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

WRIT PETITION NO. 14229 OF 2016

Vishnu Gopal Pendharkar & anr. ..Petitioners

vs.

Pune Municipal Corporation & ors. ..Respondents

....

Shri Mahendra M. Agavekar for petitioners.

Mrs. Lalita H. Panchakshari for respondent Nos. 9 & 10.

....

CORAM : M.S.KARNIK, J.

DATE : 30th AUGUST, 2019

P.C. :

Heard learned counsel for the petitioners.

2. By this Petition under Article 227 of the Constitution of India the petitioners are challenging the order dated 26/10/2015 passed by the trial Court below Exhibit 1 in Regular Civil Suit No. 591 of 2007 dismissing the suit for default in view of Order 9 read with Order 17 Rule 2 and 3 of the Code of Civil Procedure, 1908.

3. In the suit, the petitioners who are the original plaintiffs are challenging the notice dated 28/3/2007 issued by the respondent - Corporation under Section 478 (1) of the Mumbai Pune Municipal Corporation Act for calling upon the petitioners to demolish the permanent and unlawful construction mentioned in the notice. It is the plaintiffs case that the work is not of a permanent nature and the same is necessary for protection of the lives of the plaintiffs who are above 65 years on the date of filing of the suit and staying alone.

4. In brief the suit is dismissed as the petitioners – original plaintiffs and their learned counsel were absent when the matter was called out. It is further recorded in the order that Advocate for plaintiffs filed application at Exhibit 127 and sought adjournment to file affidavit of evidence. In view of the delay and since the plaintiffs are absent for a long time and as the suit is of the year 2007, the suit came to be dismissed in default by the impugned order.

5. It is the contention of learned counsel for the petitioners that the petitioners are very old and find it difficult to keep a track of the proceedings. In paragraph 7 of the Petition it is stated that the petitioner No.1 is now 78 years of age and he has to do all the running around to collect the evidence. The petitioners were facing practical difficulty in getting all the documents and materials which are in possession of respondent No.1. It is on account of the difficulty in procuring the documents that the petitioners had filed application for adjournments from time to time.

6. Learned counsel appearing on behalf of respondent Nos. 9 and 10 opposed the Petition. According to her, the petitioners never participated in the suit proceedings. She pointed out that the suit is of the year 2007 and since then the petitioners are not diligent in prosecuting the suit. Despite grant of several opportunities the petitioners did not lead the evidence.

7. No doubt the petitioners have sought adjournments from time to time to lead the evidence. The petitioners requested for repeated adjournments on the pretext that they are in the process of collecting the documents. It also cannot be overlooked that sufficient opportunity was given to the petitioners to proceed with the case. However, in my opinion, considering the age of the petitioner No.1 which as on today is more than 80 years, one opportunity needs to be given to the petitioners to contest the suit. The petitioners should not be non suited only on the ground of default. Defendant Nos. 9 and 10 can be adequately compensated with a direction to petitioners to pay exemplary costs.

8. Only by way of indulgence an opportunity is given to petitioners to lead evidence. Learned counsel for the petitioners on instructions states that the petitioners are willing to co-operate with the trial Court and henceforth will not take any unnecessary adjournments. Hence the following order :

ORDER

- i. The Petition is allowed with no order as to costs.
 - ii. The impugned order dated 26/10/2015 passed by the trial Court below Exhibit 1 in Regular Civil Suit No. 591 of 2007 is set aside.
 - iii. Regular Civil Suit No. 591 of 2007 is restored to file.
 - iv. The petitioners and respondent Nos. 9 and 10 to appear before the trial Court on 23rd September, 2019 along with an authenticated copy of this order.
 - v. In so far as rest of the respondents are concerned, the petitioners to give a notice to the defendants about the next date.
 - vi. Considering the fact that the suit is of the year 2007, the hearing of the suit is expedited. The trial Court is requested to decide the suit as expeditiously as possible, preferably within a period of 18 months from today.
9. With these observations, the Petition is disposed of.

(M.S.KARNIK, J.)