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

WRIT PETITION NO.7672 OF 2013

Veena Vilas Katre
Through her Power of Attorney
Dr. Subhash Nathmal Pallod ...Petitioner

Versus

Kishan Santu Pawar alias Mahale
Deceased through Legal Heirs and Ors. ...Respondents

Mr. Mandar Limaye a/w Ms. Gauri Velankar, for the Petitioner.

Mr. S. S. Kanetkar, for the Respondent Nos.3 to 5, 7, 9 and 10.

CORAM : REVATI MOHITE DERE, J.

DATE : 21st FEBRUARY, 2020

P.C. :

1. Heard learned counsel for the parties.
2. By this Petition, the Petitioner has impugned the order dated 9th July, 2013, passed by the learned 4th Additional Judge, Small Causes Court, Pune, below Exhibit – 1, in Special Miscellaneous Application No.41 of 2012, by which, the Petitioner's application seeking restoration of the Special Civil Suit No.1325 of 2004, was dismissed.

3. Perused the papers including the impugned order. The petitioner is the original plaintiff who had filed a suit for Specific Performance of an Agreement dated 31st March, 1994, as well as for a declaration that the Consent Decree in R.C.S. No.1175 of 1998 is not binding on him. In the said suit, the respondents – defendants appeared and filed their written statement. The trial Court framed issues in the said suit and the matter was posted for filing of the evidence of the petitioner herein i.e. the original plaintiff on 17th August, 2011. The petitioner sought an adjournment on that day, for filing affidavit of evidence, pursuant to which, the matter was adjourned to 12th September, 2011. As none appeared for the petitioner, the matter was again adjourned to 28th September 2011 and thereafter to 8th October, 2011. It is not in dispute that on 8th October, 2011, the matter was wrongly listed, inasmuch as, it was a 2nd Saturday and there was a holiday for the Court. It appears that since the date was wrongly given as 8th October, 2011, the matter was kept on the following Monday i.e. on 10th October, 2011, as a result of which the petitioner was unaware of the said date and as such neither the petitioner nor her advocate could remain present on the said date. As none appeared on 10th October, 2011, the trial Court dismissed the suit for default. Pursuant thereto, the petitioner filed an application and sought restoration of the said Special Civil Suit, which was dismissed by the trial Court vide

order dated 9th July, 2013.

4. No doubt, it appears that the petitioner was not present on the earlier dates however, on 8th October, 2011, the matter was wrongly listed due to the mistake of the Court Clerk. Pursuant thereto, the Court Clerk placed the aforesaid matter on 10th October, 2011 and as such none appeared for the Petitioner on the said date and the Suit was dismissed for default. Under Order IX, Rule 4 of Civil Procedure Code, the petitioner – plaintiff had either the option of filing a fresh suit or to seek restoration of the suit.

5. In view of the said provision, the petitioner – plaintiff filed an application seeking restoration of the suit, which was dismissed for default. In the facts, having regard to the fact that the date on which the matter was posted was a 2nd Saturday, a holiday, pursuant to which, the matter was kept on 10th October, 2011 i.e. on the following Monday, resulting in the absence of both the petitioner as well as her advocate, will have to be considered whilst deciding the aforesaid petition.

6. Having gone through the provisions, the observations made by the trial Court that under Order XVII Rule 3 read with Rule 2 of the Civil

Procedure Code, there is no provision of restoration of suit, is contrary to the provisions of Code of Civil Procedure.

7. Considering the aforesaid, in the interest of justice, the impugned order dated 9th July, 2013, passed by the learned 4th Additional Judge, Small Causes Court, Pune, below Exhibit – 1, in Special Miscellaneous Application No.41 of 2012, is quashed and set aside, subject to the petitioner depositing costs of Rs.25,000/- in the trial Court. The said costs to be deposited by the petitioner, within two weeks from the date of uploading of the aforesaid order. The trial Court to release the said costs, so deposited, amongst the respondents.

8. Special Civil Suit No.1325 of 2004 is restored back to its original file. Since the suit is of the year 2004, the hearing of the suit is expedited. All parties agree to co-operate in the expeditious disposal of the suit. The restoration of the suit is subject to the petitioner depositing costs of Rs.25,000/- in the Registry of the trial Court, to be payable to the respondents.

9. The Petition is allowed in the aforesaid terms and is accordingly disposed of.

10. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.