

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1387 OF 2013

Smt. Bharti Kanhaiyalal Makhija & Ors. .. Appellants
vs.
Mr. Yahya Abu Soeb & Or. .. Respondents

Mr. V. T. Dubey for Appellants.
Mr. R. A. Singh i/b. Mr. S. R. Singh for Respondents.

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

P.C :

1] This Court on 25 February 2014, had issued notice to the respondents, returnable on 25 March 2014 making it clear that the matter would be disposed of finally at the stage of admission. This position was made further clear by order dated 13 October 2014.

2] Mr. Dubey, learned counsel appears for the appellants and Mr. Singh, learned counsel appears for the respondents.

3] The challenge in this appeal is to the order dated 22 October 2013, by which the learned trial Judge has dismissed the appellants' Notice of Motion No. 1196 of 2010 for restoration of L.C. Suit No. 3515 of 2005, which was dismissed by order dated 23 March 2010 for failure on the part of the appellants – plaintiffs to serve writ of summons upon the respondents who are the defendants in the suit.

4] Mr. Dubey, learned counsel for the appellants points out that at the stage when the Notice of Motion for ad interim relief was heard before the learned trial Judge, the defendants in the suit were

duly represented by an Advocate R. V. Bansode. He submits that this Advocate has also filed his vakalatnama in Court. He submits that such vakalatnama enures until disposal of the suit unless there is any specific order for discharge. He submits that it is in these circumstances that no further steps were taken for service of writ of summons. He submits that the suit was dismissed on 23 March 2010 and Notice of Motion No. 1196 of 2010 was taken out soon thereafter i.e. on 16 April 2010. In these circumstances, he submits that the impugned order may be set aside and an opportunity may be granted to the appellants to proceed with the suit. Mr. Dubey also points out that the suit basically seeks eviction of the respondents from the suit premises and therefore this is not a case of any serious prejudice to the respondents, who have in the meanwhile, continued in possession of the suit premises.

5] Mr. Singh, learned counsel for the respondents submits that the impugned order may not be disturbed. He points out that for almost five years, no proper steps were taken by the appellants to effect service of writ of summons. He points out that there were specific orders made by the learned trial Judge directing service. However, such orders were flouted by the appellants and no service was effected. In these circumstances he submits, that the learned trial Judge, was right in dismissing the suit for non prosecution and thereafter, refusing to restore the same.

6] Upon due consideration of the rival contentions and perusal of the material on record, it does transpire that the appellants were not diligent enough in taking steps to serve the writ of summons upon the respondents. It is possible that the appellants were under the *bona fide* impression that since, some Advocate did appear for the respondents at the stage of hearing on the Notice of Motion of ad

interim relief, no further steps were required to be taken by them. At the same time however, the record indicates that even after the conclusion of the hearing on the Notice of Motion for ad interim reliefs, specific orders were issued directing the appellants to take steps and despite such orders, no steps were taken, leaving the learned trial Judge, with no alternate than to dismiss the suit on 23 March 2010. However, the appellants, within reasonable time, did apply for restoration. Explanation was also offered as regards the circumstances in which steps remained to be taken. Although, there is some negligence on the part of the appellants, the negligence, is certainly not of such a degree, as to non-suit the appellants from prosecuting their case on merits. On account of the negligence, the learned trial Judge, would have always visited the appellants with costs and therefore, restored the suit.

7] In the aforesaid circumstances, the impugned order dated 22 October 2013 is set aside. The Notice of Motion No. 1196 of 2010 in the suit is allowed and the order dated 23 March 2010 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 dispose of such suit in accordance with law and on its own merits. All this however, shall be subject to the appellants paying costs of Rs.15,000/- (Rupees Fifteen Thousand) to the respondents, within a period of four weeks from today. Such costs to be deposited before the learned trial Judge within a period of four weeks from today. Upon deposit, the respondents, who are now represented by an Advocate Mr. Sanjeev Singh before the learned trial Judge shall be entitled to withdraw the same unconditionally.

8] In case the amount of costs are not deposited before the learned trial Judge within a period of four weeks, then the

appellants will not have the benefit of this order and this Appeal from Order shall be deemed to have been dismissed without any further reference to this Court.

9] Mr. Singh, learned counsel for the respondents makes a statement that if the costs are deposited and the suit stands restored, then, the respondents will file their written statement within a period of eight weeks from the said of such restoration. If the written statement is filed within the aforesaid period, then the learned trial Judge to take the same on record and thereafter proceed to decide the suit on its own merits and in accordance with law.

10] 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 determined by the learned trial Judge.

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

(M. S. SONAK, J.)