

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 14506 OF 2017

SHAIKH NAWAB SHAIKH DADABHAI
VERSUS
DWARKABAI @ MANGAL BHARAT UBALE AND OTHERS

Advocate for Petitioner : Mr. M.S. Kulkarni.
Advocate for Respondent No. 1 : Mr. S.D. Tawshikar.
Advocate for Respondent No. 4 : Mr. M.R. Sonawane.

CORAM : RAVINDRA V. GHUGE, J.
DATE : 26th November, 2018

PER COURT :

1. The petitioner/original defendant No. 3 is aggrieved by the order dated 26/07/2017, by which, the Trial Court has allowed an application filed by the plaintiff on 08/02/2017, by which the Regular Civil Suit No. 333/2014, is restored as against defendant No. 3.

2. I have heard the learned advocates for the respective sides at length. The petitioner has relied upon the judgment delivered by this Court in the matter of Vishwanath Satwaji Gaikwad Versus Laxman Abaji Kavale & others, [2000 AIR Bombay 307]. Learned advocate for the original plaintiff has relied upon the following judgments :

1. Arjun Singh Vs. Mohindra Kumar and Others, [AIR 1964 (2) SC 993]

2. Shaikh Abdul Rafi Abdul Aziz and Another Vs. Aspy Beharam Talathi and Another [1994 Mh.L.J. 438]
3. Firdous Omer (Died) by LRs. And Others Vs. Bankim Chandra Daw (Died) by LRs. and Others, [AIR 2006 SC 2759]
4. Vareed Jacob Vs. Sosamma Geevarghese and Others, [AIR 2004 SC 3992]
5. Shree Sanad Textile Industries Vs. Naranji Peraj Transport Co.[AIR1996 Guj 107]
6. Dr. Indira Bai Amma, TC 5/1970 Vs. Nimmy (Minor) Nalini Devi and Others, [WP(C).No. 24883 of 2007 (K)]
7. Mohd. Haroon S/o. Mohd. Haneef and another Vs. Mohd. Younus S/o. Mohd. Haneef and Others, [2018 (1) Mh.L.J.]

3. The undisputed factors emerging from the record are as under :

- (a) RCS No. 333/2014 has been filed by the plaintiff for seeking partition and separate possession, on 18/09/2014.
- (b) Summons were issued on 19/09/2014, to the defendants.
- (c) The petitioner/defendant No. 3 was not served and the plaintiff did not take appropriate steps leading the Trial Court to pass an order of dismissing the suit against defendant No. 3, dated 01/07/2015.

(d) Application Exhibit 5 was taken up for hearing and was rejected on 20/11/2015.

(e) No steps were taken by the plaintiff under Order IX Rule 5 of the Code of the Civil Procedure for seeking restoration of the suit as against this petitioner.

(f) On 08/02/2017, which is after a period of about 20 months, that the plaintiff filed an application Exhibit 18 praying for setting aside the order of dismissal against defendant No. 3.

(g) By the impugned order dated 26/07/2017, without issuing notice to defendant No. 3, the Trial Court allowed application Exhibit 18 and restored the suit as against defendant No. 3.

4. Despite the extensive submissions canvassed by the learned advocates for the respective sides, it is obvious that Exhibit 18 which was filed after about 20 months of dismissing the suit against this petitioner, the Trial Court did not issue notice to this petitioner. The Bombay amendment Act, Order IX Rule 5 (1), mandates that the plaintiff will have to move an application for seeking issuance of fresh summons to the unserved defendant. If no such steps are taken, the suit shall be dismissed to the extent of the unserved defendant. Under Order IX Rule 6 (1) (b) when summons are not duly served on the defendants, the Court can direct the issuance of a second summons.

5. It appears that the plaintiff has approached the Trial Court with Exhibit 18 praying for recalling of the order dated 01/07/2015. I have perused Exhibit 18 and I find that there are hardly any reasons assigned to explain as to why the plaintiff has waited, firstly, for the Court to pass an order of dismissing the suit against defendant No. 3 and secondly, as to why did the plaintiff did not take steps for 20 months after the order of dismissal was passed.

6. I have also perused the impugned order which not only deals with the pleadings of the parties and due diligence, but the Trial Court did not even care to issue notice to defendant No. 3. Contention of the plaintiff is that the law does not provide for condonation of delay as limitation is not prescribed. I, however, find from order IX Rule 5 (1) read with Rule 6 (1) (b) that the plaintiff has liberty of moving an application for issuance of fresh summons for the second time only within a period of two months pursuant to the summons being returned without being served. With a passage of two months after the summons having been returned, if the plaintiff does not take steps, the Trial Court is left with no options but to dismiss the suit as against the unserved respondent, in default. The law applicable for restoration of a suit on dismissal in default, will equally apply *mutatis mutandis* to such cases.

6. At this juncture, the learned advocate for the plaintiff submits that

since this Court is causing an interference in the impugned order and having expressed a view that Exhibit 18, is a vague application, he prays for liberty to enable the plaintiff to file a proper application with an application for condonation of delay and an affidavit. Learned advocate for the petitioner submits that if such liberty is being granted, all contentions of the petitioner be left open to be canvassed before the Trial Court for opposing an application on its merits.

7. In view of the above, this petition is partly allowed. The impugned order dated 26/07/2017 is quashed and set aside and application Exhibit 18 stands disposed of. The plaintiff is granted the liberty to file a proper application with an application for condonation of delay along with an affidavit, within three weeks from today. A copy to be served on the petitioner and all other defendants. If this direction is complied with, the Trial Court would consider the said application on its own merits and after considering the law laid down in the judgments cited by the litigating sides which are mentioned in paragraph No. 2 of this order.

8. All the litigating sides including the petitioner/defendant No. 3 shall appear before the Trial Court on 17/12/2018. The defendant would receive the copy of the application which the plaintiff desires to file under Order IX Rule 5 of the C.P.C. The Trial Court shall decide the

said application as expeditiously as possible and in any case on/or before the 15/02/2019.

(RAVINDRA V. GHUGE, J.)

S.PC.