

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 463 OF 2017

Exide Industries Ltd.	..Applicant
<u>In the matter between :</u>	
Exide Industries Ltd.	..Applicant
vs.	
Martin and Harris Pvt. Ltd.	..Respondent

Mr. P. K. Dhakephalkar – Senior Advocate with N. Rizvi i/b. M/s.
Thakore Jariwala & Associates for Applicant.
Ms Preeti Shah for Respondent.

CORAM : M. S. SONAK, J.
DATE: 08 SEPTEMBER 2017

P.C :

1] Heard Mr. Dhakephalkar- learned Senior Advocate for the applicant and Ms Preeti Shah for the respondent.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the order dated 22nd March 2017 made by the learned trial Judge restoring the respondent's T.E. & R. Suit No. 37/51 of 2010, which suit, came to be dismissed for non prosecution.

4] The operative portion of the impugned order dated 22nd March 2017, reads thus :

“1. Order passed by this Court in T.E. and R. Suit on 25/11/2014 dismissing that suit for non prosecution is hereby set aside subject to cost of Rs.10,000/- to be paid by the plaintiff to the defendant.

2. Both the parties are directed to appear before this Court on 07/06/2017 in connection with hearing of the suit.”

5] Mr. Dhakephalkar, learned Senior Advocate for the petitioner submits that this is a case where no sufficient cause had been shown for restoration and further, the respondent, despite several opportunities, had delayed leading evidence in the suit without any justification whatsoever. Mr. Dhakephalkar also submitted that the application for restoration, in the form in which it was made, was not maintainable. He submits that even in the past, the respondent has instituted suit and permitted the same to be dismissed for non prosecution, thereby, occasioning very severe prejudice to the petitioner. On all these grounds, learned counsel for the petitioner submits that the impugned order warrants interference and must be set aside.

6] Ms Shah defends the impugned order by pointing out that sufficient cause was shown for non prosecution. She submits that there were genuine difficulties in preparing the affidavit in lieu of examination-in-chief and collecting the documents which were required to be tendered in evidence. She submits that the trial Court, has considered the cause shown and further, used its discretion judiciously. For these reasons, she submits that this

petition may be dismissed.

7] On perusal of the impugned order as also the cause shown, it cannot be said that this is a case of arbitrary or unreasonable exercise of discretion in the matter of restoration of the suit. It is not possible to accept the contention that application for recall of the order dismissing the suit for non prosecution was not maintainable. In any case, since the matter is before this Court, and since, this Court is of the opinion that the cause shown was sufficient for recall of the order dismissing the suit for non prosecution and for grant of yet another opportunity to the respondent but proceeded with the suit, no useful purpose will be served by interfering with impugned order on the ground that the application, in the form in which it was made, was not maintainable.

8] The reasoning for the exercise of discretion is reflected in paragraphs 12, 13 and 14 of the impugned order and again, it cannot be said that the discretion has been exercised capriciously or on basis of any irrelevant parameters. In the matter of this nature, where the trial Court, has exercised discretion in a positive manner. There is ordinarily, no scope to interfere in exercise of extra ordinary jurisdiction under Article 227 of the Constitution. No doubt, in the matter of this nature, there is bound to be as recorded by the learned trial Judge some lapse on the part of the party seeking

discretionary relief of restoration. However, that by itself, is not sufficient to non-suit the party or to deny the party adjudication on merits. The cause shown in this case, does not smack of any malafides. The respondent, who had instituted the suit, is really not gaining anything by delaying such suit. If, upon consideration of such factors, the learned trial Judge has exercised discretion in a positive manner, there is no reason to interfere with the exercise of such discretion. This is consistent with the law laid down by the Hon'ble Supreme Court in the case of ***N. Balakrishnan vs. M. Krishnamurthy***¹.

9] In the same judgment however, the Hon'ble Supreme Court has held that in the matter of exercise of said discretion, the opposite party cannot be altogether forgotten. The opposite party is also required to spend both time and money pursuing the litigation. The opposite party cannot be prejudiced on account of defaults on the part of the plaintiff. In such circumstances, it is necessary to award proper costs, so that, the plaintiff, pursues the matter with reasonable diligence. The costs of Rs.10,000/- awarded by the trial Court in the facts and circumstances of this case are too meager. The amount of costs are therefore enhanced to Rs.1,00,000/- (Rupees One Lakh). Such costs to be paid / deposited by the respondent within a period of four weeks from today. If such costs

1 (1998) 7 SCC 123

are deposited before the trial Court, the petitioner shall be at liberty to withdraw the same unconditionally.

10] The impugned order on restoration is not interfered with. However, the amount of costs is enhanced to Rs.1,00,000/- (Rupees One Lakh) payable within a period of four weeks from today.

11] Rule is disposed of in the aforesaid terms.

12] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)

Chandka