visit to Sangli during which time he learnt that a suit for specific performance was filed against him by Respondent Nos. 1 and 2. Petitioner appointed an advocate to obtain the copy of the suit proceedings and came to know that Respondent No. 3 was shown as his wife in the suit proceedings; there was a notarized agreement of sale in respect of the suit property dated 14.08.2013; suit proceedings were served upon Respondent No. 3 (alleged wife) who received the same on behalf of herself and the Petitioner at an address in Wanleswadi; the suit proceeded in the absence of the Petitioner; Petitioner was not aware about the suit proceedings as he was living in Pune. 3.4. On 05.03.2015 the

aforementioned suit was decreed ex parte against the Petitioner (Defendant No. 1) by the learned trial court.

4. Mr. Patwarhdan, learned counsel appearing for the Petitioner submits that sometime in August 2017 when the Petitioner visited Sangli, he came to know about the aforementioned ex parte decree. The Petitioner therefore immediately filed an Appeal in the District Court at Sangli on 21.09.2017 along with the Misc. Civil Application seeking condonation of delay. He submits that in view of the strong facts in the present case, the learned Judge ought to have allowed condonation of delay. He submits that the Petitioner has also filed a police complaint against the Respondents; investigation has taken place and a charge sheet has also been filed against the Respondents; the Respondents were arrested and are presently released on bail; that the Petitioner did not waste any time after it came to his knowledge in August 2017 had immediately approached the civil court by adopting the appropriate remedy of filing the Appeal; that the grounds for passing the ex parte judgment & decree are very strong and amount to an imminent fraud played by the Respondents on the Petitioner; that the Petitioner did not know the Respondents nor has executed any agreement for sale with / along with the Respondents and in view thereof, the impugned order dated 20. 07.2021 deserved to be set aside and the First Appeal should be taken on record of the Court for passing appropriate directions / order.

5. PER CONTRA, Mr. Shah, learned counsel appearing for Respondent Nos. 1 and 2 has opposed the present petition on the ground that against the order rejecting the application for condonation of delay, the Petitioner ought to have filed a Second Appeal against the said order. He submits that invocation of this Court's jurisdiction under Article 226 & 227 of the Constitution is not maintainable; that when there is a statutory remedy available this Court should not exercise its writ jurisdiction.

5.1. Mr. Shah further submits that since the Petitioner is now divested of his right, title and entitlement in the suit property by virtue of the registered agreement dated 07.12.2015 in favour of G.P. Developers, the said G.P. Developers through its partners Mahesh Govind Patil and Baban Lawate are now seized with the rights in the suit property and have already filed an application before the District Court at Sangli seeking leave to file the Appeal since the Petitioner has no locus to file the present writ petition. He submits that the Petitioner had knowledge about the ex parte decree as far back as on 31.07.2017 when he was informed by his purchasers about the decree but the Petitioner did not take immediate action for almost seven months until filing of the suit on 16.02.2018; that the Petitioner has also not explained the reason for the delay of 40 days from the date of knowledge in the application and hence, the impugned order has been correctly passed.

6. I have heard the learned counsel appearing for the respective parties and perused the record. Submissions made by the parties are on pleaded lines. At Exhibit "E" (page 46 to the writ petition) is the Misc. Application No. 213 of 2017

filed by the Petitioner seeking condonation of delay. In paragraphs 6 and 7 of the said application the reasons for delay have been adequately explained by the Petitioner. The facts as seen are extremely gross on the face of record. The document in favour of the Respondent Nos. 1 and 2 though concerning an immovable property belonging to the Petitioner (denied by the Petitioner) is not a registered document. The Petitioner was 74 years old at the time of filing of the suit in 2017. Respondent No.3 has been shown as his wife by the Respondent Nos. 1 and 2 in the suit which was instituted by them in the year 2013. ...

Petitioner has denied having met or known Respondent No. 3 altogether. Respondent Nos. 1 and 2 have taken the aid of Respondent No. 3 in serving the Petitioner and obtaining the exparte decree against the Petitioner. In this entire gamut of proceedings the suit property never remained idle. The Petitioner in 2015 initially entered into a development agreement, issued power of attorney and subsequently by a registered deed sold the suit property for consideration. All throughout the suit property was being developed. If required the Respondent Nos. 1 and 2 could have always approached the civil court for execution of the decree or for seeking their substantive rights in the suit property.

7. Perusal of the application clearly shows that adequate reasons have been given by the Petitioner for seeking condonation of delay in respect of the period of 30 months 14 days before gaining knowledge of the impugned exparte decree and for the period of 40 days after gaining knowledge of the exparte decree. The impugned order while giving reasons in paragraph No. 7 records that the Petitioner was residing at Sangli at the relevant time. The learned Judge has come to the conclusion that since in 2015 the Petitioner had entered into the registered sale deed / transaction with the developer / purchaser it would appear that the Petitioner used to visit Sangli. Based on this reason, the learned Appellate Court had concluded that there is inordinate delay of 30 months and 14 days.

Prima facie the aforesaid findings in paragraph No. 7 are completely unsustainable and deserve to be set aside on the face of record. There are no reasons given by the learned Appellate Court to come to the conclusion that the Petitioner was residing at Sangli at the relevant time. The record is referred to by the learned Appellate Court but the said record will always shown the name of the Petitioner and the address at Walneswadi. The learned Appellate Court has failed to look into and consider the reason that Respondent No. 3 whom the Petitioner denies knowing has been put up as the wife of the Petitioner by the Respondent Nos. 1 and 2 and she has been served on behalf of both of them and on the strength of this service the exparte decree has been passed. These are very strong and significant grounds which have not been dealt with or reasoned by the learned Appellate Court while passing the impugned order. In so far as the issue of reasonable cause for condoning delay is concerned, there is apparent consistency in the case made out by the Petitioner. In the application seeking condonation of delay in paragraph Nos. 5 and 6 the reasons have been given

which have not been considered in the impugned order. In the facts and circumstances of the present case, such reasons ought to have been considered by the learned Appellate Court. It is also pertinent to note that Respondent No. 3 who has received service on behalf of the Petitioner of the suit proceedings filed by the Respondent Nos. 1 and 2 does not know Marathi; she hails from Kerala and she has signed the bailiff report on the instructions of Respondent Nos. 1 and 2. The fact that the suit summons was not served upon the Petitioner stands clearly proved in the present case. The question as to whether the Petitioner has been defrauded or otherwise will be the subject matter of the pending proceedings. It is seen that criminal action / offence has also been filed against Respondent Nos. 1 and 2.

8. It is seen that the learned Appellate Court has not considered the fact that the suit summons was never served on the Petitioner but was accepted by Respondent No. 3 falsely claiming to be his wife. Due to this the Petitioner had no knowledge about the suit proceedings as well as the exparte decree. This was the cause for the delay. Another important aspect of the service of the summons is that the same was accepted by Respondent No.3 on behalf of the Petitioner. Hence there was want of knowledge on the part of the Petitioner about the suit proceedings as well as the exparte decree resulting in the delay. The Petitioner has also relied upon judgment dated 06.07.2019 passed by the court of 7th Joint Civil Judge, Senior Division, Sangli in Regular Civil Suit No. 71 of 2018 in the suit for declaration and mandatory injunction against Respondent No. 2 declaring that the Petitioner and the Respondent No. 3 are not husband and wife and the Respondent No. 3 being permanently restrained from posing as the Petitioner's wife and also not to involve into any illegal transactions concerning the properties of the Petitioner.

9. For all the above reasons and in view of the above discussion and findings, the Writ Petition stands allowed in terms of prayer clauses (A) and (B) which read as under:-

"(A) That this Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order and / or direction thereby quashing and setting aside the judgment and order dated 20th of July 2021 passed by the learned District Judge No. 6 at Sangli in Civil Miscellaneous Application No. 213 of 2017, Exhibit A hereto;

(B) That this Hon'ble Court be pleased to allow the Petitioner's application dated 21st of September 2017 filed before the learned District Court at Sangli being Miscellaneous Civil Application No. 213 of 2017, Exhibit E hereto."