

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

**CIVIL APPLICATION NO.2792 OF 2012
IN
FIRST APPEAL NO.439 OF 1993**

Jithubhai N. Patel & Anr. ..Applicants/Appellants

V/s.

Smt.Dahiben Samjuben R. Patel

Since Deceased by his heirs

1A. Smt. Kujbala Rameshbhai Patel

& Anr.

..Respondents

Ms.S.M. Dandekar for the Applicants/Appellants.

Ms.Binjal Samani i/by Raval Shah & Co for the Respondents.

CORAM : M. S. SONAK, J.

DATE : 16 FEBRUARY 2017.

P.C.

1. Heard Ms.Dandekar for the applicant in Civil Application No.2792 of 2012 and Ms.Binjal Samani for the respondents.

2. Ms.Dandekar submits that after the appeal was dismissed for default on 19-01-2012, this Civil Application seeking restoration was taken out on 06 August 2012 i.e. within the prescribed period of limitation. She submits that on 19 July 2010,

she could not remain present in the Court, as, she was required to attend her personal matter in another Court.

3. Ms.Samani, the learned counsel for the respondents submits that the conduct of the applicants in the present case is such that it would dis-entitle them to any discretionary or equitable order. She submits that though the application for restoration was filed on 06 August 2012, there was delay of over five years, in even moving this application. Ms.Samani further points out that the applicant have virtually harassed the respondents and gone to the extent of damaging the suit premises occupied by them in pursuance of the interim protection granted to them on 14 June 1993. Ms.Samani offered to place on record the list of dates in order to elaborate her plea of harassment.

4. At this stage, it will not be appropriate to consider the alleged conduct of the applicants post 06 August 2012 which is the date of which the applicants applied for recall of order dated 19-07-2012 dismissing the appeal for default. What is important is that this application for restoration was made within the prescribed period of limitation. The reason for the absence of the counsel on 19-07-2012, cannot be said to be something, which is unusual or it

cannot be said that no sufficient cause has been shown for the absence on the particular day when the appeal came to be dismissed for default. Since, sufficient cause has been shown for the absences on 19-07-2010, it would be appropriate to recall the order dated 19-07-2010 and restore the appeal to the file. Such restoration shall however be subject to payment of cost of Rs.5,000/- to the respondents. Such cost to be deposited in this Court within a period of two weeks from today. In case, the costs are not deposited, the Civil Application shall be deemed to have been dismissed.

5. It is clarified that the restoration of the appeal will not, in the facts and circumstances of the present case, be treated as automatic restoration of the interim order dated 14-06-1993. This is because in the present case, though restoration application was filed on 06 August 2012, the same was moved for consideration only after a period of five years or thereabouts. In the meanwhile, admittedly, the applicants lost the possession of the suit premises on 26-12-2016. In such circumstances, there cannot be any automatic revival of the interim order granted on 14-06-1993, even though, a case has been made out to restore the appeal. The applicant has taken out another Civil Application No.191 of 2017, in effect, to seek the restoration of possession. In this application, the question

of revival of interim order dated 14-06-1993 and restoration of possession will be considered in accordance with law and on its own merits.

6. The Civil Application No.2792 of 2012 is therefore, disposed of in the aforesaid terms.

7. The Civil Application No.191 of 2017 to be placed for further consideration on 14 March 2017, in case, the costs as directed in Civil Application No.2792 of 2012 are indeed deposited within a period of two weeks from today. In case, the amount of costs are not deposited, then possibly there will be no question of considering Civil Application No.191 of 2017.

(M. S. SONAK, J.)