

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**WRIT PETITION NO.2661 OF 2015**  
**WITH**  
**WRIT PETITION (STAMP) NO.12151 OF 2015**

Pradeep Dalichand Shah. ] ... Petitioner

Versus

Vishnu Vitthal Gokhale (Deceased) Through ]  
his L.R.s and Ors. ] ... Respondents

Mr. Shishir Joshi i/b Mr. Chetan Mhatre for Petitioner.  
Mr. S. M. Oka i/b Mahesh Menon & Co. for Respondent Nos.2(a) and 2(b)

**CORAM :- M. S. SONAK, J.**  
**DATE :- APRIL 30, 2015**

**P. C. :-**

1. These two petitions can be disposed of by a common order. Accordingly, Rule in both the petitions. At the request of and with the consent of the learned Counsel for the parties, Rule is made returnable forthwith.

2. The writ petition no.2661 of 2015 questions two orders made by the City Civil Court on 17 February 2015, which have the effect of dismissal of Suit No.7195 of 2006 for failure on the part of

the petitioner - plaintiff to proceed with his evidence in the suit. The challenge in writ petition (stamp) no.12151 of 2015 is to the order by which the learned City Civil Court Judge has declined to recast the issues.

3. By the first order dated 17 February 2015, the City Civil Court dismissed the suit for failure on the part of the petitioner to proceed with the evidence. By the second order made on the same date, the learned Civil Judge, declined to recall its first order and restore the suit.

4. Mr. Oka, the learned counsel for the respondent Nos. 2(a) and 2(b), submitted that the orders impugned in writ petition no. 2661 of 2015 are appeal-able and therefore, petition under Article 227 of the Constitution of India would not be maintainable. The submission, is technically correct, however availability of an alternate remedy is not an issue which goes to the root of maintainability of the petition under Article 227 of the Constitution of India. Besides, in the peculiar facts and circumstances of this case, as indicated hereafter, no useful purpose would be served by relegating the petitioner to alternate remedy.

5. In the first place, it is necessary to take up for consideration the orders impugned in the two petitions together, as obviously, they have nexus with one another. The order impugned in writ petition (stamp) no.12151 of 2015 is not appeal-able. Secondly,

records would indicate that the petitioner applied for restoration on the very day when the suit was dismissed for failure on the part of the petitioner to lead his evidence. Normally, when restoration is applied for on the same day, the same is considered without even insistence upon a formal notice of motion. The grievance of the respondent nos. 2(a) and 2(b) before this Court as well as the City Civil Court was that the petitioner, by not filing affidavit in lieu of examination-in-chief, was unnecessarily delaying the proceedings before the Civil Courts. If therefore, at this stage, the petitioner is required to avail alternate remedy of appeal, which in any case lies before this Court itself, the result would be further protraction of proceedings. This shall benefit neither parties. Accordingly, in view of such peculiar facts and circumstances, the present petitions are being entertained.

6. The suit in the present case is of the year 2006. Accordingly, there was really no justification on the part of the petitioner to apply for recast of issues at such a belated stage. Accordingly, there is no necessity to interfere with the order impugned in writ petition (stamp) no. 12151 of 2015. If, however, the suit is ultimately decided against the petitioner, and the petitioner chooses to institute an appeal against the decree so made, the petitioner shall be at liberty to challenge the said order, in the appeal so instituted.

7. The orders dated 17 February 2015, impugned in writ petition no. 2661 of 2015 operate rather harshly upon the petitioner.

Considering the circumstance that restoration was applied for on the very day, interests of justice would be met if an additional opportunity is afforded to the petitioner, subject of course to the petitioner paying costs to defendant nos.2(a) and 2(b) for the prejudice that has occasioned to them by way of delay in disposal of the suit. Accordingly, impugned orders dated 17 February 2015 are set aside subject to the petitioner paying costs of Rs.25,000/- (Rupees Twenty Five Thousand) to the respondent nos. 2(a) and 2(b) who are stated to be contesting respondents and who, in any case, have appeared in this Court, through a Counsel. The petitioner to pay such costs to respondent nos.2 (a) and 2(b) on or before 12 June 2015. Further, the petitioner is directed to file his affidavit in lieu of examination-in-chief on or before 12 June 2015, so that there is further progress in the suit originally instituted in the year 2006. In case the costs are not paid on or before 12 June 2015, these petitions shall be deemed to have been dismissed.

8. Accordingly, Rule is made partly absolute to the aforesaid extent in the two petitions. There shall be no separate order as to costs in the petitions.

9. All concerned to act on basis of an authenticated copy of this order.

**(M. S. SONAK, J.)**