

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.1176 OF 2014
IN
NOTICE OF MOTION NO.3537 OF 2014
IN
NOTICE OF MOTION NO.847 OF 2012
IN
SUIT NO.6274 OF 2006
(H.C. SUIT NO.1182 OF 2006)**

**WITH
CIVIL APPLICATION NO.1418 OF 2014**

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**ALONGWITH
APPEAL FROM ORDER NO.1178 OF 2014
IN
NOTICE OF MOTION NO.3538 OF 2014
IN
NOTICE OF MOTION NO.3443 OF 2011
IN
SUIT NO.6274 OF 2006
(H.C. SUIT NO.1182 OF 2006)**

**WITH
CIVIL APPLICATION NO.1420 OF 2014**

Vijay Moreshwar Vaity & Ors. Appellants

Vs.

**Mankubai Motiram Koli (since deceased) Respondents
through Legal Heirs,
Shri. Krishna Motiram Koli & Ors.**

Mr. Mayur Khandeparkar i/by Mr. Girish B. Kedia, Advocate for the Appellants.

Mr. S.M. Suryawanshi, Advocate for Respondents no. 1(a) to 1(d).
Mr. Vijay M. Vaghela, Advocate for Respondent no.2.

Coram : Smt. R.P. SondurBaldota, J.

Date : 19th January, 2015.

P.C.

1 This is a common order on the above two appeals that challenge identical orders. The appeals are taken up for final hearing at the stage of admission, pursuant to the order dtd. 14th January, 2015.

2 The appellants are the plaintiffs in S.C. Suit No.6274 of 2006. They had taken two Notices of Motion for interim reliefs being Notice of Motion No.847 of 2012 and Notice of Motion No. 3443 of 2011, which were dismissed for want of prosecution by the Bombay City Civil Court, by the common order dtd.20th September, 2014. The appellants, then filed Notices of Motion No.3537 of 2014 and 3538 of 2014 for restoration of the earlier Notices of Motion. By the common order dtd. 18th November, 2014, both the Motions were dismissed. The appellants have approached this court against the orders of dismissal of their application for restoration.

3 On 20th September, 2014, when the two Notices of Motion for interim reliefs were on the board for hearing, a junior advocate

appearing for the appellants submitted an application for adjournment on the ground that the advocate appearing for the appellants was out of station for his personal work and as such unable to appear before the Court to argue the applications. Since advance intimation of the application of adjournment had been given by the advocate for the appellants, the appearances for the respondents were also by junior advocates. The court, however, rejected the application with an observation that no good ground was made out for adjournment and kept back the matter. On the second call of the matter, the same advocates appeared. As a result, there could be no arguments on merits. The Court then dismissed both the Notices of Motion for want of prosecution with observation, “if the party asking interim relief is not prompt to pursue for it inspite of expiry of about two years, the court would form an opinion that the party asking interim relief is not prosecuting the matter, hence the Notice of Motion No.847 of 2012 and Notice of Motion No.3443 of 2012 stand dismissed for want of prosecution”.

4 On 23rd September, 2013, the appellants filed applications under Order 9, Rule 13 Code of Civil Procedure (“CPC”) for restoration of their Notices of Motion for interim reliefs. In the affidavit-in-support of the Notices of Motion, the appellants repeated the reasons for absence of their advocate and requested that the Notices of Motion be restored in the interest of justice. The Court however dismissed these applications also by the order impugned in the present two appeals.

5 In the first paragraph of the impugned order, which is a common order, the Court refers to the merits of the suit by saying that the suit for specific performance had been filed after 28 years of the first agreement and 18 years from the second writing. Paragraph 2 of the order refers to the orders of dismissal of Notices of Motion No.847 of 2012 and 3443 of 2011. At paragraph 3, the learned Judge refers to the directions given to the appellants to submit affidavit of documents and evidence within a prescribed period and failure on the part of the appellants to comply with the directions. The learned Judge thereafter opines that “This conduct of the plaintiffs is sufficient to draw an inference that there are no materials and circumstances or events to prevent the plaintiffs or the persons representing them for hearing in the suit. The situations are made available to the plaintiffs to have a disposal of suit claims on merits, but the plaintiffs avoided to avail the opportunities.”

6 There are two more observations made by the Court in the impugned order. It says that the appellants had failed to produce any document to explain the cause for absence of the learned advocate on 20th September, 2014. Secondly that the appellants had since June, 2014 made no efforts for getting the Notices of Motion for interim reliefs heard. If this past conduct of the appellants and the circumstances of the case are taken into consideration, according to the learned Judge, the same would reveal that the real intention of the

appellants is to keep the matter alive for interim point and claims instead of disposal of the suit on merits.

7 Mr. Khandeparkar, the learned advocate for the appellants submits that all the above observations in the impugned order are in fact uncalled for and not supported by the record. He points out from the Roznama that on no date except for 20th September, 2014, the appellants had sought an adjournment. They had in fact been ready for hearing of the Notices of Motion, on each date of the matter. The adjournments granted in the matter had been either at the instance of the respondents, (the original defendants) or because of want of sufficient time for the court. The Roznama of the suit produced by the appellants confirms this position. Therefore, any observation made in the order on the conduct of the appellants must be held to be perverse, as the same is not supported by the Roznama. For the same reason, it must also be held that the inference drawn in the impugned order that the appellants have avoided opportunities made available to them for disposal of the suit claim on merit are not justified.

8 The impugned order indicates that the learned Judge was not satisfied with the explanation offered for not proceeding with the hearing of the Notices of Motion on 20th September, 2014. The reasons for not proceeding with the matter on that day as stated in the application for adjournment as also the application for restoration is same i.e. the Advocate appearing for the appellants was out of station

for his personal work. There is nothing on record to disbelieve this statement and there was no need for production of any document to establish that the advocate was in fact out of station for his personal work. Ordinarily when such a statement is made by or on behalf of the advocate, who is an officer of the Court, it is not doubted and is accepted at its face value. Undoubtedly, the court can further probe into the validity of the statement made for adjournment, but such exercise is to be undertaken only in the event of existence of circumstances creating doubt regarding truthfulness of the statement. As already mentioned above, there is nothing whatsoever on record to indicate that the statement had been made mischievously or the adjournment was being sought for with an ulterior motive. The genuineness of the reasons stated for the adjournment can also be seen from the fact that the advocate for the other side i.e. for the respondents had been, in fairness, given an advance intimation of the application for adjournment. The advocate for the respondents had also sent a Junior to record the appearance, thereby tacitly giving consent for the adjournment. Under such circumstances, the Bombay City Civil Court was not justified and not correct in dismissing the Notices of Motion on 20th September, 2014 in the first place. Secondly, at least when the application for restoration was made, it ought to have arisen to the occasion and allowed the same. What cannot be forgotten even for a moment is that the advocates are representing their respective clients, the litigants. Dismissal of the application for interim reliefs and refusal of its restoration would cause denial of an

opportunity of hearing and thereby cause injustice to the litigant. This must be avoided under all the circumstances. No litigant, unless for sufficient reasons, be denied an opportunity of hearing. Therefore, the impugned orders cannot be justified.

9 Mr. Vaghela, the learned advocate appearing for respondent no.2 vehemently opposes the appeals submitting that the Notices of Motion for restoration were not maintainable and that no case was made out by the appellants for not proceeding with the matter on 20th September, 2014. In my considered opinion, the stand taken by respondent no.2 is unfair and unreasonable. As already noted above, when advance intimation of application for adjournment on 20th September, 2014 was given by the appellants to the respondents, there was not only no objection raised but a tacit consent given by the learned advocate by not attending the court and by sending his Junior to the court. It is not even the case of respondent no.2 that he had opposed the application for adjournment or that he was ready for hearing of the Notices of Motion on that day. Having given consent in such a manner, respondent no.2 could not have opposed the application for restoration before the Bombay City Civil Court as also the present appeals.

10 As regards the maintainability of the Notices of Motion for restoration, Mr. Vaghela, the learned advocate appearing for respondent no.2 submits that the order dtd. 20th September, 2014

cannot be said to be an ex-parte order to be amenable to Order 9, Rule 9 CPC. Mr. Khandeparkar submits in reply that the court can resort to its inherent jurisdiction under Section 151 CPC under such circumstances. He relies upon the decision of Division Bench of our High Court in Laxmi Investment Co. Pvt. Ltd., Akola vs. Tarachand Harbilas and others, reported in AIR 1968, Bombay, page 250, by which it is held that an application for restoration of an application though not covered by Order 9, Rule 9 read with Section 141 CPC can be maintained under Section 151 CPC. The decision of the Division Bench being a complete answer to the argument on maintainability of the Notices of Motion for restoration, it need not be dilated further.

11 The next argument of Mr. Vaghela is that the order passed by the City Civil Court on 20th September, 2014 cannot be said to be an order of dismissal for default. He points out that the advocate for the applicant was in fact present in the court and had chosen not to argue the case. Therefore, the Notices of Motion were dismissed for want of prosecution. This according to him amounts to withdrawal of the Notices of Motion. This would be a hype-technical view of the matter.

12 The advocates who were present before the court on 20th September, 2014 for both the sides were not to argue the matter. The advocate for the appellants, who was to argue the matter was absent, on account of whose absence, adjournment was being sought on that day. And because the matter was not expected to be heard on merits,

the advocate for the respondent had sent a junior only to mark appearance. In such circumstances, the order of dismissal of Notices of Motion for want of prosecution passed on that day was in-effect an order without hearing of the parties and hence the order for dismissal. It is to be remembered that physical presence of an advocate in the court hall when the matter is called out does not amount to presence for effective hearing. It is as good as non-appearance.

13 Mr. Vaghela then submits that the Bombay City Civil Court had discretion to allow the application for restoration and once that discretion is exercised, the same should not be lightly interfered with. In this connection, he relies upon decision of the Apex Court in Wander Ltd. And another vs. Antox India Pvt. Ltd., reported in 1990 Supp. (1) SCC 727 wherein it has been observed that :

“9..... The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

He also relies upon decision of Division Bench of our High Court in Shri. Vidyadhar Sitaram Mokal & Ors. vs. Mr. Barkatullah Allhasan

Shaikh & Ors., reported in 2014 (1) ALL MR, page 121, in which the limited scope of jurisdiction under Order 43 CPC is recognised in following terms.

“8..... Unless the view taken by the trial court is found to be perverse or impossible, it is not permissible for this Court to interfere with the order of the trial court. Equally, merely because this court finds that other view is more probable, it is not possible for this court to substitute the view of the trial court with its own view.”

It has already been observed that the impugned order results into denial of an opportunity of hearing to the appellants and in that respect, would be unreasonable and perverse order, therefore, the same cannot be maintained.

14 For all the reasons stated above, the Appeals from Order are allowed. The orders dtd. 18th November, 2014 are set aside. The Notices of Motion No.3537 of 2014 and 3538 of 2014 are allowed.

15 In view of disposal of the Appeals from Orders, the above Civil Applications do not survive, the same are accordingly disposed off.

(Smt. R.P. SondurBaldota, J.)