

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1134 OF 2014
WITH
CIVIL APPLICATION NO. 1365 OF 2014

Aazad Mohammed Shaikh .. Appellant
vs.
Municipal Corporation of Gr.Mumbai .. Respondent

Ms Seema Singh for the Appellant.
Ms M.M. More for the Respondent-MCGM.

CORAM : M. S. SONAK, J.
DATE : 8 FEBRUARY 2017.

P.C. :-

1] Heard Ms Seema Singh, learned counsel for the appellant and Ms More, learned counsel for the respondent-MCGM.

2] With the consent of and at the request of learned counsel for the parties, this appeal is being disposed of finally, at the stage of admission itself.

3] The challenge in this appeal is to the order dated 19 July 2014, by which, learned trial Judge has declined to restore the appellant's (plaintiff) suit which came to be dismissed for default.

4] Ms Seema Singh, learned counsel for the appellant, submits that there was only two days delays in applying for restoration of the suit. She submits that sufficient cause was shown not only to explain the two days delay, but also to explain the absence of advocate of the appellant on the date when the suit came to be dismissed for default.

Learned trial Judge, instead of considering such cause, has delved into merits of the matter and on the said basis declined to either condone the delay or restore the suit. She submits that such exercise is not proper and therefore, the impugned order may be set aside and the suit restored.

5] On the other hand, Ms More, learned counsel for the respondent -MCGM, submits that from the material on record, it is clear that the appellant after obtaining the ad-interim order, did not pursue the suit diligently. Despite several opportunities, the appellant was not pursuing the matter with due diligence only with a view to unduly extend the ad-interim reliefs. Further Ms More submits that the appellant is rank trespasser and not entitled to any reliefs. For all these reasons, there is no infirmity in making of the impugned order.

6] At the stage of deciding whether sufficient cause has been shown for condoning the delay of two days or for seeking restoration of the suit, it is ordinarily not proper to delve into the merits of the respective contentions. Whether the appellant is the rank trespasser is a matter which will ultimately to be decided in the suit. That by itself, was not a very relevant consideration when it comes to decide the motion of seeking condonation of delay or restoration. On this ground, the appeal is liable to be allowed and the impugned order is set aside.

7] However, Ms More is right in her submission that a party cannot obtain ad-interim relief and thereafter not pursue the

matter diligently with a view to secure extension of this ad-interim relief for any unreasonable length of time. At least, *prima facie*, it does appear that the appellant was not diligent in pursuing the suit, though the appellant may have shown sufficient cause for the absence of his advocate on 3 November 2012 when the suit came to be dismissed for default. Accordingly, this is a fit case to restore the suit, but to not to revive the ad-interim order obtained by the appellant in the suit. On the ground of lack of diligence on the part of the appellant, it is always permissible to vacate the ad-interim order. In any case, this is not a fit case for revival of the ad-interim order consequent upon restoration of the suit.

8] The appeal is therefore, partly allowed. The notice of motion taken out by the appellant for seeking condonation of delay is allowed. Similarly, the notice of motion seeking restoration of the suit is also allowed. However, the ad-interim order in operation earlier, shall not stand revived.

9] There shall, however, be no order as to costs.

10] The civil application does not survive and the same is also disposed of.

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

(M. S. SONAK, J.)