

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 845 OF 2009
WITH
CIVIL APPLICATION NO. 1203 OF 2015
AND
CIVIL APPLICATION NO. 10 OF 2017
IN
APPEAL FROM ORDER NO. 845 OF 2009

Shri Mohammed Matloob
s/o. Haji Mehmood
(since deceased) through Lrs.
Smt. Chaman Sultana & Ors. .. Appellants
vs.
Nawab Ahmed s/o. Haji Mehmood
& Ors. .. Respondents

Mr. R. Mane for Appellants.
None for Respondents.

CORAM : M. S. SONAK, J.
DATE : 31 MARCH 2017

P.C :

1] Mr. Mane, learned counsel for the appellants state that service is complete upon all the respondents and their legal representatives.

2] The challenge in this appeal is to the order dated 18 April 2006, by which the appellants – original plaintiff's Notice of Motion No. 1025 of 2006 in S.C. Suit No. 5809 of 1995 seeking restoration of the suit, came to be dismissed for non prosecution by the learned Trial Judge on 7 February 2006,.

3] Mr. Mane, learned counsel for the appellants points out that the appellant – original plaintiff was a visually impaired person. He points out that the appellant – original plaintiff had engaged an

Advocate and he reasonably believed and expected that his Advocate would attend the matter on due dates. He points out that even the learned Trial Judge has accepted the position that the appellant was visually impaired but has dismissed the Notice of Motion by observing that there was no valid reason for the Appellant's Advocate to remain repeatedly absent on the due dates. In these circumstances, Mr. Mane submits that the impugned order may be set aside and the suit may be restored.

4] Despite service, none of the respondents have appeared in the matter. The suit instituted by the appellant – original plaintiff's for declaration of share in the suit property, which is a shop and residential premises in Mumbai. There was no dispute that the original plaintiff was visually impaired to the extent of hundred percent. It is also the case of the appellant that during the relevant period, he had proceeded to his native place at Meerut in U.P. It is also stated that the Advocate was busy in some other court when the matter was called out and therefore the matter came to be dismissed for default.

5] In this case, the suit was dismissed for default on 7 February 2006 and the Notice of Motion seeking restoration was taken out on 28 February 2006. As noted earlier, there is no dispute that the original plaintiff was visually impaired. There is no reason to doubt the appellant's – original plaintiff statement that at the relevant time, he had proceeded to Meerut, U.P., which is his native place. In such circumstances, it does appear that the appellant, had taken whatever steps that were possible for him to prosecute the suit. This is not a case of some gross negligence and therefore, in a situation of this nature, learned Trial Judge should have exercised discretion and restored the suit which was dismissed for non prosecution on 7

February 2006. At the highest, some costs could have been imposed upon the appellant.

6] Taking into consideration the aforesaid circumstances cumulatively, a case is made out to warrant interference with the impugned order. The impugned order dated 18 April 2006 is accordingly set aside. The Notice of Motion No. 1025 of 2006 is allowed and the order dated 7 February 2006 dismissing the suit for non prosecution is also set aside. The suit is restored to the file of the learned Trial Judge, who shall proceed to decide the same on its own merits and in accordance with law.

7] In case, the service is not complete upon the defendants before the learned Trial Judge, the appellant to take steps to complete such service within a period of eight weeks from today.

8] It appears that during the pendency of this appeal, some of the respondents, who are defendants before the learned Trial Judge have also expired. The legal representatives of such respondents have already been brought on record in this Court. Accordingly, leave is also granted to bring on record the legal representatives of such defendants in the suit before the learned Trial Judge. Necessary amendment to be carried out within a period of eight weeks from today.

9] It is made clear that this Court has not adverted to the merits of the matter and therefore all contentions of all parties are left open to be decided by the learned Trial Judge.

10] The Appeal is accordingly allowed. In view of this, Civil Applications do not survive and are disposed of accordingly.

11] In the facts and circumstances of the present case, there shall be no order as to costs.

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

(M. S. SONAK, J.)

Chandka