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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3778 OF 2019

Smt. Ambibai Ramchandra Bhoir
Decd and others

....Petitioners

V/s.

Shri. Nandkumar Balkrushna
Salvi, Prop of M/s. Sunita Enterprises

.....Respondent

Mr. S. M. Oak i/b Mr. Sagar Joshi for the Petitioners
Mr. P. K. Dhakephalkar, Senior Advocate i/b Jaydeep Deo for
Respondent

CORAM : NITIN W. SAMBRE, J.

DATE: FEBRUARY 9, 2021.

P.C.:

1] Heard respective counsel.

2] This petition is by Defendants questioning the order of restoration of Suit passed in Appeal by the learned District Judge, Thane on 12/03/2018.

3] The case of the Petitioner is, Suit for specific performance being Special Civil Suit No. 751/2008 was scheduled for recording of evidence of Plaintiff on 23/09/2013. Said Suit came to be dismissed as parties to the suit i.e. Plaintiff and Defendant both remained absent. Respondent-Plaintiff thereafter moved Civil Misc. Application No. 576 of 2013 styling same to be an Application under Order 9 Rule 9 of the Code of Civil Procedure, 1908 [C.P.C. for short] for restoration of the Suit. Said Application came to be rejected on 23/12/2017. Feeling aggrieved, Respondent-Plaintiff preferred Appeal being Misc. Civil Appeal No. 16 of 2018. Said Appeal came to be allowed vide order impugned. As such, this Petition.

4] Submissions of learned counsel for the Petitioner are, dismissal of suit for absence of both parties to the suit can be inferred under the provisions of Order 9 Rule 3 of the C.P.C. and that being so, the only remedy available to the Respondent-Plaintiff is by way of fresh Suit and not by way of filing Application for restoration of the Suit under Order 9 Rule 9 of the C.P.C. So as to substantiate his claim, he would rely on order of dismissal of the Suit passed on 23/09/2013,

provisions of Order 9 Rule 3 and Rule 4 of the C.P.C. As such, the submissions are, since the order of restoration of the Suit is passed in Appeal which was not maintainable in law, order impugned is liable to be quashed and set aside.

5] Shri. Dhakephalkar, learned Senior counsel appearing for the Respondent would support the order impugned as according to him, order of dismissal was termed to be under Order 9 Rule 3 as the Respondent-Plaintiff has failed to lead evidence and that being so, Application under Order 9 Rule 9 for restoration of the Suit was maintainable. In the said Application, Petitioner has chosen not to appear in spite of service and as such, has given up his contest at that stage of the proceedings. He would then urge that Appellate Court while entertaining the Appeal against an order of rejection of prayer for restoration of Suit passed under Order 9 Rule 9 of C.P.C. was very much competent under the provisions of Order 41 Rule 1 of C.P.C. to entertain the Appeal. As such, according to him, Petition is liable to be dismissed.

6] Considered submissions.

7] The fact remains that Suit in question was initiated way back in 2008 which is for specific performance.

8] Suit came to be dismissed on 23/09/2013 wherein it is specifically mentioned that both parties to the Suit are absent. It is also mentioned that Plaintiff to the suit has failed to adduce evidence and as such, Suit came to be dismissed in default for want of prosecution.

9] As such, order of dismissal of the Suit passed on 23/09/2013 speaks of absence of their lawyers of respective parties so also the parties. In the later part of the order, it is also observed that Plaintiff has failed to adduce the evidence and that being so, Suit is dismissed in default for want of prosecution.

10] As such, it can be noticed that there is scope to read the said order either under the provisions of Order 9 Rule 3 of the C.P.C. i.e.

dismissal of Suit for absence of both parties and also under Order 9 Rule 8 of the C.P.C. i.e. where the Plaintiff fails to remain present when the Suit is called out for hearing.

11] In the aforesaid background, the submissions of learned senior counsel for the Respondent, that he has choice of remedies, and he can chose either under Order 9 Rule 4 of the C.P.C. for initiation of fresh Suit or to apply for restoration of the Suit under Order 9 Rule 9 of the C.P.C. is very much justified.

Apart from above, Order 9 Rule 4 of C.P.C. also provides of remedy of restoration of Suit by the same Court by setting aside order of dismissal.

12] In the aforesaid background, choice of remedy exercised by the Respondent in applying restoration of the Suit under Order 9 Rule 0 of the C.P.C. cannot be faulted with.

13] There is one more reason which calls for dismissal of the Petition and that is when the proceedings under Order 9 Rule 9 of

the C.P.C. were initiated, Petitioner has chosen not to resist the said plea and it is by way of afterthought in the subsequent proceedings i.e. in Appeal a plea is raised that the order impugned of dismissal of Suit has been passed under Order 9 Rule 3 of the C.P.C. and not under Order 9 Rule 8 of the C.P.C.

14] In the aforesaid background, in my opinion, no case for interference in extraordinary jurisdiction is made out. As such, petition fails, stands dismissed. However, Respondent to deposit cost of Rs. 50,000/- in the Trial Court within period of 4 weeks from today to which the Defendant-Petitioner will be entitled to withdraw.

[NITIN W. SAMBRE, J.]