

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

APPEAL FROM ORDER NO. 410 OF 2016

IN

NOTICE OF MOTION NO. 2004 OF 2014

IN

SUIT NO. 8980 OF 1994

WITH

CIVIL APPLICATION NO. 537 OF 2016

IN

APPEAL FROM ORDER NO. 410 OF 2016

Piloo Homi Vachha

...Appellant

Versus

Manilal Hversus Rathod & Ors.

...Respondents

Mr. Gauraj Shah, i/b Kanga & Co., for the Appellant.

Mr. Siddharth Ingule, a/w Mr. Vivek Walawalkar a/w Ms. Karishma Shirke, i/b Gordhandas & Fozdar, for the Respondent No. 3

CORAM : R.M. SAVANT, J.

DATE : 2nd August 2016

P.C. :

1. Admit.
2. Considering the challenge raised, heard forthwith.

3. The above Appeal from Order arises out of the order dated 27th August 2015 passed by the learned Judge of the City Civil Court Greater Mumbai by which order the Notice of Motion No. 2004 of 2014 filed by the Appellant/original Plaintiff for restoration of the Suit came to be dismissed.

4. 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 this Court and came to be transferred to the City Civil Court on the pecuniary jurisdiction of the City Civil Court being enhanced. The issues in the Suit was framed on 19th November 2012 and the Suit was posted on 30th April 2013 for filing of the evidence of the Plaintiff. It seems that though originally there were three Plaintiffs, the Plaintiffs No. 1 and 2 have expired and the Appellant who is now the sole surviving Plaintiff is around 94 years of age. Though the Advocate for the Plaintiff was present, he could not file the Affidavit of Evidence. The reasons for the same were put forth before the Trial Court. However, the Trial Court did not countenance the said reasons and dismissed the Suit for non prosecution on 30th April 2013. It is thereafter that the instant Motion was filed on 20th April 2014, that is almost after a period of one year. The Trial Court

did not accept the reason for the delay in filing the instant Notice of Motion for restoration of the Suit and has accordingly, rejected the same by the impugned order dated 27th August 2015.

5. The learned Counsel for the parties that is Mr. Shah, appearing on behalf of Appellant and Mr. Ingule, appearing on behalf of the Respondent No. 3 would make submissions for and against the Appeal being allowed and the Suit being restored to file. The learned Counsel appearing on behalf of the Respondent also sought to question the maintainability of the above Appeal from Order.

6. Having heard the learned Counsel for the parties, I have considered the rival contentions. As indicated above, it is on account of non filing of the Affidavit of Evidence that the Suit in question came to be dismissed for non prosecution on 30th April 2013. No doubt there is a delay of about one year in filing of the above Notice of Motion. However, it is required to be borne in mind that the Appellant, who as indicated above is the sole surviving Plaintiff, is more than 94 years of age and some indulgence therefore, would have to be shown to the surviving Plaintiff on the said ground. Insofar as the contention raised on behalf of the Respondents as regards the maintainability of the above Appeal. In my view, there is

no substance in the same having regard to Order XLIII(1)(k) of the Code of Civil Procedure, 1908. It is well settled that a party should be given an opportunity to prosecute its remedy on merits rather than being thrown out on technicalities. In my view, therefore, the impugned order dated 27th August 2015 is required to be quashed and set aside and is accordingly, set aside. The above Appeal would accordingly stand allowed. Consequently, the Notice of Motion would stand allowed and the Suit would stand restored to file.

7. The Appellant/original Plaintiff to file the Affidavit of Evidence on or before 23rd August 2016.

8. The Trial Court is directed to decide the Suit expeditiously.

9. The parties to act upon the copy of the instant order duly authenticated by the Court Sheristedar/Associate.

10. The parties to bring to the notice of the Trial Court the aforesaid developments when the Suit comes up for hearing before the Trial Court tomorrow.

[R.M. SAVANT, J.]