

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

**APPEAL FROM ORDER NO.549 OF 2016
WITH
CIVIL APPLICATION NO.707 OF 2016**

**M/s. Navyug Dal Mill and ors. : Appellants/Applicants.
Versus
Messrs Satyam Enterprises and anr. : Respondents.**

**Mr. P S Dani, Senior Advocate i/by Mr. N H Shukla for the
Appellants/Applicants.
Mr. N V Walawalkar, Senior Advocate a/w Mr. J S Hegde for the
Respondent No.1
Mr. P K Dhakephalkar, Senior Advocate a/w Mr. P G Karande for the
Respondent No.2.**

**CORAM : R. M. SAVANT, J.
DATE : 30th June 2016**

P.C.

1 Admit. Considering the challenge raised in the above Appeal from Order, the same is heard forthwith.

2 The above Appeal from Order arises out of the order dated 28/04/2016 passed by the learned Judge of the City Civil Court, Greater Mumbai by which order the Notice of Motion filed by the Appellants – original Plaintiffs came to be dismissed.

3 It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the suit in question was originally filed in the

year 1992 in this Court and thereafter was transferred to the City Civil Court on its pecuniary jurisdiction being enhanced in the year 2012. The issues in the said suit were framed on 17/11/2014 and the suit was kept for evidence viz. filing of the affidavit of evidence of the Plaintiffs' witnesses on 15/12/2014. In view of the fact that the Plaintiffs did not file the affidavit of evidence of their witness, the suit in question came to be dismissed for non-prosecution on the said day i.e. on 15/12/2014. It seems that immediately thereafter on the same day an application marked as Exhibit 5 for restoration of the suit came to be filed on behalf of the Plaintiffs. The said application came to be allowed by the Trial Court by passing the following order :-

“Applicant is allowed subject to condition that Plff has to file affidavit of evidence on next date without fail. Matter is restored to its original file. Matter is adjd for filing affidavit of evidence to 19/1/2015.”

The reason behind passing the said order seems to be that the suit was more than 10 years old and therefore the Trial Court expected the Plaintiffs to file the affidavit of evidence as the issues were already framed. The said application as indicated herein above came to be allowed on 15/12/2014 and though the application was allowed, a condition was imposed on the Plaintiffs viz. the Plaintiffs have to file affidavit of evidence on the next date without fail. When the suit was listed on 19/01/2015, the affidavit of evidence was not filed on behalf of the Plaintiffs and resultantly the suit came to be again dismissed on 19/01/2015. This resulted in the Plaintiffs filing the instant Notice of

Motion bearing No.371 of 2015, which, as indicated herein above, was for restoration of the suit in question by setting aside the order dated 19/01/2015. In the affidavit in support to the said Notice of Motion the cause shown was that since the order was on the roznama, the learned counsel who was appearing on behalf of the Plaintiffs did not hear the condition imposed by the Trial Court viz. filing of the affidavit of evidence by the next date and therefore the affidavit of evidence could not be filed. The said explanation did not commend acceptance to the Trial Court especially having regard to the fact that the suit on the earlier occasion was dismissed on the said ground on 15/12/2014 on account of the Plaintiffs not showing their readiness to proceed with the suit. The Trial Court relied upon the judgment of the Calcutta High Court reported in *AIR 2016 Calcutta 91* in the matter of *Shankri Naskar v/s. Kolkatta Port Trust and others.* wherein the Calcutta High Court has held that a lis cannot be allowed to be kept pending indefinitely ie. pending in perpetuity causing immense prejudice to other side. As indicated above, it is the said order dated 28/04/2014 which is taken exception to by way of the above Appeal from Order.

4 The learned Senior Counsel appearing on behalf of the Appellants herein i.e. the original Plaintiffs Shri P S Dani would reiterate the case of the Plaintiffs as urged in the Trial Court in support of the restoration of the suit in question by setting aside the order dated 19/01/2015. Whereas the learned

Senior Counsel appearing for the Respondent Nos. 1 and 2 would oppose the restoration of the suit in question. In addition, the learned Senior Counsel for the Respondent Nos.1 and 2 would contend that it is not only for non-filing of the affidavit of evidence, but since the Plaintiffs were also unrepresented on 19/01/2015, that the suit came to be dismissed for non-prosecution.

5 Having heard the learned counsel for the parties, I have considered the rival contentions. There can be no dispute about the fact that indulgence was shown to the Plaintiffs and the dismissal of the suit was set aside by the Trial Court by the order dated 15/12/2014 and that the suit was kept on 19/01/2015 on which day the Plaintiffs were required to file the affidavit of evidence of their witness. The reason put forth on behalf of the Plaintiffs that their advocate did not hear the condition imposed by the Trial Court whilst setting aside the dismissal of the suit and restoring the same can be said to be a plausible reason for the affidavit of evidence not being filed on 19/01/2015.

6 In my view, the Trial Court ought not to have been on technicalities but could have directed the Plaintiffs to file the affidavit of evidence on 19/01/2015 within a particular time frame and if not filed could then have passed appropriate orders in the suit. The suit is of the year 1992 and as indicated above transferred from this Court to the City Civil Court. In

my view, it is always desirable to give proper opportunity to a party to prosecute its remedy on merits rather than being thrown out on technicalities. The prejudice and equities could have been balanced by the Trial Court by imposing appropriate condition as regards the costs. In my view, therefore the Plaintiffs are required to be shown one final indulgence to prosecute the suit in question on merits. Hence the following directions :-

- [A] The impugned order dated 28/04/2016 is accordingly set aside and the Notice of Motion No.371 of 2015 would stand allowed. The suit in question would accordingly stand restored to file.
- [B] Since the Plaintiffs are to examine three witnesses, as stated by the learned Senior Counsel for the Appellants/Plaintiffs, the Plaintiffs would file affidavit of evidence of their 1st witness on 18/07/2016. Thereafter the Trial Court may fix the date of cross examination of the 1st witness of the Plaintiffs. The Plaintiffs would file affidavit of evidence of their remaining witnesses as would be directed by the Trial Court. The cross examination of the said witnesses would also be completed as per the directions of the Trial Court.
- [C] The hearing of the suit in question is expedited and the suit is directed to be disposed of latest by 31/10/2016.

- [D] The learned Senior Counsel for the parties assure this Court that their respective clients would not ask for any unnecessary adjournments in the Trial Court.
- [E] In the facts and circumstances of the present case, the Plaintiffs to pay costs of Rs.25,000/- each to the Defendant No.1 and the Defendant No.2. The same to be done on or before 18/07/2016. The payment of costs is a condition precedent. If the costs are not paid, then the benefit of this Order would not enure to the Appellants/Plaintiffs and the above Appeal from Order would then be deemed to have been dismissed without further reference to this Court.
- [F] Even if the affidavit of evidence of the 1st witness of the Plaintiffs is not filed on 18/07/2016, then the said condition as mentioned herein above in clause (E) would govern the Plaintiffs and then the above Appeal from Order would also be deemed to have been dismissed on the said ground.
- [G] Since the suit in question is restored to file, the interim orders which were operating on the date of its dismissal would continue

to operate subject to the above.

- [H] The above Appeal from Order to accordingly stand disposed of. In view of the disposal of the above Appeal from Order, Civil Application No.707 of 2016 does not survive and the same to accordingly stand disposed of as such.
- [I] The parties to appear before Trial Court on 11/07/2016 and produce the copy of the instant order before the Trial Court on the said date.
- [J] All concerned parties to act upon an ordinary copy of the instant Order duly authenticated by the Court Associate/Sheristedar.

[R.M.SAVANT, J]