

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

907 WRIT PETITION NO.3801 OF 2005

DEELIP DAMU PATIL

... PETITIONER
(Orig. Defendant No.1)

VERSUS

MACHUINDRA DAMU PATIL & ORS

... RESPONDENTS
(Original Plaintiffs)

...
Mr. B R Warma , Advocate for Petitioner
Mr. U.S. Malte, Advocate for Respondent No.1

...
CORAM : V. K. JADHAV, J.
DATED : 6th February, 2020

PER COURT :-

1. Heard both the sides.
2. The respondent no.1 – original plaintiff has instituted a suit bearing Special Civil Suit No.28 of 2000 for declaration and partition before the Civil Judge, Senior Division, Amalner. By order dated 28.03.2003 passed below Exhibit-1, the trial court has dismissed the suit in default. Therefore, the respondent – plaintiff has thus filed an application under Order 9 Rule 9 of the Civil Procedure Code for setting aside the dismissal order and for restoration of the suit and the said application is numbered as Misc. Civil Application No.8 of 2003. Both the parties led the oral and documentary evidence in support of their rival contentions and after hearing of both the parties, the learned Civil Judge, Senior Division, Amalner, by the impugned order dated

05.11.2004 in Misc. Civil Application No.8 of 2003, allowed the application and set aside the dismissal order dated 28.03.2003 passed below Exhibit-1 in Special Civil Suit No.28 of 2002, subject to costs of Rs.300/- (Rs. Three Hundred Only) and further directed that the Special Civil Suit No.28 of 2000 be restored to its original number and the stage. Hence this writ petition.

3. Learned counsel for the petitioner – original defendant submits that on 17.09.2002 vide Exhibit-44, the trial Court has framed the issues and further fixed the case for evidence on 18.10.2002. Though the matter was adjourned from time to time, however, on 10.12.2002, the application came to be filed by the counsel for adjournment. Further on 31.01.2003, another application was moved by the counsel for the plaintiff for adjournment. It is a part of record that till 21.03.2003 neither plaintiff nor his advocate was present. Learned counsel submits that on 28.03.2003, the trial Court has dismissed the suit in default for the said reason. Learned counsel submits that though the respondent - plaintiff has examined himself and witness no.2 viz. Dr. Ajay D. Khairnar to substantiate the grounds raised in the application seeking restoration of suit, however, they have contradicted each other on material part. Learned counsel submits that neither the respondent – plaintiff was suffering from any illness nor the

Medical Certificate (Exhibit-40) is genuine. Learned counsel submits that despite the same, the trial Court has allowed the application by the impugned order and the said impugned order is liable to be quashed and set aside.

4. Learned counsel for respondent no.1 – original plaintiff submits that the suit pertains to the immovable property. It is an old suit. Even though the suit came to be restored by the impugned order dated 05.11.2004, because of the interim relief granted by this Court, the said suit is still pending. Learned counsel submits that the evidence of the respondent – plaintiff and his witness i.e. Dr. Ajay D. Khairnar is inconsistent on material part. The respondent - plaintiff was under treatment for his ailment of Typhoid. Furthermore, the trial court has also observed that the six dates were given for hearing after framing the issues and out of those six dates, on two dates, the Presiding Officer was on leave. In addition to that on two occasion, the counsel for the plaintiff sought adjournment and it was granted by the Court. So only on three of the occasions, the plaintiff found remained absent on the date of hearing. Learned counsel submits that the trial Court has, therefore, rightly allowed the application and restored the suit to its original number by setting aside the order of dismissal in default. There is no substance in this writ petition. The writ petition may kindly be dismissed.

5. On perusal of the impugned order and the observations made by the trial Court, it appears that the petitioner was deprived from sufficient reasons to appear before the trial Court when the suit was kept for hearing. The respondent – original plaintiff has examined himself and also witness - Dr. Ajay D. Khairnar. The witness - Dr. Ajay Khairnar has deposed that he has issued medical certificate (Exhibit-40). The respondent – plaintiff was under his treatment for ailment of Typhoid. It further appears that the trial Court in Paragraph No.15 of the impugned order has given details of hearing dates. The suit pertains to the immovable property. Even though the suit was restored by the impugned order, the suit is pending for almost more than 16 years because of the interim order passed by this Court. In view of this, I do not want to interfere in the order passed by the trial Court. Hence, I proceed to pass the following order:

ORDER

(I) The writ petition is hereby dismissed.

(II) The trial Court shall dispose of the suit, as expeditiously as possible, preferably within a period of six months from the date of this order.

(V. K. JADHAV, J.)