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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8798 OF 2014

Mr.Mohd.Sajid Turabali Shaikh

.. Petitioner

Vs.

1. State of Maharashtra

2. Ms.Nahida d/o of Mehaboob Khan Pathan

.. Respondents

Mr.Mohan Pillai, Advocate for the Petitioner.

Mr.A.R.Patil, AGP for Respondent No.1-State.

Mr.Ratneshwar Jha, Advocate for Respondent No.2.

CORAM : R.G.KETKAR, J.

DATE : 12th February, 2015

P.C. :

. Heard Mr.Mohan Pillai, learned Counsel for the petitioner, Mr.A.R.Patil, learned AGP for respondent No.1-State and Mr.Ratneshwar Jha, learned Counsel for respondent No.2 at length. Rule. Learned Counsel for respective respondents waive service. At the request and by consent of the parties, rule is made returnable forthwith and the petition is taken up for final hearing.

2. By this petition under Articles 226 & 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 23/07/2014 passed by the learned Principal Judge, Family Court, Mumbai in Civil Misc. Application No. 46 of 2014. By

that order, the Family Court rejected the application made by the petitioner for setting aside the order of dismissal of the petition dated 08/02/2013 and for restoration of the petition No.B-127 of 2010.

4. In support of this peittion, Mr.Pillai submitted that the Family Court dismissed the application mainly on the ground that the delay condonation application No. 112 of 2013 was dismissed for non presecution. The Family Court observed in paragraph 6 that the present application is an attempt as and by way of back door method for setting aside order of dismissal of the main petition. The Family Court also observed that the petitioner is in arrears of huge amount of maintenance to the wife and child. The one who comes before the Court for equitable reliefs must show equity. The constituted attorney of the petitioner was not granted permission to appear on his behalf. He submitted that basically on these grounds, the Family Court rejected the application. He further submitted that in pursuance of the order dated 28/01/2015, the petitioner has deposited the entire arrears of maintenance of Rs.1,22,000/- upto 31/12/2014 in this Court under due intimation to Mr.Jha. Mr.Pillai states that the petitioner will take out appropriate application for setting aside order refusing permission to the constituted attorney to represent the petitioner, if permission is not already granted. He further assures that the petitioner will extend the fullest co-operation before the Family Court for early disposal of the petition.

5. On the other hand, Mr.Jha supported the impugned order. He submitted that initially the petition was dismissed in default on 08/02/2013. Subsequently, Misc. Application No. 112 of 2013 for condonation of delay was also dismissed for want of presecution on 17/12/2013. The petitioner never attended proceedings before the Family Court as also proceedigns before the Metropolitan Magistrate. He further submitted that for the reasons set out in paragraph 6 of the impugned order, the Family Court was fully justified in dismissing the application.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the main petition was dismissed in default on 08/02/2013. The petitioner also took out Misc. Application No. 112 of 2013 for condonation of delay. The said application was also dismissed in default on 17/12/2013. The petitioner thereafter took out present application for setting aside order of dismissal of petition dated 08/02/2013 and for restoration of the Petition No. B-127 of 2010. Mr.Pillai has stated that for the reasons set out in paragraph 6 of the impugned order, the Family Court rejected the application. He states that he will take out appropriate application for recalling the order dated 17/12/2013 passed in Misc. Civil Application No. 112 of 2013 as also appropriate proceedings challenging refusal of permission to the constituted

attorney to represent the petitioner before the Family Court.

7. As noted earlier, mainly on three grounds, the Family Court rejected the application. In view of the statements recorded earlier as also having due regard to the fact that the petitioner has deposited entire arrears of maintenance in this Court, in my opinion, case is made out for setting aside order dated 23/07/2014 thereby restoring Civil Misc. Application No. 46 of 2014. Hence, the petition is allowed in the following terms.

1) The impugned order dated 23/07/2014 is quashed and set aside. Civil Misc. Application No. 46 of 2014 is restored to the file of the Family Court for deciding it afresh. All the contentions of the parties on merits are expressly kept open.

2) Respondent No.2 is permitted to withdraw the amount deposited by the petitioner in this Court unconditionally.

8. Liberty is reserved to the parties to approach the Family Court for expeditious disposal of the petition.

9. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)