

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

WRIT PETITION NO. 896 OF 2007

Hariba Tatyaba More Petitioners
(Died) thru his LRs
Smt. Indrabai Hariba More & Ors.

Vs.

Dada Eknath More & Ors. Respondents

Mr. Ajay A. Joshi for Petitioners.
Mr. Vishwanath Talkute for Respondent Nos. 1 to 4.

Coram : NITIN W. SAMBRE, J.
Date : 11TH FEBRUARY, 2021

P.C.:

1. The objection raised by the learned counsel appearing for the Respondents is that the petition is preferred at a belated stage as the order impugned dated 16th August, 2003 is questioned before this Court in 2007 i.e. after lapse of almost more than three years.

2. If the aforesaid submissions are considered, what is noticed is, the issue involved in the Petition was referred to Full Bench was, whether the application for restoration is maintainable under Section

151 of Code of Civil Procedure, in case if the suit is dismissed under Sub Rule 1 of Rule 5 of Order IX C.P.C.

3. The Full Bench of this Court has held that the application for restoration under Section 151 C.P.C. is maintainable, in such an eventuality with a caveat that the Petitioner must show sufficient cause.

4. In the aforesaid background, in my opinion, the objections raised by the learned counsel for the Respondent is required to be overruled.

5. As far as the order impugned is concerned, in my opinion, the observations of this Court in Writ Petition Nos. 896 of 2007 and 7552 of 2009 particularly in paragraph 14 is worth referring to. The said observations reads thus :

14. "Overruling the view taken by the learned Single Judge of this Court and answering the reference by declaring that Section 151 of the Code could be invoked to seek restoration of a suit dismissed under Sub-Rule (1) of Rule 5 of Order IX of the Code, we lodge the caveat. The caveat would be that the Plaintiff would have to

show a sufficient cause. The previous conduct of the Plaintiff would also require to be considered. The inconvenience and the prejudice caused to the served defendants or the defendant who was not served as a consequence of restoration of the suit would also have to be kept in mind.”

6. As such, if we test the reasons furnished in the order impugned dated 16th August, 2003 passed below Exhibit 73 in Regular Civil Suit No. 312 of 2000 preferred by the Petitioner, the only reason furnished therein is non-maintainability of the application for restoration. The trial Court was of the view that in case if the suit is dismissed under Order IX, Rule 5(1) of C.P.C., in case fresh suit is maintainable and not an application for restoration under Section 151 of C.P.C.

7. In the aforesaid background, particularly observations of the Full Bench in paragraph 14 referred supra, the order impugned, in my opinion is not sustainable and that being so, same is liable to be quashed and set aside.

8. The petition stands allowed in above terms.
9. The Application, Exhibit 33 is restored to file of learned Civil Judge, Senior Division, Sangola.
10. The said Court is directed to decide the application taking in view the observations of the Full Bench as referred to above expeditiously.

(NITIN W. SAMBRE, J.)