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

CIVIL REVISION APPLICATION NO.478 OF 2017

Sunil Jethe	...	Petitioner
V/s.		
M/s D.J.Builders	...	Respondents

Mr. S. G. Deshmukh i/by Sanket Desphande,
for the Petitioner.

Mr. Rahul Singh a/w Chetan Agrawal I/by
Legal Catalyst, for the Respondent Nos 3A to
3F.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th MARCH, 2018.

P.C. :

1] Heard learned counsel for the petitioner and learned
counsel for the respondents.

2] By this Revision Application, filed under Section 115 of
Code of Civil Procedure, the petitioner is challenging the order dated
28.7.2017, passed by 5th Joint Civil Judge Junior Division, Kalyan,
thereby allowing Misc. Civil Application No.482 of 2012.

3] Misc. Civil Application No.482 of 2012, was filed by the
respondent for restoration of the suit bearing R.C.S.No.538 of 2007,
which came to be dismissed for default on 19.11.2012.

4] While challenging the impugned order of the trial Court, the submission of learned Counsel for the petitioner is that the order of dismissal of the suit was passed by the trial Court after the suit was pending for three years for adducing evidence on framing of issues on, 29.7.2009. However, all along the plaintiff of the said suit i.e. respondent No.1 herein, has failed to adduce evidence and hence it was held that “inspite of giving ample and liberal opportunities, plaintiff failed to adduce evidence, it appears that the plaintiff is not interested in prosecuting the suit, hence the suit is dismissed for default”.

5] It is urged that, in the application filed for restoration of the said suit, there is not a single whisper as to which circumstances prevented the respondent No.1 from adducing evidence in the suit for a period of three years, after framing of the issues. According to learned counsel for the petitioners, in the absence of any such explanation given by the respondent No.1, the trial Court should not have allowed this application. It is submitted that the reason given by the petitioner that he made enquiry with the staff of the Court, as the matter was not appearing on the board and thereafter it was misplaced, is not correct. According to learned counsel for the petitioner, the Roznama and daily board clearly go to show the matter was very much appearing on the relevant dates, but despite that

respondent has not bothered to remain present to adduce evidence. The roznama also shows that the matter was kept for “dismissal for default” and in such circumstances, the explanation given by the respondent No.1 for his remaining absent and allowing the matter to be dismissed for default is not at all just and legal. As in spite of all these facts, the trial Court has allowed the said application for restoration, the impugned order passed by the trial Court cannot be justified.

6] It is further submitted by learned counsel for the petitioner that, respondent No.1 has already created third party interest in the suit property, by executing three sale deeds and as a result thereof, he has lost interest in proceeding with the suit and only with an intention to harass the petitioner, application for restoration of suit was filed. Hence, the trial Court has committed an error in granting such application.

7] Per contra, learned counsel for respondent has supported the impugned order by submitting that the said order is already executed, in absence of the stay order from this Court. It is submitted that though the trial Court has stayed its order for a period of four weeks, the petitioner herein was not diligent in getting the stay order extended, as a result thereof, respondent No.1 has deposited the costs in the trial Court and thereafter the suit is restored and now kept

before the trial Court for recording of the evidence.

8] In my considered opinion, it cannot be denied that respondent No.1 has given explanation about his absence in the Court for adducing evidence as according to him, he has lost the track of the file. Even, if the said explanation is not found satisfactory, the fact remains that the petitioner has filed this application for restoration, immediately after he came to know about the dismissal of the suit for default. Now the suit is already restored to its file and hence the substantive cause of justice requires that the matter should be decided on merits instead of this Court entering into technicalities, especially when the trial Court has already exercised its discretion in allowing the application filed by respondent No.1 and restored the suit to its original file. The suit pertains to immovable property, therefore, it is all the more necessary that it should be decided on merits instead of being dismissed on technicalities and that is the consistent view taken by this Court and also by the Apex Court.

9] As regards the prejudice, that may be caused to the petitioner, admittedly restoration of the suit is allowed by trial Court by awarding costs of Rs.5,000/- which are deposited in the trial Court, in my considered view, the said amount of costs can be enhanced to Rs.50,000/-.

10] In view thereof, the Revision Application is accordingly

dismissed.

11] The impugned order passed by the trial Court is modified to the extent of enhancing the costs to Rs.50,000/- to be paid to the petitioner by the respondent including the costs of Rs.5,000/- already deposited in the trial Court, within two weeks from the receipt of this order, by the trial Court.

[DR.SHALINI PHANSALKAR-JOSHI, J.]