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**Brian Robert Alexander and Others Vs. M/S. A.G. Enterprises**

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**SooperKanoon Citation** : sooperkanoon.com/1144488

**Court** : Mumbai

**Decided On :** Mar-26-2014

**Judge** : The Honourable Chief Justice Mr. Mohit S. Shah &Amp; M.S. Sanklecha

**Appeal No.** : Appeal Nos. 143 of 2014, 144 of 2014 In Notice of Motion (L) No. 369 of 2014 In Suit No. 4378 of 1994 & In Notice of Motion No. 232 of 2014

**Appellant** : Brian Robert Alexander and Others

**Respondent** : M/S. A.G. Enterprises

**Judgement** :

Oral Order: (CJ.)

These appeals under Clause 15 of the Letters Patent take exception to the order dated 7 March 2014 of the learned Trial Judge. By the impugned order the Notice of Motion No.232 of 2012 taken out by the plaintiffs to set aside the order of Prothonotary and Senior Master extending time to file written statement, is disposed of as infructuous and Notice of Motion (L) No.369 of 2014 taken out by the defendant seeking to recall the order dated 17 February 2014 is allowed.

2. The broad facts leading to filing of these appeals are, appellant-plaintiffs filed the present suit being Suit No.4378 of 1994 for a declaration that the additional FSI of 1573.90 sq.ft which has become available due to a change in the Development Control Rules in respect of the suit land belongs to the original plaintiffs. Plaintiffs also claim the sum of Rs.1.60 crores together with interest

thereon from the respondent-defendant for utilization of the said FSI.

3. It appears that since no written statement was filed in the suit, the matter was listed before the Prothonotary and Senior Master of this Court on 12 December 2013. At that time, the Prothonotary and Senior Master passed the following:

œ... The Advocate for Defendant submits that he desires to withdraw his appearance. Mr.Nitin G.Raut, Advocate for Defendant, can do so as per law by taking out an appropriate proceedings, if he so desires. It is made clear that since Vakalatnama is filed, Advocate for Defendant has to file Written Statement. Accordingly, by way of last chance, time granted to Defendant to file Written Statement on or before 30-01-2014, failing Suit against Defendant will be transferred to the list of Undefended Suits.?

When the matter was again listed before the Prothonotary and Senior Master on 30 January 2014, the following order was passed by him:

œ... . Advocate for Defendant submits that he wrote a letter to his client for seeking discharge.

However, same is returned back with the postal remark œLEFT?. In that view of matter, Advocate for Defendant is required to take out appropriate proceeding for getting himself discharge as per law. Advocate for Plaintiffs is objecting, since last two occasions same statement was made and time sought. However, in the interest of justice, by way of last chance, time is granted to take out appropriate proceeding till 21-02-2014, failing Suit against Defendant will be transferred to the list of Undefended Suits.?

4. It appears that in the meantime, the suit was listed before the learned Trial Judge on 17 February 2014 and the learned Trial Judge passed the following order:-

œPlace for exparte decree on 24 February 2014.?

5. Thereafter, the defendant filed Notice of Motion (L) No.369 of 2014 with a prayer to recall the order dated 17 February 2014 and to take written statement of

the defendant on record after condoning the delay with liberty to defend the suit.

6. In the meantime the plaintiffs had taken out another notice of motion being Notice of Motion No.232 of 2012 for setting aside the order dated 30 January 2014 of the Prothonotary and Senior Master granting time to the defendant to file written statement upto 21 February 2014.

7. By the impugned order under appeal the learned Trial Judge has recalled the order dated 17 February 2014 and granted liberty to the defendant to file and serve the written statement by 18 March 2014. The aforesaid liberty was granted subject to the condition that the defendant shall pay the plaintiffs costs quantified at Rs.25,000/- by 14 March 2014. There is no dispute that the defendant tendered the costs of Rs.25,000/- to the plaintiffs who accepted the same without prejudice to its rights and contentions. The written statement affirmed on 20 February 2014 has also been taken on record after payment of above costs.

8. Learned counsel for the respondent-defendant raises a preliminary objection that the appeals are not maintainable. This objection is raised on the ground that the impugned order is not a judgment within the meaning of Clause 15 of the Letters Patent.

9. As against the above, the learned counsel for the appellants-plaintiffs submits that appeals are maintainable. This is on the ground that the impugned order has deprived the appellant-plaintiffs' of its valuable right to get exparte decree

10. On merits, it is submitted by the appellant-plaintiffs that the learned Trial Judge erred in permitting the defendant to file his written statement after a delay of more than 15 years. It is further submitted that the learned Trial Judge has also not given any reason for condoning such gross delay and the learned Trial Judge has not even passed any order condoning the delay. Reliance has been placed upon the decision of the Supreme Court in P.K.Ramachandran v/s. State of Kerala and anr, (1997) 7 SCC 556 in support of the contention that the learned Trial Judge ought to have recorded satisfaction that the explanation for the delay was reasonable or satisfactory. This, according to him, is a sine qua non for condonation of delay.

Further, it is submitted that when there is no sufficient cause disclosed in the application for condonation of delay, the Court has no unlimited discretion to condone the delay. In support reliance is placed upon the decision of the learned single Judge of this Court in Nandkishor D.Wadgaonkar and anr. v/s. Gajanan U. Pede, 2014(1) Mh.L.J. 343.

11. On the other hand, learned counsel for the respondent-defendant has opposed the appeals. Besides the objection about maintainability of appeals it is submitted that the defendant had set out all the relevant facts in his affidavit dated 20 February 2014 in support of his notice of motion for setting aside the order dated 17 February 2014. Facts stated in the said affidavit were not controverted by the plaintiffs, even though the plaintiffs did file affidavit-in-reply to the defendant's notice of motion. Learned counsel points out that after the defendant's previous advocate applied for time for filing written statement in the year 1999, the suit did not appear for direction. Thereafter the plaintiffs themselves had obtained permission for amendment of the plaint in the year 2005 and in the year 2009. Thereafter, the suit was transferred to the Bombay City Civil Court on 22 October 2012 on account of amendment to the Bombay City Civil Courts Act enhancing pecuniary jurisdiction of that Court. The suit was, however, sent back by the City Civil Court to the High Court on 3 May 2013 and thereafter the suit was listed before the Court and appeared under caption for `Direction' on 28 January 2014 and stood over to 4 February 2014. The suit was also being listed before the Prothonotary and Senior Master for filing the written statement. The Prothonotary and Senior Master had initially granted time upto 30 January 2014 for filing written statement and thereafter time was granted till 21 February 2014. The defendant had affirmed the written statement on 20 February 2014 and on that day itself instituted Notice of Motion (l) No.369 of 2014 for recalling the order dated 17 February 2014 and for permission to file the written statement. Hence, no adverse order was passed against the defendant till 17 February 2014 and there has been no question of making any application for condonation of delay as such, but it was out of abundant caution that the defendant had made a prayer in the notice of motion to condone the delay in filing the written statement. Learned counsel further submits that plaintiffs have already suitably compensated by payment of costs of Rs.25,000/- and therefore no prejudice has been caused to the plaintiffs.

12. We have heard the learned counsel for parties and considered the rival submissions.

13. In Shah Babulal Khimji v/s. Jayaben D.Kania and anr. (1981) 4 SCC 8, the Supreme Court has laid down the principle for determining what is the judgment within the meaning of Clause 15 of the Letters Patent. After observing that most of the interlocutory orders which contain the quality of finality are clearly specified in Order 43 Rule 1 of the Civil Procedure Code and are therefore judgments within the meaning of Letters Patent. The Supreme Court further observed that there may also be interlocutory orders which are not covered by Order 43 Rule 1 of the Code of Civil Procedure but which possess the characteristics and trapping of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. The Apex Court then gave an illustration that where the Trial Judge in a summary suit refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. Such order will undoubtedly be treated as judgment so as to be appealable. Take the converse case, where the Trial Judge allows the defendant to defend the suit unconditionally, in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote. This is so according to the Apex Court because the plaintiff still possesses full right to show that the defence is false and succeed in the suit.

14. The present case is akin to the above illustration given by the Apex Court. If the learned Trial Judge had refused to grant permission to the defendant to file the written statement, the defendant would have lost the valuable right to defend the suit and his remedy would be to file an appeal. However, in the present case, by allowing the defendant to defend the suit by filing the written statement, the learned Trial Judge has not caused any direct or immediate damage or prejudice to the plaintiff, as explained by the Supreme Court in the above judgment.

15. We are, therefore, of the view that the impugned order under appeal is not a judgment within the meaning of Clause 15 of the Letters Patent. Appeals are, therefore, not maintainable.

16. Even otherwise, in the facts and circumstances of the case, we are of the view that the discretion exercised by the learned Trial Judge cannot be said to be arbitrary or contrary to law. The facts pointed out by the defendant in his affidavit dated 20 February 2014 clearly indicate that the suit was not placed before the Court till January 2014 for any direction. In the above circumstances, the liberty granted by the learned Trial Judge to the defendant to file the written statement cannot be said to be arbitrary or capricious.

17. In the result, both the appeals are, therefore, dismissed.

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