

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1210 OF 2016

Gyanchand Panjumaal Darda through
POA Holder Chandar Parasram Chhabria ... Petitioner
Vs.
Kolhapur Municipal Corporation ... Respondent

Mr. Chetan G. Patil for Petitioner.
Mr. Sagar A. Mane for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 28, 2016

ORDER :

Heard Mr. Patil, learned Counsel for petitioner and Mr. Mane, learned Counsel for respondent at length. Rule. Mr. Mane waives service for respondent. 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 Article 227 of the Constitution of India, petitioner, hereinafter referred to as appellant, has challenged the judgment and order dated 07.04.2008 passed by the learned II Joint Civil Judge, Senior Division, Kolhapur in Miscellaneous Application No.284 of 2004 as also the judgment and order dated 02.08.2014 passed by the learned Ad-hoc District Judge-4, Kolhapur in Miscellaneous Civil Appeal No.93 of 2008. By these orders, the Courts below rejected the application made by the plaintiff for restoration of Municipal Appeal No.2 of 1998 which was dismissed in default on 17.08.2002.

3. Appellant herein instituted Municipal Appeal No.2 of 1998 under Section 81-F of the Maharashtra Municipal Corporations Act (for short

'Act') challenging the notice dated 15.12.1997 issued by respondent-Corporation. According to the appellant, by that notice, respondent-Corporation has enhanced the rent in respect of the property owned by it retrospectively. On 17.08.2002, the learned Judge dismissed the Appeal after observing that appellant and his Advocate failed to appear for hearing though called several times from 11.30 to 5.00 p.m. No adjournment application was filed. Matter was kept for order with an intention to given an opportunity to the appellant. But the appellant failed to utilise the opportunity given to him. It appears that the appellant is not interested in proceeding with the appeal. The learned Judge accordingly dismissed the Appeal in default.

4. Appellant filed Miscellaneous Application No.147 of 2003 for condoning the delay of 270 days in filing the Application for restoration of Municipal Appeal No.2 of 1998. He also filed Miscellaneous Application No.284 of 2004 for restoration of the Municipal Appeal. By judgment and order dated 13.09.2004, the learned Judge allowed the application for condonation of delay and condoned the delay in filing restoration application. The restoration application was ordered to be registered and numbered subject to payment of cost of Rs.200/-.

5. By the impugned order dated 07.04.2008, the learned trial Judge dismissed the application for restoration of Municipal Appeal No.2 of 1998. Aggrieved by that decision, appellant preferred Appeal, which came to be dismissed on 02.08.2014. It is against these orders, appellant has instituted the present Petition.

6. In support of this Petition, Mr. Patil contended that appellant was represented by Power of Attorney. Appellant's Power of Attorney was not well and in fact had undergone heart operation in the year 2002 at

Lilavati Hospital, Mumbai. He submitted that on 17.08.2002, Advocate representing appellant was busy in other Court, and therefore, could not attend the appeal as also could not file application for adjournment. He submitted that Advocate for the appellant had filed three appeals namely, Appeal No.1 of 1998 to 3 of 1998 and he was under bonafide impression that all the appeals were clubbed together. His Advocate was not aware of Appeal No.2 of 1998 being fixed for hearing on 17.08.2002.

7. Mr. Patil further submitted that the reasons given by the appellant for condoning the delay of 270 days as also for restoration of Municipal Appeal No.2 of 1998 are same. In an application for condonation of delay, appellant filed affidavit and he was not cross-examined. The learned trial Judge accepted the reasons given for condoning the delay. The said order was not challenged by the Corporation. However, while considering the application for restoration, the learned trial Judge did not accept the self-same reasons given for condonation of delay. He, therefore, submitted that the order dated 07.04.2008 is liable to be set aside. As far as the order dated 02.08.2014 is concerned, he submitted that the appellate Court was impressed by the fact that though the delay was condoned in the year 2004, appellant did not pursue the matter and get the appeal decided immediately. He submitted that the learned District Judge also failed to appreciate that the reasons given for condonation of delay were found to be sufficient. He, therefore, submitted that the order of the appellate Court also deserves to be set aside.

8. On the other hand, Mr. Mane supported the impugned orders. He submitted that the application for condonation of delay was allowed on 13.09.2004. However, the appellant did not pursue restoration

application and the same came to be decided in April 2008. He invited my attention to paragraphs 9 to 12 of the District Court's order. He submitted that in the year 2006, the learned trial Judge has passed order recording that appellant is not interested to proceed with the restoration application. He submitted that appellant was taking order of status-quo against the respondent and also was seeking extension of status-quo time and again. In paragraph 12, the learned District Judge noted that appellant was trying to delay the hearing of the Appeal and is not diligent in pursuing his cause. He, therefore, submitted that no case is made out for exercising powers under Article 227 of the Constitution of India.

9. 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, on 17.08.2002, Appeal preferred by the appellant was dismissed in default. Appellant filed Miscellaneous Application No.147 of 2003 for condonation of delay of 270 days in filing the application for restoration. Appellant also filed Miscellaneous Application No.284 of 2004 for recalling the order dated 17.08.2002 thereby restoring Municipal Appeal No.2 of 1998. Perusal of the reasons given in the application for condonation of delay and in application for restoration are one and the same. This is also not seriously disputed by the respondent. It is also not in dispute and is a matter of record that in application for condonation of delay, appellant filed affidavit in support of its contention and the said version was not challenged by cross-examining the appellant. In other words, the statements made on affidavit are remained unchallenged. By order dated 13.09.2004, the delay application was allowed subject to cost. It is not in dispute that respondent-Corporation did not challenge that order.

10. However, by order dated 07.04.2008, the application for restoration was rejected. Perusal of paragraphs 5 and 6 of order dated 07.04.2008 shows that the learned trial Judge discarded the reasons given by the appellant. As far as the Appellate Court is concerned, the appellate Court was basically influenced by the fact that appellant was not prosecuting the appeal diligently and was sitting tight over the order of status-quo. In my opinion, once the application for condonation of delay was allowed on the grounds which are also same in the application for restoration, the Courts below ought to have allowed the application for restoration. If at all, the Court was of the opinion that appellant was delaying the matter, it could have imposed the cost while granting / extending the order of status-quo and also could have kept the matter for dismissal. Even nothing prevented respondent in moving the Court for immediately taking up the application for restoration after the delay was condoned. Perusal of the impugned orders does not indicate that any such attempt was made by the respondent-Corporation. In my opinion, the Courts below ought to have restored the application subject to imposing cost if at all the appellant was not diligently prosecuting the Municipal Appeal. By not restoring the appeal, it stands dismissed on the technical ground.

11. In view thereof, impugned orders are liable to be set aside and Municipal Appeal No.2 of 1998 deserves to be restored to the file of the Court. As the Municipal Appeal is pending since 1998, parties agree that they will extend full co-operation for disposal of the appeal in a time bound manner and will not seek unnecessary adjournments. Hence, the following order:

- a. Impugned orders dated 07.04.2008 and 02.08.2014 are set aside;
- b. Municipal Appeal No.2 of 1998 is restored subject to

petitioner paying cost of Rs.15,000/- to respondent within two weeks from today;

- c. Parties shall appear before the Court of Civil Judge, Senior Division, Kolhapur on 08.02.2016;
- d. The learned trial Judge is requested to decide the Appeal within 3 months from the date of appearance of the parties;
- e. All contentions of the parties on merits are expressly kept open;
- f. Respondent is permitted to withdraw Rs.5,000/- deposited in this Court unconditionally;
- f. Rule is made absolute in the aforesaid terms.

12. Mr. Patil submitted that though status-quo order dated 12.03.2015 is operating, respondent has issued eviction notice dated 15.01.2016. Upon taking instructions, Mr. Mane states that said notice shall stand withdrawn and communication to that effect shall be issued to the appellant within two weeks from today. Statement is accepted.

(R. G. KETKAR, J.)

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