

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

Amk

**APPEAL FROM ORDER (STAMP) NO. 21607 OF 2016
WITH
CIVIL APPLICATION (STAMP) NO. 21608 OF 2016
IN
APPEAL FROM ORDER (STAMP) NO. 21607 OF 2016**

Shri Shambhu D. Bhagwante	.. Appellant/Applicant
Vs.	
The Municipal Corporation of Gr. Mumbai	.. Respondent

Mr. J. S. Yadav i/b Bholaprasad S. Shukla for the Appellant/Applicant.
Mrs. M. R. Bhoir for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 18th AUGUST, 2016.

P. C. :

1. Admit. Respondent waives service of notice.
2. Heard finally, at the stage of admission itself, with consent of both the counsel.
3. This appeal is preferred against the order dated 25.07.2016 passed by the City Civil Court, Borivali Division, Mumbai in Notice of Motion No. 1415 of 2013 in L.C. Suit No. 2839 of 2009. By the impugned order, the trial Court has rejected the said Notice of Motion which was for seeking restoration of the suit which was disposed of for non compliance of the order passed by the trial Court.

4. It is submitted by the learned counsel for the appellant that the appellant has filed this suit challenging the notice issued under Section 351 of the BMC Act and the order dated 26.11.2009. In the said suit, the order of status quo was passed. The suit came to be dismissed for default on 30.04.2013 as the appellant and his advocate remained absent. On the same date, learned counsel for the appellant applied for restoration and the said application was allowed subject to payment of costs of Rs.2,000/- to be deposited within one week with Legal Services Authority. The appellant failed to deposit the said amount. However, on 15.06.2013, after he came to know about the said order, he filed this Notice of Motion for restoration of the suit and also for permission to deposit the amount of the costs.

5. The trial Court rejected the said Notice of Motion considering the fact that earlier also the suit was dismissed for default on 30.04.2013 and it was restored subject to condition of deposit of costs amount of Rs.2,000/- within one week. As the appellant has not given valid and sufficient explanation for the non compliance of the said order, the trial Court thought it fit to reject the said Notice of Motion, especially, considering that the interim order was obtained and in such suit, there is always a tendency to protract and prolong the hearing of the suit one way or either.

6. Submission of the learned counsel for the appellant is that, the appellant was out of station when, on 30.04.2013, the suit came to be dismissed for default. However, on the same day, his advocate has filed application for restoration, which was allowed subject to costs of Rs.2,000/-. The appellant was and is ready to deposit the said costs immediately after he came to know about the same. He has moved Notice of Motion on 15.06.2013 and thus, it is submitted that the matter needs to be decided on merits instead of throwing the case of the appellant at the threshold itself. It is submitted that the appellant is ready to abide by any conditions of this Court, like imposition of further costs.

7. Learned counsel for the respondent has opposed and resisted this appeal by submitting that it is one more attempt on the part of the appellant to take advantage of the order of status quo passed in his favour and thereby to protract the hearing of the suit. Hence the appeal should be dismissed.

8. In my considered opinion, though it may be true that the conduct of the appellant is not proper, as one way or other, he appears to be attempting to take advantage of the order of status quo passed in his favour; at the same time, it is necessary for substantial cause of justice that both parties should get an opportunity to prove their case on merits. It is submitted by the learned counsel for the appellant that the appellant

will be depositing the costs of Rs.2,000/- within a week from date of the order of this Court and also filing the affidavit of evidence. In view thereof, subject to further costs of Rs.10,000/-, this appeal deserves to be allowed.

Hence, the order:

- (i) The appeal is allowed.
- (ii) The impugned order passed by the trial Court stands set aside.
- (iii) L. C. Suit No. 2839 of 2009 is restored to its original file, subject to condition, that the appellant shall deposit costs of Rs.2,000/- to the Legal Services Authority as ordered by the trial Court on 13.04.2013 and further costs of Rs.10,000/- to the Corporation within a week from the date of this order.

9. As the Appeal itself is allowed, the Civil Application having become infructuous, stands disposed of.

10. Parties to act on the authenticated copy of this order.

[DR. SHALINI PHANSALKAR-JOSHI, J.]