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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7719 OF 2016

Smt. Shobha Vishwanath Kolekar

..Petitioner.

V/s.

Mohan Shankar Jaigude & Ors.

..Respondents.

Mr.Subhash V.Gutte for the petitioner.

Mr.Vaibhav R.Gakwad for respondent Nos.1 to 3.

CORAM : M.S.SONAK, J.

DATE : MARCH 22, 2019

ORAL JUDGMENT

Heard Mr.Gutte, learned counsel, appointed under the legal aid scheme for the petitioner and Mr.Gaikwad, learned counsel for respondent Nos.1 to 3.

2. Challenge is to the order dated February 1, 2016 by which learned Appeal Court has rejected the petitioner's Civil Miscellaneous (Restoration) Application No.155/2015 seeking restoration of the appeal.

3. As rightly pointed out by Mr.Gaikwad, learned counsel for the respondents against the impugned order, an appeal from order is

maintainable. This means that the petitioner will have to withdraw this petition and file an appeal explaining the delay in filing the appeal. In the peculiar facts of the present case, however, interest of justice will be served, if the petition is entertained as it is. Remedy under Article 227 of the Constitution of India is always retained by this Court for exercising it at any appropriate case. This appears to be an appropriate case to do. This petition has been filed with the assistance of the legal services authority. An advocate under legal aid assistance appears for the petitioner. Therefore, it would not be proper to require the petitioner to file appeal at this stage.

4. From the perusal of the impugned order, it is apparent that the appeal was dismissed on July 6, 2015 and application for restoration was taken out with the prescribed period of 30 days. However, learned Appeal Court has adverted to the antecedent delay and on such basis refused to restore the appeal. According to me, atleast in the facts of the present case, this was not a proper approach.

5. Mr.Gaikwad learned counsel for the respondents points out that the impugned decree was made some time in the year 2013 and the appeal was filed on July 24, 2014. Thereafter, notices were issued on September 5, 2014 and the petitioner failed to take steps. Therefore, on February 15, 2015, the matter was placed on February 23, 2015 for dismissal. Even on this date, neither the petitioner nor advocate for the

petitioner appeared in the matter and finally, the matter was dismissed on July 6, 2015. Mr.Gaikwad submits that all these makes it clear that the petitioner was not pursuing the appeal with due diligence. Mr. Gaikwad points out that in the meanwhile, the execution of the decree has been delayed. He submits that despite the decree of 2013 for the last six years, the respondent has not been able to secure possession. For all these reasons, he submits that the petition be dismissed.

6. As noted earlier, learned trial Judge has taken into consideration the antecedent delay which was not proper. The petitioner has shown sufficient cause for the absence of her advocate on July 6, 2015. Taking into consideration all these factors and in order to promote substantial justice, restoration should have been allowed subject to the payment of costs in order to compensate the obvious prejudice caused to the respondent.

7. Accordingly, this petition is allowed and the impugned order dated February 3, 2015 is set aside subject to payment of costs of Rs.15,000/-, to be paid by the petitioner to the respondent within a period of eight weeks from the date this order is uploaded on the website.

8. Learned counsel for the petitioner undertakes to communicate this order to the petitioner as early as possible and in any case within a period of one week from today.

9. Parties to appear before the Appeal Court on June 3, 2019 at 11.00 a.m. and produce an authenticated copy of this order. If by that date the petitioner has paid the costs of Rs.15,000/- or atleast deposited the costs of Rs.15,000/- before the Appeal Court, then, the Appeal Court is directed to dispose of the appeal as expeditiously as possible and in any case within a period of three months from the said date.

10. However, if the costs are not paid, then, even this petition shall be deemed to have been dismissed without further reference to this Court.

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

(M.S.SONAK, J.)