

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPELLATE DIVISION**

**COMMERCIAL APPEAL No. 48 of 2016
IN
NOTICE OF MOTION No. 790 of 2016
WITH
NOTICE OF MOTION NO. 06 of 2017
IN
COMMERCIAL APPEAL No. 48 of 2016**

M/s Meeti Developers Pvt. Ltd.

..Appellants.

Vs

Vijay Papneja & Anr

..Respondents.

Mr. Rajiv Chavan, Sr. Counsel a/w. Priyanka Chavan & Omkar Kulkarni i/by Prerna Lalchandani, Advocate for the Appellants.

Mr. Vinod Sharma, Advocate for Respondent No.1.

Mr. Rakesh Kumar Singh, Advocate for Respondent No.2.

**CORAM : NARESH H. PATIL AND
SMT. BHARATI H. DANGRE,JJ.**

DATE : 13th JULY, 2017.

P.C. :

1) The Appeal arises out of order dated 15.10.2016 passed by the learned Single Judge in Notice of Motion No.790/2016 in Suit No. 942 of 2011. The Appellant herein is the original plaintiff. The plaintiff claims to be a developer. It is contended

that the plaintiff and respondent no. 1 and 2 entered into an agreement with respondent No.2 Cooperative Housing Society for carrying out redevelopment of the building occupied by the members of original defendant no.2. The parties entered into an agreement on 25.10.2007 styled as Agreement for grant of development rights. It is contended by the plaintiff that as the defendant did not co-operate with the plaintiff for carrying out developmental works, the defendant terminated the agreement with the plaintiff. The suit came to be filed by the plaintiff in the month of March, 2011 seeking the relief for specific performance of the agreement dated 25.07.2010 and for other consequential reliefs of mandatory injunction and for damages. The plaintiff filed Notice of Motion No.1355 of 2011 on 28th April, 2011 for appointment of Court Receiver and seeking direction for taking possession of the suit property and for interim injunction restraining defendant No. 1 and 2 from interfering. By an order dated 02.02.2015 learned Single Judge dismissed the notice of motion no. 1355 of 2011.

2) Being aggrieved by the aforesaid order dated 2.2.2015 passed in said notice of motion, the plaintiff preferred an Appeal on 02.03.2015 bearing Appeal No.328/2016 before the Division Bench of this court.

3) In the meanwhile, the suit was posted for hearing. By order dated 05.01.2016, the Suit No. 942/11 was dismissed for non-prosecution by the learned Single Judge.

4) By an order dated 22.02.2016 appeal No.328/2016 came to be dismissed by a Division Bench of this Court. On 08.03.2016 a Notice of Motion No. 790/2016 was filed for restoration of the suit. By an order dated 15.10.2016 the said notice of motion came to be dismissed. The present appeal arises against the said order passed by the learned Single Judge on 15.10.2016 in Notice of Motion No. 790 of 2016.

5) The learned Senior Counsel appearing for the appellant submitted that the plaintiff had raised substantial issues in the suit which was yet to be tried. The appellant was prosecuting proceedings in the appeal filed against the dismissal of the notice of motion. The earlier advocate appointed by the plaintiff in the suit was to be replaced. During this time, one of the Directors of the plaintiff who was looking after the litigation fell ill and could not take necessary steps to appoint a lawyer to prosecute proceedings of suit. The Counsel submitted that the plaintiff did not intend to delay proceedings of the suit. The counsel referred to various orders passed by the learned single Judge and affidavits filed by the appellant.

6) The Counsel has referred to observations made by learned Single Judge while deciding notice of motion No. 1358/2011 on 2nd February, 2015, wherein the learned Single Judge observed in paragraphs No. 17 and 18 as under :

“17. Even the considerations of balance of convenience weigh heavily in favour of the Defendants. Neither can the redevelopment of the suit building be stalled nor can the 2nd Defendant Society be restrained from taking up redevelopment of its own property pending the final disposal of this present suit. Such status quo order shall work an irreparable prejudice to Defendant No.2 and its members. On the other hand, if the Plaintiff succeeds at the trial in showing that the development agreement was indeed valid and subsisting and that the Defendants were not within their rights to terminate the same, the Plaintiff can very well be awarded damages, which will be adequate to compensate the Plaintiff.

18. Learned Counsel for Defendant No.2 states that the 2nd Defendant Society shall cause its members to bring in the sum of Rs.1.14 crores paid by the Plaintiff to the members and in the event of the members not bringing in such money, the 2nd Defendant Society shall itself bring in the amount of Rs.1.14 crores and deposit the same in this Court within a period of eight weeks from today. The statement is accepted.”

7) We have heard learned Advocate for Respondent No.1, who has adopted submissions of the Advocate for Respondent No.2.

8) We have perused the record and considered the submissions advanced by the learned counsel appearing for the parties. The suit came to be dismissed on 05th January, 2016 for want of prosecution. Notice of Motion No. 790 of 2016 for restoration of the suit was also dismissed by the learned single Judge on 15.10.2016. While dismissing the same, the learned single Judge observed that normally such applications are leniently allowed but in the facts the court did not accept explanation given by the appellant -plaintiff. During the course of hearing, the learned counsel for the appellant submitted that at one stage, during the pendency of these proceedings, the director who was looking after the litigation of the company could not take steps as he fell ill. The Respondent/defendants were contesting the proceedings/ notice of motion filed by the appellant, praying for restoration of the suit. In the facts we find that the appellant should have been diligent in prosecuting his remedies. The appellant had taken steps for filing the notice of motion for restoration of the suit but he failed to take necessary steps to engage an Advocate in the proceedings of the suit. The learned single Judge while dismissing the suit observed that before the Prothonotary and Senior Master of this court the suit was called on 03.03.2015 and 20.07.2015

when none appeared for the plaintiff. The plaintiff ought to have taken required steps for representing / appearing before the Prothonotary through himself or through an Advocate.

9) The issue raised by the plaintiff in the present suit is of specific performance of the agreement based on agreement entered into by the parties on 25th October, 2007. Near about 10 years have expired since then. The suit was filed in the year 2011.

10) The learned counsel appearing for the appellant submits that he would assure the court that such lapse will not occur in future and he would prosecute the proceedings diligently in case its restoration is allowed.

11) Normally the court would take lenient view in restoration of suit. In the facts of the case, we find that restoration of the suit would provide necessary opportunity to the plaintiff to put-forth his case before the court. In the facts, such an opportunity may not be denied to the plaintiff.

12) Taking into consideration the facts and the attending circumstances surrounding the case, we are inclined to allow the Appeal subject to condition.

ORDER

i. The impugned order dated 15.10.2016, dismissing the Notice of Motion 790/2016 filed for restoration of the suit, is quashed and set aside.

ii. The Suit is restored to the file of the court subject to payment of cost of Rs.25,000/- by the Appellant, which shall be deposited within two weeks with the Prothonotary and Senior Master. On deposit of costs, the Respondent No.2 society will be entitled to withdraw the said amount of cost.

iii. The Appeal is allowed in the above terms.

iv. In view of the above, the Notice Motion No.06 of 2017 also stands disposed of.

v. In the facts of the matter, the parties may contemplate referring their dispute to mediation.

(SMT. BHARATI H. DANGRE,J.)

(NARESH H. PATIL,J.)

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