

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1210 OF 2018

Machindra M. Karape and anr. .. Petitioners
vs.
Dyanoba M. Karape
through LR.s and ors. .. Respondent

Mr. D.G. Dhanure for the Petitioner.
Mr. Uday B. Nighot for the Respondents.

CORAM : M. S. SONAK, J.
DATE : 27 MARCH 2019.

ORAL JUDGMENT

1] Heard Mr. Dhanure, learned counsel for the petitioners
and Mr. Nighot, learned counsel for the respondents.

2] Rule. Rule is made returnable forthwith by consent.

3] The challenge in this petition is mainly to the orders
dated 29th April 2011 and 21st January 2017 by which the
petitioners' suit stood dismissed for non-prosecution.

4] The record indicates that after the order dated 29th
April 2011 was made, on the same date the advocate for the
petitioners applied for restoration of the suit. However, the
learned Trial Judge rejected this application with a cryptic

order by observing that the suit was dismissed for non-production of evidence and as such the application was not tenable without evidence affidavit. The petitioners then took out a formal application for restoration along with application for condonation of delay. By order dated 11th April 2014, the learned Trial Judge allowed the application for condonation of delay subject to payment of costs of Rs.5000/-. However, thereafter, the application for seeking restoration was kept pending for three years and ultimately, by order dated 21st January 2017, the same came to be rejected. Accordingly, the challenge in this petition is to the orders dated 29th April 2011 and 21st January 2017.

5] If the reasons set out in the application seeking restoration and the reasons set out for explaining delay are perused, then it cannot be said that the reasons are substantially different. In any case, the petitioners had shown sufficient cause for their absence on 29th April 2011, on which date the suit came to be dismissed for non-prosecution. Therefore, by imposing costs, the suit could

have been restored in order to promote the substantial justice.

6] Mr. Nighot, learned counsel for the respondents, however points out that on at least two dates, prior to the date when the suit is dismissed for non-prosecution, opportunities were granted to the petitioners, but such opportunities were not availed of by the petitioners. He submits that if such antecedent conduct of the petitioners are taken into account, then there was no error whatsoever on the part of the learned Trial Judge in dismissing the suit for non-prosecution.

7] In such matters, normally, the antecedent diligence is not required to be looked into except perhaps for determining the quantum of costs. This is a normal rule though not an impermeable rule. In the present case, it cannot be said that any case warranting departure from this normal rule has been made out. Therefore, since sufficient cause was shown for non-appearance on 29th April 2011, the learned Trial Judge, ought to have restored the suit. It is pertinent to

mention that on behalf of the petitioners, their advocate had made an application for restoration on the very same date, which, as noted earlier, came to be rejected by cryptic order.

8] No doubt, the respondents will suffer prejudice, because in the meanwhile, almost eight years have passed since dismissal of the suit for non-prosecution. Though, the petitioners have to take blame for this inordinate delay, there is really no explanation as to why it took the learned Trial Judge almost three years to dispose of the application for restoration, even after the learned Trial Judge chose to condone the delay in the institution of the same by order dated 11th April 2014. Once the condonation of delay was granted, the discretion ought to have been exercised in favour of restoration of suit within reasonable time from the date of the order dated 21st April 2014. The prejudice to the respondents is such as can be compensated by way of costs. The costs will however, have to be substantial.

9] The learned counsel for the petitioners, on the basis of instructions from the petitioner No.1, who is present in the

Court, has offered costs of Rs.50,000/- which, in my opinion, are substantial to compensate the respondents for the prejudice.

10] Accordingly, Rule is made absolute in this petition. The orders dated 29th April 2011 and 21st January 2017 are set aside. The suit is restored. This shall however be subject to the payment of costs of Rs.50,000/- within a period of maximum four weeks from today. The costs may be either directly paid to the respondents or deposited before the Trial Court within a period of four weeks from today. If the costs are deposited before the Trial Court, the respondents shall have unconditional liberty to withdraw the same.

11] If the costs are indeed paid within four weeks from today, then the parties are directed to appear before the learned Trial Judge on 2nd May 2019 at 11.00 a.m. and to file an authenticated copy of this order. Learned Trial Judge to then proceed with the suit in accordance with law and on its own merits.

12] Since the suit is of the year 1997, the learned Trial Judge is directed to dispose of such suit as expeditiously as possible and in any case on or before 31st December 2019. Both parties to cooperate in the expeditious disposal of the suit and not to seek any unnecessary adjournment. In particular, taking note of the petitioners conduct, the petitioners are directed not to seek any undue adjournments in the suit. If such adjournments applied for, the learned Trial Judge shall take strict action in the matter so that the suit can be effectively disposed of by 31st December 2019.

13] All concerned to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)