

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4084 OF 2015

Raoji Harshi Boricha .. Petitioner
vs.
Hemashree Dattatray Mhatre .. Respondent

Mr. Mandar Limaye for the Petitioner.
Mr. C.S. Joshi for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 23 JUNE 2015.

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] This petition challenges the order dated 18 March 2015 made by the Ad-hoc District Judge-2, Thane in Miscellaneous Civil Appeal No. 200/2014 and two orders dated 8 October 2014 made by the learned Joint Civil Judge, Junior Division, Thane, all of which result in dismissal of the petitioner's application seeking condonation of delay in setting aside the *ex-parte* decree of his eviction made on 18 March 2010.

3] The petitioner's application seeking condonation of delay for setting aside *ex-parte* decree was initially rejected by the Trial Court. The petitioner, however, appealed and the District Court remanded

the matter to the Trial Court for fresh consideration, including by way of afford of an opportunity to the petitioner to lead evidence in support of the cause set out in the application seeking condonation of delay. The record would indicate that the ample opportunity was afforded to the petitioner to lead evidence in the matter. The matter was posted on atleast 11 dates, in order to enable the petitioner to lead evidence in the matter. However, for one reason or the other, no evidence was led and in the meantime despite the *ex-parte* decree against the petitioner, the petitioner continued to enjoy possession of the suit premises.

4] On 8 October 2014, the Trial Court recorded that the petitioner and his counsel are absent and in the past number of opportunities had been afforded to the petitioner. The application seeking condonation of delay was dismissed for want of prosecution.

5] On the same date, at about 5.45 p.m., the petitioner moved an application for restoration. The reason set out in the application was that there was some technical default in the computer at the chambers of the petitioner's advocate, due to which affidavit in lieu of examination-in-chief could not be filed. It was stated that the

default has since been remedied and alongwith application seeking restoration, the affidavit in lieu of examination-in-chief was also appended.

6] The learned Trial Court dismissed the application for restoration on 8 October 2014 itself, stating that the ground set out in the application seeking restoration “*is not at all justifiable*”.

7] The petitioner, thereafter instituted an appeal before the District Court, which appeal has since been dismissed with costs by the judgment and order dated 18 March 2015. The District Court has taken cognizance of the conduct of the petitioner throughout the proceedings and held that such petitioner does not warrant any indulgence.

8] The learned counsel for the petitioner has submitted that there was sufficient cause for non-attendance by the petitioner or his advocate on 8 October 2014 when the matter was called out. In any case, on the same date, at about 5.45 p.m., the petitioner and his advocate did appear alongwith an application for restoration, which was accompanied by an affidavit in lieu of examination-in-chief. In

such a situation, the learned counsel for the petitioner submitted that there was no question of an adverting to any past conduct of the petitioner. Consequent upon satisfaction that sufficient cause has been shown in the application for restoration, the proceedings ought to have been restored.

9] The learned counsel for the respondent, on the other hand, submitted that the petitioner is bent upon delaying the proceedings and in the meantime take an advantage of situation. The learned counsel pointed out that the *ex-parte* decree was attempted to be executed in the year 2012 and the panchanama which was recorded in this regard states that some other person was found in possession of the suit premises. This panchanama was recorded on 30 January 2012. On this basis, the learned counsel for the respondent submits that there is absolutely no error in approach of the Trial Court or Appeal Court.

10] Having heard the learned counsel for the parties and perused the material on record, it does appear that the petitioner has been protracting the proceedings without any reasonable cause. Therefore, even if, any equitable order has to be made in favour of the

petitioner, the same shall have to be subject to some stringent conditions, so as to ensure that the petitioner does not obtain any undue advantage in the matter.

11] The record does indicate that an application for restoration was filed by and on behalf of the petitioner on the same date on which his application seeking condonation of delay was dismissed for want of prosecution. The record also indicates that his application was accompanied by an affidavit in lieu of examination-in-chief. In this context, the explanation that there was some defect in the computer, which laid to some marginal delay could not have been rejected at the outset. Accordingly, it would be appropriate if two orders dated 8 October 2014 and the order dated 18 March 2015 made by the Appeal Court confirming the same are set aside and yet another opportunity is granted to the petitioner to lead evidence in support of application for condonation of delay. Such orders are accordingly, set aside, subject to certain stringent conditions referred to hereinafter.

12] In the first place, the petitioner shall pay costs of Rs.25,000/- to the respondent. Such costs have already been deposited by the

petitioner in this Court. Accordingly, the respondent shall be at liberty to withdraw the same unconditionally.

13] Secondly, the petitioner shall file an affidavit-cum-undertaking before the Trial Court indicating therein that the petitioner and his family members were in occupation of the suit premises until the same were locked and the key thereof was handed over to the Trial Court. The affidavit-cum-undertaking to further indicate that in case, the possession of the suit premises is restored to the petitioner, the petitioner shall not induct any other person therein or create any third party rights. This is necessary in the context of what is recorded in the panchanama dated 30 January 2012, which now the petitioner disputes as being incorrect.

14] Thirdly, the petitioner shall deposit in the Trial Court compensation at the rate of Rs.5000/- per month from 1 January 2012 till 30 June 2015 for the occupation of the suit premises, notwithstanding the circumstance that there is already an eviction decree against the petitioner. The learned counsel for the petitioner, upon taking instructions from the son of petitioner, who is present in the Court, states that 50% of the arrears will be deposited before the

Trial Court within a period of two days from today and balance 50% of the arrears will be deposited on or before 10 July 2015. This statement is accordingly accepted. Upon deposit of 50% of the arrear and upon the petitioner filing affidavit-cum-undertaking as directed in paragraph 13 above, the Trial Court to hand over the key of the suit premises to the petitioner.

15] The Trial Court is directed to decide the application for condonation of delay as expeditiously as possible and in any case within a period of two months from today. Learned counsel for the petitioner upon taking instruction from the son of the petitioner, who is present in the Court, has stated that apart from the petitioner examining himself, there is no proposal to examine any further witnesses. The respondent will be at liberty to examine any witnesses, in case they chose to do so.

16] Considering that direction as issued to the petitioner to deposit compensation at the rate of Rs.5,000/- per month, including arrears from 1 January 2012, *ex-parte* decree shall not be executed until the decision on the application for condonation of delay and in case the delay is condoned, until the application for setting side the *ex-parte* decree is disposed of.

17] It is made clear that this Court has not examined any merits of the application seeking condonation of delay or seeking the recall of *ex-parte* decree. Accordingly, it shall be open for the Trial Court to decide such matters, in accordance with law as also the material that may be placed before it.

18] In case, there is any breach on the part of the petitioner in complying with the conditions imposed, then this petition shall be deemed to have been dismissed and the respondent shall be at liberty to institute execution proceedings in pursuance of the *ex-parte* decree.

19] Rule is made absolute to the aforesaid extent, with costs as indicated above.

20] All concerned to act upon an authenticated copy of this order.

(M. S. SONAK, J.)