

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3822 OF 2016

MANIKRAO SANGAPPA LANDGE
VERSUS
YAMUNABAI SHANKARRAO KULKARNI (DIED)
THROUGH LRS AND OTHERS

Advocate for Petitioner : Mr. V.V. Bhavthankar.
Advocate for Respondents : Mr. P.S. Shendurnikar.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 15.02.2019

PER COURT :

1. The petitioner/original defendant is aggrieved by the order dated 22.01.2016, passed by the appellate Court, by which, Miscellaneous Civil Appeal No. 39/2005, filed by the appellant/original plaintiffs, has been allowed and the order of dismissing the suit in default, has been set aside and the suit has been restored.

2. I have considered the strenuous submissions of the learned advocates for the respective sides.

3. The petitioner's case is that after the Trial Court dismissed Special Civil suit No. 179/2001, on 15.03.2004, the plaintiffs had moved their Miscellaneous Application within 30 days before the same Court. The said Application was filed under Order IX Rule 9

read with Rule 8 of the Code of Civil Procedure, which could not have been filed under the said provision since the suit was dismissed in default when neither of the parties appeared on the date the suit was posted for recording of oral evidence of the plaintiffs. Thereafter, the plaintiffs had the only remedy of preferring an Application under Order IX Rule 4 seeking restoration of the suit or file a fresh suit, subject to the law of limitation. He, further, submits that the trial Court rejected the Miscellaneous Application filed by the plaintiffs, on 22.06.2005. This would give rise to a remedy of filing a Writ Petition before this Court and the plaintiffs could not have filed a Miscellaneous Civil Appeal under Order XLIII Rule 1 (c) of the C.P.C.

4. Learned advocate for the plaintiffs points out that he had approached the trial Court within 30 days from the date of the suit being dismissed in default. The suit was actually posted for recording the evidence of the plaintiff on 13.03.2004, which was a non working second Saturday. 14.03.2014 was a Sunday. The suit was automatically taken on board on 15.03.2004. The plaintiffs moved an application indicating that the advocate is unwell and is not attending the Court work. Yet, the suit was dismissed in default on that date.

5. He then, submits that as the Application was filed, contending that the order of DID was passed under Order IX Rule 8, they had invoked the jurisdiction of the Court under Order IX Rule 9. This was rejected by the trial Court on 22.06.2005. The plaintiff filed an Appeal before the appellate Court which was dismissed in default and again restored. The defendants approached this Court in a Writ Petition No. 7015/2012. By order dated 03.07.2013, the petition was allowed and the Miscellaneous Civil Appeal No. 39/2004, was again remitted to the appellate Court. Thereafter, the Appeal was again allowed by order dated 18.10.2013. The defendant again filed Writ Petition No. 1029/2014, before this Court and since the appellate Court had not dealt with the contentions of the litigating sides, the matter was remanded to the appellate Court for the second time. The Appeal has now been allowed for the third time by the impugned order dated 22.01.2016.

6. He, further, submits that these plaintiffs have suffered grave hardships and manifest inconvenience. For no mistake on their part and when their advocate was ill and not available in the Court on the accidental date of hearing on 15.03.2004, the trial Court dismissed the suit in default. The restoration Application was filed within 30 days which should have been considered by taking a pragmatic view. Yet, it was rejected and in this entire litigation during which these

litigants have made this third round up to the High Court, the plaintiffs have lost 15 valuable years.

7. I find this case to be quite peculiar. Issue is only as regards a Miscellaneous Civil Appeal having been filed and entertained by the appellate Court on three occasions, pitted against the contention of the defendant that the Miscellaneous Civil Appeal could not have been filed. The contentious issue is as to whether the suit was dismissed under Order IX Rule 8 or under Order IX Rule 3.

8. There is no dispute that both the parties had appeared in the Court after receiving summons, the pleadings were completed and the matter was posted, for number of dates, for recording of evidence of the plaintiffs. The plaintiffs were present on 15.03.2004 and had moved an application seeking an adjournment as their advocate was unwell and was not in the Court premises. In this backdrop, the trial Court should have adjourned the matter. Consequentially, Order IX Rule 3 would not be applicable since the plaintiffs were present on the date of hearing and had moved an application for an adjournment. Similarly, Rule 8 under Order IX would also not have been attracted since it prescribes that when the defendant has appeared and the plaintiffs do not appear when the suit was called on for hearing, the Court can make an order of dismissing the suit.

9. This argument on, which provision of law can squarely be said to be applicable, would continue, in the light of the fact that the plaintiffs were indeed present before the Court on 15.03.2004 and the trial Court could not have dismissed the suit in such circumstances. However, it is a painful situation that these plaintiffs have lost 15 years on this small issue and though they had moved an Appeal for restoration of suit within 30 days from the DID order, the Trial Court, instead of taking a pragmatic view, resorted to a pedantic approach and rejected the Application.

10. I am fortified in my view of object of doing substantial justice, by the judgment of the Hon'ble Apex Court (Three Judges Bench) in the matter of Haryana State Co-Operative Supply and Marketing Federation Ltd. Vs. Jayam Textiles and another [2014 (5) Mh.L.J. 249] wherein the Hon'ble Apex Court has held in paragraph 7 as under :

“7. Having heard learned counsel for the parties and after perusing the material on record, we find that admittedly authorisation by the Board of Directors of the appellant-Federation was not placed before the Courts below. But, we may notice that a specific averment was made by the appellant-Federation before the learned Judicial Magistrate that the said General Power of Attorney has been filed in connected case being CC No. 1409/1995, which has neither been denied nor disputed

by the respondents. In any case, in our opinion, if the Courts below were not satisfied, an opportunity ought to have been granted to the appellant-Federation to place the document containing authorisation on record and prove the same in accordance with law. This is so because procedural defects and irregularities, which are curable, should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use.”

11. In view of the above, I do not find that the impugned order could be termed as being perverse or erroneous. This petition, is therefore, dismissed.

12. Considering the peculiar facts as above, I called upon the defendant to state as to whether he would like to pray for costs. Learned advocate for the petitioner/defendant submits that he does not desire to make any statement. Learned advocate for the plaintiffs submits that they are poor agriculturists and in the facts and circumstances recorded above, they have lost 15 valuable years without the suit progressing any further. In this backdrop, I am not imposing costs.

13. Considering the above, the litigating sides shall appear in

Special Civil Suit No. 179 of 2001 before the trial court on 11.03.2019. The plaintiff shall prepare the affidavit in lieu of examination-in-chief of the first witness and shall produce the same on 11.03.2019. The trial Court would be justified in refusing unnecessary adjournments to the plaintiffs and would endeavour to decide the said suit as expeditiously as possible and in any case on/or before 15.11.2019.

(RAVINDRA V. GHUGE, J.)

S.P.C.