

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1994 OF 2012

Ramdas V. Malode and ors. .. Petitioner
vs.
Narendra B. Sonawane and anr. .. Respondents
WITH
CIVIL APPLICATION NO. 521 OF 2015
Narendra B. Sonawane .. Applicant
vs.
Ramdas V. Malode & ors. .. Respondents

Mr. Ramesh Gite for the Petitioners in WP No. 1994 of 2012 and for Respondent Nos. 1 to 6 in CA No. 521 of 2015.
Mr. S.S. Kulkarni for Respondent No. 1 in WP No. 1994 of 2012 and for the Applicant in CA No. 521 of 2015.
Mr. R.D. Soni i/b Ram & Co for Respondent No. 2 in WP No. 1994 of 2012 and for Respondent No. 7 in CA No. 521 of 2015.

CORAM : M. S. SONAK, J.
DATE : 1 April, 2015.

P.C. :-

1] This petition is directed against the order dated 2 February 2012, made by the 5th Joint Civil Judge, Senior Division, Nashik restoring the Special Civil Suit No. 265 of 1999 which had been dismissed for default on 20 November 2004.

2] The suit, in the present case, is for specific performance and the same was instituted by respondent No. 1 (original plaintiff) some time in the year 1999. At the stage when, the matter was for cross-

examination of the plaintiff's witness, the same was dismissed on 20 November 2004. Within nine days from the date of such dismissal, respondent No.1 made an application seeking restoration. The reason set out in the application for restoration was that respondent No.1 experienced hypertension and was required to be admitted in the hospital on the date when the matter was posted for further evidence.

3] The learned counsel for the petitioners submitted that though the application for restoration was made on 29 November 2004, records which disclose the same came to be disposed of only on 2 February 2012 by the impugned order. Thus, the application came to be decided after a period of seven years three months and two days. The learned counsel for the petitioners submits that this being a suit for specific performance, it is incumbent upon the plaintiff to not only aver but also demonstrate that he has throughout been ready and willing to perform his part of the contract. The time lag of over seven years in obtaining orders for restoration of the suit is indicative of circumstance that the petitioner was never ready and willing to perform his part of the contract. Without considering this aspect, the learned Civil Judge has restored the suit which had been dismissed for default. This according to the learned counsel for the

petitioners is a jurisdictional error or in any case an approach fraught with material irregularity.

4] Having heard learned counsel for the parties and perused the record or rather the extracts of records produced by the parties, there is really no reason to interfere with the impugned order. This is because, the application for restoration was made hardly within nine days from the date of the suit came to be dismissed for default. Further, sufficient cause was also shown by respondent No.1 for his absence on the date when the suit came to be dismissed *ex-parte*. Apart from the medical certificate, respondent No.1 also examined himself in support of the statements made in the application for restoration.

5] The issue of readiness and willingness, is undoubtedly an important factor, which will guide the discretion of the Civil Court in the matter of decreeing specific performance. However, this is not an aspect which the learned Civil Judge was required to take into consideration, at the stage of dealing with an application for restoration of a suit which came to be dismissed for default. Undoubtedly, it will be open to the petitioners to advert to this position, as the suit proceeds and the learned Civil Judge will also

take this aspect into consideration for the purposes of deciding the issue of readiness and willingness. Suffice to note that this Court has not gone into the issue and therefore, all contentions of all parties in this regard which kept open for decision by the learned Civil Judge.

6] Although, there is no reason to interfere with the impugned order, nevertheless, the circumstance that it has taken almost seven years for an application for restoration which was made within nine days from the date of dismissal of the suit for default, is a circumstance, which cannot be easily ignored. There is no sufficient material placed on record as to which of the parties exactly were responsible for such inordinate delay. Nevertheless, it was for the respondent No.1, who have pursued the matter and obtained expeditious order in the matter of restoration of the suit. The impugned order, though has restored the suit has not awarded any costs in favour of the petitioners. Considering the circumstance that restoration application was virtually taken up for consideration after such inordinate delay, the aspect of delay was relevant at least in the context of award of costs in favour of the petitioners. Accordingly, although the impugned order in so far as it restores the suit is not liable to interfere with, same is liable to be made subject to payment of costs of Rs.15,000/- by respondent No.1 to the petitioners. The

impugned order is modified to said extent. Such costs to be paid or deposited in the Trial Court within a period of four weeks from today. Upon deposit, the petitioners shall be at liberty to withdraw the same unconditionally.

7] During pendency of the present petition, this Court made an interim order on 4 March 2015, upon the motion of respondent No.1. This is because, by an earlier order, this Court had stayed further proceedings before the learned Civil Judge in Special Civil Suit No. 265 of 1999. Now that, the impugned order, in so far as as restoration of the suit is concerned, is not being interfered with, there is no reason for the said interim order to survive. However, it shall be open for the respondent No.1 to take out appropriate proceedings before the learned Civil Judge in this regard and the learned Civil Judge shall consider and decide such motion on its own merits and in accordance with law. It is made clear that this Court has not examined such matter and therefore, it shall be open to the learned Civil Judge to decide such motion, uninfluenced by the circumstance that an interim order was made by this Court on 4 March 2015.

8] Except to the extent indicated, the impugned order is not interfered with. Taking into consideration the circumstance that the suit has been pending from the year 1999, learned Civil Judge is directed to dispose of the suit as expeditiously as possible and in any case within a period of one year from today.

9] All parties to appear on 20 April 2015 at 11.00 a.m. before the learned 5th Joint Civil Judge, Senior Divison, Nashik alongwith an authenticated copy of this order, in order to obtain further directions in the matter of disposal of the Special Civil Suit No. 265 of 1999.

10] Rule is disposed of in the aforesaid terms. There shall be no order as to separate costs in this petition.

11] Civil Application No.521 of 2015 does not survive and is accordingly disposed of.

12] All parties to act upon an authenticated copy of this order.

(M. S. SONAK, J.)