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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 15 OF 2016

Prakash Madhukar Deshpande ... Applicant

Vs.

Shri Chandrakant M.Deshpande and others ... Respondents

Mr.P.M.Deshpande, Applicant in-person.

CORAM : R.G.KETKAR, J.**DATE : 08th JANUARY, 2016****P.C. :**

1. Heard Mr.P.M.Deshpande, applicant in-person at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant has challenged the order dated 14/12/2015 passed by the learned Civil Judge, Senior Division, Pune in Misc. Application No. 1227 of 2015. By that order, the learned trial Judge issued notices to the other side for filing say and evidence, if any.

3. Having regard to proviso to Section 115 of C.P.C., in my opinion, Civil Revision Application is not maintainable. Hence, leave to convert Civil Revision Application into Writ Petition is granted. Amendment shall be carried out forthwith.

4. Mr.Deshpande submitted that the petitioner's father – Madhukar Madhav Deshpande, since deceased, has instituted Regular Civil Suit No. 1727 of 1996 for permanent injunction against the respondents. On 03/03/2009, neither the plaintiff nor his

advocate as also defendants and their advocate appeared. On that day, the learned trial Judge passed the following order :

“Called on today. Plaintiff absent. Order on exhibit 1. Suit stands dismissed in default. All stamps are punched and cancelled. Proceeding closed.”

5. He submitted that the learned trial Judge has passed the order under Order 9 Rule 3. The application for restoration was made under Order 9 Rule 4. By the impugned order, the learned trial Judge has issued notices to the defendants. He submitted that if the Suit is dismissed in default under Order 9 Rule 3, notice is not required to be issued to the defendants as they also remained absent as also their advocate remained absent. The learned trial Judge ought to have restored the Suit without issuing notices to the other side. In support of these submissions, he relied upon following decision.

1. Ram Kishore Agarwalla Vs. The Commissioner of Dhanbad, AIR 1978 Patna High Court 237.
2. Pritam Chand Vs. Shamsheer Singh, AIR 1986 Punjab & Haryana High Court, 300.

6. In case of **Ram Kishore Agarwalla** (*supra*), Division Bench of the Patna High Court considered provisions of Order 9 Rules 2 to 4, 8 & 9. The Division Bench observed that there is distinction between a case which was dismissed in default either under Order 9 Rules 2 or 3 and a case which is dismissed under

Order 9 Rule 8. If the case is dismissed in default under Order 9 Rules 2 or 3, an application under Order 9 Rule 4 is maintainable and the same can be decided without issuing notices to the defendants as neither plaintiff nor defendants appeared as also their advocates had not appeared on the day when the Suit was called out for hearing. As against this, if a case is dismissed under Order 9 Rule 8, in such a situation, plaintiff is absent and the defendant appears and therefore, notice is required to be issued in application under Order 9 Rule 9.

7. As noted earlier, in the present case, on 03/03/2009, plaintiff and his advocate as also defendants and their advocate did not appear. In view thereof, the learned trial Judge was not justified in issuing notices to the respondents as the application was essentially under Order 9 Rule 4. As I have held that the learned trial Judge was not justified in issuing notices to the other side, in this case also notices to the other side are dispensed with. In view thereof, the impugned order is set aside and the Misc. Application No. 1227 of 2015 is allowed in terms of prayer clause (A) with no order as to costs. After restoration of the Suit, the learned trial Judge will issue fresh notices to the defendants and their advocate and proceed with the matter in accordance with law. Order accordingly.

(R.G.KETKAR, J.)