

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3006 OF 2018

Yeshwant Ramchandra Dongre

...Petitioner

Versus

Haji Sulaiman Haji Ayub Bhiwandiwalla
(since deceased) through LR's.

...Respondents

....

Mr. Nikhil Wadikar a/w. Mangesh Bansod i/b. Law Loyals, Advocate for the Petitioner.

Mr. Narayan Sahu a/w. Omkar Kulkarni, Advocate for the Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 25th APRIL, 2018

PC.

1. Heard Mr. Nikhil Wadikar, learned counsel for the petitioner and Mr. Narayan Sahu, learned counsel for the respondents, at length. Mr. Sahu assures that on or before 3.5.2018, he will file appearance on behalf of the respondents.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 22.11.2017 passed by the Appellate Bench of the Small Causes Court in Marji Application No.634/2013 in Appeal No.163/2004. By that order, the Appellate Court rejected the application filed by the petitioner/appellant (original defendant) for setting aside the order dated 26.8.2013 dismissing the appeal in default.

3. By order dated 7.3.2018, notice for final disposal was issued to the respondents. Said order also recorded the statement on behalf of the petitioner that he is residing in the suit premises along with adult family members, namely, Sagar Manohar Dongre (nephew of the petitioner) and Mrs. Pooja Sagar Dongre (daughter-in-law of the petitioner), he has neither created third party interest nor parted with the possession and will hereafter neither create third party interest nor part with the possession and will clear arrears of rent if any before the next date of hearing.

4. Mr. Wadikar states that the petitioner has complied the order dated 7.3.2018 and presently is not in arrears of rent.

5. Rule. Mr. Sahu waives service on behalf of the respondents. Having regard to the narrow controversy raised in this Petition as also in view of the order dated 7.3.2018, Rule is made returnable forthwith and the petition is taken up for final hearing.

6. In support of this Petition, Mr. Wadikar submitted that the appeal was dismissed for default on 26.8.2013. Application for restoration was made on 4.9.2013. The respondents herein failed to file reply to the application and the application was ordered to be proceeded without their reply on 25.8.2015. In the meantime, the respondents herein filed reply at Exhibit-7. The Appellate Court

rejected the application on the ground that the reason given by the petitioner that the Advocate on record engaged a Counsel and that he lost track of the matter and the Counsel was not feeling well, are not supported by any evidence. The reason that the Junior Advocate was overburdened by the work cannot be taken as a sufficient cause. He submitted that this being the substantive appeal, the Appellate Court was not justified in rejecting the application for restoration of the appeal. Instead of dismissing the application for restoration, the Appellate Court could have imposed costs and ensured that the petitioner argues the appeal on merits. He, therefore, submitted that the impugned order deserves to be set aside thereby restoring the appeal for deciding it on merits. Mr. Wadikar assures that in case the Court is inclined to restore the appeal, the petitioner will argue the appeal on the date/s so fixed by the Appellate Court and will not seek adjournment.

7. On the other hand, Mr. Sahu submitted that the appeal was fixed for final hearing on 25.6.2013, 11.7.2013 and 29.7.2013. However, the Advocate for the petitioner did not proceed with the hearing of the appeal. While dismissing the suit in default on 26.8.2013, the Appellate Court noted that the petitioner herein was absent since last five months. He failed to proceed despite granting

adjournment as last chance. As the appeal is very old, the appeal was dismissed in default. He further supported the impugned order by submitting that no sufficient case is made out for restoration of the appeal.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The petitioner had instituted substantive appeal challenging the judgment and decree dated 29.8.2003 passed by the learned trial Judge in R.A.E. Suit No.1450/1994. If at all the Appellate Court was of the opinion that the petitioner is delaying the hearing of the appeal, it could have imposed costs on the petitioner.

9. In the case of **Kalipada Das and others vs. Bimal Krishna Sen Gupta (dead) by L.Rs.**, AIR 1983 SC 876, the Apex Court observed in paragraphs-5 and 7 thus :

“5. The only question is whether the appellant tenants who undoubtedly failed to comply with the Court's order to supply the paper-books within the prescribed time should be visited with such serious consequences of a penal nature as described by the High Court itself. Supplying paper-books is a procedural requirement devised to facilitate rendering justice. In other words, it is a procedural step in aid of justice, and not substantive justice itself. Undoubtedly, Court's orders have to be obeyed. The institution of judiciary may not be able to function if there is no sanction behind the Court's order. But penalty of failure to comply with Court's order providing a procedural stage in aid of

justice must be Commensurate with the gravity of the lapse. If the penalty imposed is disproportionate to the gravity of the lapse or omission, the procedural stage instead of becoming a step in aid of justice would be a roadblock to justice and at this stage it would be advantageous to recall what this Court said in *Sangram Singh v. Election Tribunal, Kotah and Anr.*, [1955] 2 SCR 1. It reads as under :

“Now a Code of Procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties, not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore, be guarded against (provided always that justice is done on both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

7. If the Court felt that the appellants were trying to delay the hearing of the appeal and that on account of this dilatory tactics the respondents-landlords who had obtained a decree would suffer, it was open to the High Court to direct the respondents to get the paper-books prepared and impose the cost of the same on the appellants. That was the easiest way to deal with the situation and thwart the efforts of the appellants to delay the hearing of the appeal. We fail to see how the High Court by taking the step which it took has expedited the hearing of the appeal because from June 1979 the proceeding has reached October 1982 and pursuant to the order of this Court, would consume some more time before the appeal could be disposed of. If the other way the matter had been approached by now the appeal to this Court could have been finally disposed of.”

10. Applying the tests laid down by the Apex Court in **Kalipada Das** (supra) to the facts of the present case, in my opinion, the Appellate Court was not justified in dismissing the appeal in default. The Appellate Court could have imposed costs in case it found that the petitioner/appellant is trying to delay the appeal.

11. Now as the petitioner has agreed to proceed with the appeal without seeking adjournment, interest of justice requires that the appeal is decided on merits. Hence, the Petition is disposed of in following terms :

- [i] The impugned order dated 22.11.2017 passed by the Appellate Bench of the Small Causes Court in Marji Application No.634/2013 in Appeal No.163/2004 is set aside.

- [ii] Marji Application No.634/2013 is allowed. Appeal No.163/2004 is restored to the file of the Appellate Court for deciding the same on its own merits and in accordance with law.
- [iii] The learned Counsel for the parties state that they will appear before the Appellate Court on 11.6.2018 and for that purpose no fresh notice be issued to them.
- [iv] The Appellate Court will fix suitable date for final hearing. The petitioner/appellant shall proceed with the appeal on the date/s so fixed by the Appellate Court and shall not seek any adjournment.
- [v] The Appellate Court is requested to decide the appeal within three months from fixing date of hearing.
- [vi] The petitioner shall deposit costs of Rs.10,000/- (Rupees Ten Thousand Only) in the Appellate Court within two weeks from today, under intimation in writing to the respondents' Advocate. The respondents are permitted to withdraw that amount unconditionally.
- [vii] It is made clear that if the petitioner does not deposit the costs, as aforesaid, within the stipulated time and/or does not proceed with the appeal after its restoration, the Appellate Court will be at liberty to pass appropriate orders including revival of the impugned order.
- [viii] Rule is made absolute in aforesaid terms. Order accordingly.

(R. G. KETKAR, J.)