

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 18 OF 2015

1] SAUNLO KASHINATH SAWANT
AND ANOTHER ... PETITIONERS

V/S

1] MR. SURSH SAWANT @ DNYANESHWAR
P. SAWANT AND ANOTHER ... RESPONDENTS

Mr. Vishnuprasad A. Lawande, Advocate for the
Petitioners.

Mr. G. P. Usgaonkar, Advocate for the respondent nos.1
and 2.

Coram :- N. M. JAMDAR, J.

Date :- 10 March 2015.

Order :

By order dated 4 March 2015 the petition was directed to be taken up for final disposal, accordingly taken up for final disposal.

2. By this petition, the petitioners challenge the orders passed by the learned Civil Judge, Junior Division, Mapusa dated 3 February 2014, 5 September 2014 and 16 October 2014. The consequence of the impugned orders is that the suit filed by the petitioners, which was dismissed for default, has not been restored.

3. The petitioners filed the suit against the respondents for

declaration of access, mandatory injunction and for permanent injunction. The suit was filed in the year 1998. The application for temporary injunction was taken up which was initially dismissed and appeal was filed by the petitioners, in which a status quo was directed to be maintained. According to the petitioners the respondents violated the order and contempt proceedings were filed. The suit remained pending. The evidence of the petitioners was completed on 1 April 2006. A Court Commissioner was appointed to record the evidence on 18 June 2007 and 4 January 2008. On 21 February 2008 the suit was transferred to the Court at Mapusa. After the suit was transferred to the Court at Mapusa the petitioners did not remain present on 4 to 5 dates and suit came to be dismissed for default on 26 June 2008.

4. Thereafter the petitioners filed an application for restoration along with condonation of delay. The trial Court allowed the application for condonation of delay and restoration, and accordingly suit was restored on costs. The respondents filed a miscellaneous civil appeal in the District Court and on 12 December 2011, the learned District Judge set aside the order and remanded the proceedings back to the trial Court. On 5 February 2013, the trial Court granted the application for condonation of delay, subject to payment of costs. Thereafter the matter was fixed for hearing as to application on restoration. The petitioners failed to remain present at the hearing of the restoration application which came to be dismissed on 5 September 2014. The petitioners, on the same day, made an application for review, and when the review came up on board the Advocate for the petitioners did not remain present, and the

learned Judge refused to restore the suit.

5. The learned counsel for the petitioners submitted that there is no finding that, before the suit was dismissed for non appearance in June 2008, the petitioners were anyway responsible for the delay, except for the five dates when they could not remain present. He submitted that the cogent reason was given by the petitioners that the Advocate committed a mistake in making a noting the dates, and which reason was found to be sufficient earlier, by the learned trial Judge and cost which were imposed, have been paid. He submitted that the delay in filing restoration application was condoned and thus the restoration application could not been dismissed and also the review application. He submitted that when the review application came to be dismissed the Advocate was just outside the Court and could not reach in time.

6. The learned counsel for the respondents vehemently opposed the petition. He submitted that the conduct of the petitioners is such that they deserve no any such indulgence and the learned Judge has rightly refused the application for restoration. The learned counsel relied upon the following decisions in the case of H. Dohil Constructions Co. (P) Ltd. vs. Nahar Exports Ltd. & anr., 2014 SAR (Civil) 1128 Supreme Court page 1128, Bhalchandara Ganesh Naik and Anr. vs. Sana Hotel & ors. [2009] 4 AIIMR 349, [2014] 0 Supreme (SC) 52778, Bijesh Kumar vs. State of Haryana, 1997(8) Supreme 332, P. K. Ramchandran vs. State of Kerala & Anr, 2012 SAR (Civil) 385 Supreme Court, Maniben Devraj Shah vs. Mun. Corp. of Brihan Mumbai, and [1993] 0 Supreme (SC).

21240, Salil Dutta vs. T.M.U And M.C. Private Ltd., to contend that once if there is negligence on the part of the party, the delay ought not to be condoned.

7. Firstly nature of the suit is to be seen. The suit is for right of access and for injunction. The petitioners had given a reason that the Advocate made a mistake in noting the dates and therefore, both Advocate and petitioners, remained absent when the suit was dismissed for default. Same ground taken in the application for condonation of delay and for restoration application. The learned Judge granted the application for condonation of delay, accepting the position and held that delay deserves to be condoned as it was due to mistake of the advocate that the matter went unnoticed. The petitioners have by now already deposited the costs twice.

8. It is true that the petitioners did not remain present when the restoration application came up for consideration. However, when it was dismissed a review was immediately made and at the time of review, the advocate did not remain present. However after the condonation of delay was allowed, the absence is of 2 to 3 dates. For that purpose I do not think the entire suit of the petitioners should remain dismissed for default. Generally proceedings should be disposed of on merits as it gives a quietus to the litigation. The learned Judge has not considered the options of imposing stringent conditions upon the petitioners. Instead putting the petitioners to terms, the learned Judge, without considering the fact that the delay was already condoned on the same ground, dismissed the application for restoration. The consequence of which is that suit remains dismissed, without

being heard on merits.

9. The decisions which have sought by the learned counsel for the respondents, turn on the facts of each case. Whenever the Court finds that the cause for delay is not bonafide, the Court does not exercise the discretion, but in the present case the main cause for dismissal is the mistake of the Advocate which cause was accepted while condoning the delay. Earlier the suit was restored but the order was set aside by the District Court. It is doubtful whether the District Court had any power to do so.

10. Considering this position, it was put to the learned counsel for the respondents indicate the condition that could be imposed on the petitioners such as amount of costs, discontinuance of injunction, and by asking the petitioners to withdraw the contempt proceedings filed against the respondents. The petition was adjourned to enable the learned counsel for the respondents to take instructions. The learned counsel for the respondents states that he has taken instructions from the respondents and the respondents are not interested in any options and are only interested in dismissal of the suit.

11. I have already held that having condoned delay for filing the restoration application, the learned Judge should have not refused to restore the suit on the ground, which was already accepted. The inconvenience could be set of by placing the petitioners under stringent conditions, but the respondents are not interested. In theses circumstances, I am of the opinion that by allowing the impugned order to remain would cause failure of justice and this is a fit case where the jurisdiction of this Court

requires to be exercised. Accordingly the writ petition is allowed in terms of prayer clause 'A'.

12. The suit filed by the petitioners bearing no. 55/1998 stands restored to file, to be decided on merits.

13. It is however made clear that any default on the part of the petitioners in attending any dates before the learned Civil Judge would be considered as an aggravated conduct and the petitioners will not be entitled to any equitable consideration henceforth.

14. The writ petition is disposed of as above.

N. M. JAMDAR, J.

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