

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2709 OF 2015**

Balkoshan Murlidhar Goenka

Petitioner

Vs

1.Aashirwad Films iNternaitonal
Pvt Ltd and Ors

.. Respondents

Mr. Vivek Kantawala a/w Amey Patil, Reena Joshi, Tnya Goveas i/b
M/s Vivek Kantawala & Co., Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 04/04/2016

PC:

1. Heard Mr.Vivek Kantawala, learned counsel for the petitioner. By order dated 27.4.2015 notice was issued to the respondents, returnable on 10.6.2015. office remark shows that respondents no.1 to 5 are duly served. However, none appears on their behalf.

2. Rule. At the request of Mr. Kantawala, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 19.12.2014 passed by the learned Judge, presiding over Court Room No.1 of the Bombay City Civil Court at Bombay in unregistered Notice of Motion in S.C.Suit no.75 of 1988. By that order, the learned trial Judge dismissed the Motion and consequently suit stands dismissed.

4. Mr. Kantawala submitted that the petitioner, hereinafter referred to as 'plaintiff' has instituted suit initially on the Original Side of this Court being Suit No.1497 of 1988. It was transferred to the Bombay City Civil Court. Defendants no.1 to 3 waived service. On 21.2.2013, the Court directed suit to proceed without written statement of the defendants. Thereafter, the matter was again re-arranged for written statement as last chance on 27.2.2013. On that date, the matter was adjourned for hearing without written statement on 22.3.2013. On that date, none appeared for the parties and last opportunity was given and the matter was adjourned to 4.5.2013. On 4.5.2013 as none appeared, Court dismissed the suit for want of prosecution.

5. Mr. Kantawala submitted that the plaintiff, therefore, took out Notice of Motion for restoration of the suit and by the impugned order, the learned trial Judge dismissed the Motion mainly on the ground that there was delay of 565 days in filing the Motion.

6. Mr. Kantawala invited my attention to paragraphs 3 to 7 of the affidavit of Balkishan Murlidhar Goenka and submitted that for the reasons stated in paragraphs 3 to 7, the learned trial Judge should have allowed the Motion more so when the defendants did not contest the Motion and also they were remaining absent.

7. I have considered the submissions advanced by Mr

Kantawala. I have also perused the material on record. As noted earlier, the suit was initially instituted on the original side of this Court. It was transferred to the City Civil Court. Defendants no. 1 to 3 waived service in the year 2012. They, however, did not file written statement. On 21.2.2013, the Court passed order permitting the plaintiff to proceed for hearing without written statement of the defendants. The matter was rearranged for written statement as a last chance on 27.2.2013. The matter was adjourned for hearing without written statement on 22.3.2013. On that date, nobody appeared for either of the parties and matter was adjourned to 4.5.2013 as and by way of last opportunity. As none appeared on 4.5.2013, the learned trial Judge dismissed the suit in default.

8. The plaintiff took out the Notice of Motion and also filed affidavit-in-support. For the reasons stated in paragraph 3 to 7, I am satisfied that the learned trial Judge should have restored the suit, more so when the defendants did not appear. They did not file written statement as also reply to the Motion.

9. For the reasons stated in paragraphs 3 to 7 of affidavit in support of Motion, I am satisfied that the petitioner has made out sufficient cause for condoning the delay as also for restoration of the suit. Impugned order deserves to be set aside, thereby, restoring the suit to the file of the trial Court. Trial Court will proceed with the suit after issuing fresh notice to the

defendants. Hence, the following order.

- (i) Impugned order is set aside and the suit is restored to the file of the learned trial Judge.
- (ii) Learned trial Court will issue fresh notice to the defendants and thereafter proceed with the suit in accordance with law.
- (iii) Rule is made absolute accordingly, with no order as to costs.

(R.G.KETKAR, J.)