

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8792 OF 2016

Nasiruddin Mukhtar Shaikh (since Decd)

Through Lrs.

...Petitioners

Vs.

Mr. Abdul Mannan Kazi & Anr.

... Respondents

.....

Mr. Abhijeet J. Kandarkar for the Petitioners.

Mr. K. K. Malpathak for the Respondent Nos.1 and 2.

.....

CORAM : G.S. KULKARNI, J.

DATE : JANUARY 22, 2018.

P.C. :

1. Heard learned counsel for the petitioners and learned counsel for the respondents. The challenge in this petition is to an order dated 30.12.2015 passed by the learned District Judge-10, Thane, whereby Miscellaneous Civil Appeal No.22/2015, as filed by the respondent/plaintiff challenging the order dated 9.10.2014 passed by the learned 3rd Civil Judge, Senior Division, Thane, whereby the application of the respondent/defendant for restoration of the suit dismissed for default which was rejected by the learned trial judge has been allowed.

2. Learned counsel for the petitioner/defendant submits that when the suit was taken up for hearing by the learned Trial Judge on

26.9.2005, the plaintiff was absent and accordingly the suit was dismissed for default. It is submitted that the respondent/plaintiff was well aware of the order dated 10.6.2004 passed by the learned Additional District Judge, Thane in appeal, as filed by the petitioner, whereby allowing the appeal, the parties were directed to appear before a Trial Court on 2.7.2004. It is submitted that despite respondent/plaintiff being aware of the said order no doubt the said order was challenged by the respondent/plaintiff by approaching this court in writ petition no.5686/2004, which came to be rejected by an order dated 16.7.2004, as also against the said order Special Leave Petition as filed by respondent/plaintiff came to be rejected on 18.7.2005 by the Hon'ble Supreme Court, nonetheless it was all the more necessary for the respondent to be more vigilant and diligent to appear in the suit when it was listed on 29.9.2005. It is submitted that the learned Trial Judge in the application as preferred by the respondent for restoration of the suit has appropriately taken into consideration the evidence as recorded in the said application, which clearly went to show that the respondent/plaintiff was careless and there was no sufficient ground by which it can be said that the suit needed to be restored. Learned counsel for the petitioner has drawn my attention to the relevant portion in the cross-examination and the

reasons as set out in the order dated 10th October 2014 passed by the learned Trial Judge rejecting the respondent's application for restoration of the suit. It is submitted that in the impugned order the learned Judge completely overlooked the evidence which has come on record and more particularly in the cross-examination of the respondent/plaintiff that it was not diligent in appreciating the proceedings. It is therefore submitted that the impugned order needs to be interfered and quashed and set aside.

3. On the other hand, learned counsel for the respondent had supported the impugned order, whereby the learned District Judge has restored the suit. It is submitted that the contentions as urged on behalf of the petitioner cannot be accepted considering the background of the litigation. It is submitted that the absence of the respondent who appeared on 29th September 2005 was not intentional, as the suit itself being instituted by the respondent/petitioner it cannot be said that after so much has happened the respondent was not requested to pursue the same. He accordingly justifies the impugned order.

4. Having heard the learned counsel for the parties and also having considered the order dated 9.10.2014 passed by the learned Trial Judge as also the impugned order passed by the learned District Judge, in my opinion no infirmity can be attributed to the reasons as set out in

the impugned order in granting restoration of the suit which came to be dismissed for default by the learned Trial Judge.

5. This is for the reason that the learned Trial judge has kept in mind the entire background of the litigation. It is not in dispute that earlier suit was decreed ex-parte against the petitioners in the absence of the petitioner/defendant not appearing in this suit. There were proceedings which were taken out by the petitioner for setting aside the ex-parte decree which succeeded resulting in the suit to be heard and decided on merits. It needs to be noted that an appeal which came to be filed by the petitioner before the learned District Judge against the judgment and ex-parte decree of the Trial Court dated 29.6.2002, the learned District Judge has directed the parties to appear before the Trial Court on 2.7.2004. However, proceedings of the suit were stayed by an order dated 10.6.2004, which was subject matter of the challenge before this court in Writ Petition No. 5686/2004 which came to be decided on 16.7.2004. Thereafter, the said order of this court was challenged before the Hon'ble Supreme Court by the respondent in Petition for Special Leave to Appeal (Civil) No.20478/2004, which also came to be rejected. However, in the intervening period till the suit was listed on 28.9.2005. It is on this background suit came to be thereafter listed on 29.9.2005 and in the absence of the

respondent/plaintiff it was dismissed for default.

6. In my opinion, the learned District Judge has correctly appreciated the entire factual background. It cannot be said that it was intentional for the respondent to not appear before the court, when the suit was listed. The learned District Judge accordingly felt it necessary that the suit be decided by the learned Trial Judge on merits. The learned Trial Judge had taken a narrow and technical view of the proceedings in rejecting restoration application as filed by the respondent. It has been rightly interfered in the interest of justice by the learned District Judge in granting restoration of the suit. The impugned order therefore meets the ends of justice.

7. The petition lacks merits. It is accordingly rejected. No costs.

8. In view of the dismissal of the writ petition interim order stands vacated. The parties are directed to approach the Trial Court on 12th February 2018 at 11.00 am.

(G.S. KULKARNI, J.)