

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8323 OF 2022**

Maharashtra Hybrid Seeds

Company Pvt. Ltd.

A Company Registered under Companies

Act, 1956, having its registered office at

Resham Bhavan, 4th Floor, 78,

Veer Nariman Road, Mumbai 400020.

...Petitioner

V/s.

1. DB Realty Limited

A Company Registered under Companies Act,

1956, having its registered office at

DB House, General A.K. Vaidya Marg,

Goregaon-East, Mumbai 400063.

2. Synthetic & Art Silk Mills Association Ltd.

A Joint Stock Company registered under

The Indian Companies Act 1 of 2013 having

its address at Sasmira, 3rd floor, Sasmira

Marg, Worli, Mumbai – 400025.

... Respondents

Mr. Aditya Mehta i/b. Mr. Abhishek Prabhu, Advocate for petitioner.

Mr. Aseem Naphade, Mr. Yohan Shah i/b. Negandhi, Shah & Himayatullah, Advocate for Respondent No. 1.

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CORAM : MADHAV J. JAMDAR, J.

DATED : 21st July, 2022

P.C. :

1 Heard Mr. Aditya Mehta, learned Counsel appearing for
the Petitioner and Mr. Aseem Naphade, learned Counsel for

Respondent No. 1. None appears for the Respondent No. 2 although served.

2 Present Petition takes exception to the Order dated 4th March, 2022 passed by the learned Judge, Small Causes Court, Mumbai below Exh. 1 in Marji Application No. 449 of 2015 in T.E.R. Suit No.138/166 of Marji 2012. The said application was filed by the Plaintiff i.e. Respondent No. 1 for restoration of the suit. By the impugned order, said application has been allowed and Order dated 17/11/2014 passed below Exh. 1 in T.E.R. Suit No. 138/166 of 2012 was set aside and suit was restored to its original file.

3 Before going into the rival contentions, it is necessary to set out few factual aspects. The plaintiff/Respondent No. 1 has instituted suit for eviction against the Petitioner and Respondent No. 2 bearing T.E.R. Suit No. 138/166 of 2012 on 12/7/2012. The issues in the said suit were framed on 1st February, 2014 and thereafter, the suit was adjourned for filing plaintiff's affidavit of evidence on 12/2/2014, 7/3/2014, 16/4/2014, 20/6/2014, 4/7/2014 and 7/8/2014. Thus, it is clear that the learned Trial Court has given sufficient opportunity to the plaintiff to file plaintiff's evidence affidavit.

4 The plaintiff failed to file affidavit of evidence inspite of several opportunities and therefore, the learned Trial Court kept the suit for passing dismissal order on 22/8/2014, 16/9/2014, 8/10/2014 and 17/11/2014. Thus, it is clear that initially several opportunities were granted to the Plaintiff to file affidavit of evidence and thereafter, again the suit was kept for passing dismissal order on 4 occasions and ultimately on 17/11/2014 learned Trial Court dismissed the suit for want of prosecution.

5. Thereafter, the respondent No. 1/Plaintiff filed Marji Application No. 449 of 2015 in the said suit on 24/12/2014 seeking setting aside the order dated 17/11/2014 and seeking restoration of T.E.R. Suit No. 138/166/2012. The Respondent No. 1/Plaintiff has given reasons in paragraphs – 2, 3, 4, 5, 6 and 7. The relevant portion of the said paragraphs are reproduced herein below :

“2. I say that the Plaintiff company have authorised and appointed one Mr. Dilip Ugade i.e. Law Officer to look into the matters filed by the Plaintiff Company. Mr. Dilip Ugade is the only person who was attending all the legal matters of the Plaintiff Company as also other litigations. Mr. Dilip Ugade was diligently attending all the matters pending in the Small Causes Court at Mumbai. Hereto annexed and marked Exhibit “1” is a copy of particulars of several cases being attended by Mr. Dilip

Ugade.

3 I say that apart from the Suit filed in this Hon'ble court, Mr. Dilip Ugade was also attending the Suits in the City Civil Court as also the Hon'ble High Court. Hereto annexed and marked Exhibit"2" is a copy of particulars of several cases being attended by Mr. Dilip Ugade. I say that as Mr. Dilip Ugade extremely busy with attending several Suits, he could not contact the Advocate with necessary documents. However, he took diligent search on internet and found the WP order dated 15th December, 2010 passed in WP bearing No. 2283 of 2010 and thereafter have applied for the certified copies of the same in the Hon'ble High Court , to support the Plaintiff's contention that Defendant No. 1 is a Government Undertaking. As Mr. Dilip Ugade was attending the hearing of the above Suits, the Plaintiff has also passed necessary resolution in his favour. Hereto annexed and marked Exhibit"3" is a copy of the Resolution passed by the Plaintiff Company in favour of Mr. Dilip Ugade.

4 I say that Mr. Dilip Ugade has handed over all the documents available at the relevant time to the Plaintiff's Advocate. However, a file containing several documents pertaining to the suit property was not traceable which contained certified copies of Sub lease, Auditors report, Annual Report, Form 23AC and Form 21A etc. under these circumstances, examination-in-chief could not be prepared after the Suit was adjourned for hearing.

5 I say that one Byram Rustom Jeejeebhoy has filed a suit for eviction against one J.C. Corporation and the Plaintiff herein. The said Byram Rustom Jeejeebhoy took our Injunction Notice restraining the Plaintiff from carrying out further construction on the suit property. The suit property is a large property admeasuring about 19542 square metres. The said Injunction Notice was hotly contested by the Plaintiff. Mr. Dilip Ugade was extremely busy in instructing the Advocate for the Plaintiff as also Counsel appearing for the Plaintiff to defend Injunction Notice. During this period, he was also extremely busy in attending the matters in the Hon'ble High Court. Under these circumstances, the Plaintiff could not give instructions to the Advocate till June 2014.

6 I say that in third week of July, 2014, Plaintiffs advocate fallen sick and therefore could not attend the professional work nearly for a period of 10 to 12 days. As she was not fully recovered from the illness and resumed the work, she again fallen sick in last week of October, 2014. Due to frequent illness and commitment for the several High Court and Supreme Court time bound matter there were lack of communication between the plaintiffs and its advocate.

7 In the meantime, Mr. Dilip Ugade has decided to resign from the Plaintiff Company. Mr. Dilip Ugade has given notice to quit the Plaintiff Company on 31.10.2014. Hereto annexed and

marked Exhibit “4” is a copy of the Resignation of Mr. Dilip Ugade. Under these circumstances, he was extremely busy to complete several works entrusted to him. The Plaintiff have thereafter entrusted the said work to Mr. Laxman Gadade as Mr. Laxman Gadade was very new and started to attend the above matter only from 15th December 2014 and therefore, could not take prompt steps to compile the documents and to give further instructions to draft the evidence on affidavit.”

6 The Petitioner/Defendant has filed reply dated 4/6/2016 and contended that the conduct of the Respondent No. 1/Plaintiff shows gross negligence and total lack of seriousness in prosecuting the above suit. It is also contended that the reasons given by the Respondent No. 1 for restoration of the suit are not true and bonafide. By the impugned order, the said suit was restored.

7 The learned Counsel appearing for the Petitioner submitted that sufficient opportunity was given to the Respondent No. 1/Plaintiff, however, Respondent No. 1/Plaintiff failed to file affidavit of evidence. He pointed out adjournment application dated 17/11/2014 which was rejected and the suit was dismissed for default. He pointed out that the reasons given in the said application and the reasons given in Marji Application seeking restoration of the suit are contradictory.

In the application dated 17/11/2014, it is mentioned that one Mr. Dilip Ugade who was looking after the matter has resigned from the job and he has all the original documents with him and therefore, though time is granted to file affidavit of evidence, the same could not be filed. However, in the application at page 173, in paragraph-4, it is mentioned that said Mr. Dilip Ugade has handed over all the documents to the Plaintiff's advocate. However, a file containing several documents pertaining to the suit property was not traceable and therefore, affidavit of examination in chief could not be prepared after the suit was adjourned for hearing. He submitted that the impugned order in paragraph-13 mentioned that when the suit was dismissed, both the plaintiff and defendant were absent. He submitted that this is completely incorrect. To support this submission he points out the roznama at page-210 which records that for defendant No. 2, advocate was present. He further submitted that although it is the contention raised that said Mr. Dilip Ugade was looking after the said suit, in fact, the resolution passed by the Board of Directors of the Respondent No.1 authorises four persons namely, Mr. Abdullah Patel, Mr. Rajiv Agarwal, Mr. Dilip Ugade and Mrs. Aditi Tilve as authorised persons to take necessary steps in the suit. He further submitted that the

Judgment of the Hon'ble Supreme Court reported in (2011) 9 Supreme Court Cases 678 in the matter between Shiv Cotex v/s. Tirgun Auto Plast Private Limited & ors. was cited before the learned Judge. However, the same was completely misconstrued by the learned Judge.

8 On the other hand Mr. Aseem Naphade, learned Counsel for the Respondent No. 1 submitted that sufficient reasons are given in the restoration application. He submitted that although there is some failure on the part of the Respondent No. 1 in prosecuting the suit, but what is relevant to be seen is that sufficient cause was shown for restoration of the suit. He relied on certain paragraphs in the restoration application, which are already set out hereinabove. He submitted that Mr. Dilip Ugade was looking after the said suit and several other suits and list of the same is annexed to the application. He submitted that procedural law has been enacted to facilitate fair trial and therefore, technical approach in deciding the restoration application will not meet the ends of justice. He submitted that the court should not adopt rigid view and law of procedure is handmade of justice and cannot be used to inflict injustice on the party. He relied on the Judgment of the Hon'ble Supreme court reported in (2006) 6 SCC 569 in the matter between Firdous Omer (D) By Lrs. & Ors vs

Bankim Chandra Daw (D) By Lrs.& Ors.

9 I have perused the order dated 17/11/2014 by which the learned Judge, Small Causes Court, Mumbai dismissed the suit for want of prosecution, as well as the impugned order dated 4th March, 2022 by which the suit was restored. I have also gone through the restoration application and the affidavit in reply. The factual position on record as narrated hereinabove clearly shows that issues were framed on 1st February, 2014 and thereafter, several adjournments were granted to the respondent No. 1 to file plaintiff's affidavit of evidence. Thereafter, as plaintiff failed to file affidavit of evidence, the suit was adjourned for passing order of dismissal and for that purpose also suit was adjourned on four occasions and ultimately, learned Judge has dismissed the suit.

10 The Supreme Court in **Shiv Cotex (cited supra)** has considered somewhat similar situation. In that case, suit was fixed for evidence of the plaintiff on 1/11/2006. However, no evidence was led on that day. The matter was then adjourned for evidence of Plaintiff on 2/3/2007 and on that day also, the plaintiff did not produce the evidence and therefore, the matter was adjourned to 10/5/2007, on

which date also the Plaintiff failed to produce the affidavit of evidence. Therefore, in that case, the Trial Court passed an order of closure of plaintiff's evidence and thereafter, dismissed the suit. Against the said dismissal, the plaintiff preferred civil appeal and the said civil appeal was dismissed on 20/3/2008. Thereafter, Second Appeal was filed before the High Court and the said Second Appeal was allowed and the suit was remanded to the Trial Court. In that view of the matter, the Supreme Court has observed that the High Court has shown misplaced sympathy on the non-existent justification. The relevant portion of the said Judgment in Shiv Cotex (supra) is reproduced herein below for ready reference.

“14 Second, and equally important, the High Court upset the concurrent judgment and decree of the two courts on misplaced sympathy and non - existent justification. **The High Court observed that the stakes in the suit being very high, the plaintiff should not be non-suited on the basis of no evidence. But, who is to be blamed for this lapse? It is the plaintiff alone. As a matter of fact, the trial court had given more than sufficient opportunity to the plaintiff to produce evidence in support of its case. As noticed above, after the issues were framed on July 19, 2006, on three occasions, the trial court fixed the matter for the plaintiff's evidence but on none of these dates any evidence was let in by it. What should the**

court do in such circumstances? Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward?

15 It is sad, but true, that the litigants seek - and the courts grant - adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. **It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.**

16. **No litigant has a right to abuse the procedure provided in the CPC.** Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than

three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. **When we say `justifiable cause' what we mean to say is, a cause which is not only `sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause.** The list is only illustrative and not exhaustive.

17 However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. **The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit -**

whether plaintiff or defendant - must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril.”

(Emphasis added)

The observations of the Supreme Court in **Shiv Cotex (cited supra)** are squarely applicable to the present case.

11. It is significant to note that the said judgment in **Shiv Cotex (cited supra)** was pointed out to the learned Judge and the same was considered in following manner by the learned Judge-

“19. Further reliance is placed on the Judgment passed in the case of Shiv Cotex vs. Tirgun Auto Plast P. Ltd. & ors. (2012) 4 Bom.C.R. 722 (SC). In this judgment, Hon’ble Supreme Court has held that, **if plaintiff inspite of given sufficient opportunity to lead evidence, fails to do so, then trial Court has ample power to proceed under Order XVII Rule 3 of CPC and passed the judgment on merit. However, in the case in hand, no judgment on merit has been passed and the Court did not acted under Rule 3 of Order XVII. Therefore, the law laid down this judgment is not at all helpful to the defendants.”**

(Emphasis added)

12. It is absolutely clear that learned Judge while passing impugned order has totally misconstrued the judgment of the Supreme Court in **Shiv Cotex (cited supra)**. The ratio of judgment in **Shiv Cotex (cited supra)** is totally different. The paragraphs of **Shiv Cotex (cited supra)** which are reproduced hereinabove clearly shows that learned Judge has completely misconstrued the Supreme Court Judgment. The Supreme Court has clearly held that no litigant has a right to abuse the procedure provided in the CPC. The Supreme Court has said that what is justifiable cause is a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity. It is further stated that the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not

at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit - whether plaintiff or defendant - must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed.

13 In the present, as set out hereinabove, on six occasions, the matter was adjourned for giving liberty to the plaintiff to file affidavit of evidence. The reasons given in the restoration application are that said Mr. Dilip Ugade who was looking after the suit has resigned. However, it is clear that he has resigned on 30/11/2014 and he has given notice to quit to the respondent No. 1 company on 31/10/2014. Therefore, absolutely there is no explanation for not filing affidavit of evidence from 1st February, 2014 to 7/8/2014 and there is no explanation when the suit was kept for dismissal between 22/8/2014 and 17/11/2014 for non filing of affidavit of evidence. Mr. Mehta, learned Counsel appearing for the petitioner is right in pointing out that the reasons given at page 167 of the application seeking time to file Evidence Affidavit that original documents were with Dilip Ugade and he has resigned from the job and therefore, affidavit of evidence could not be finalised and the reasons given in the restoration application that

said Mr. Dilip Ugade has already handed over all the files, however, files containing several documents pertaining to the suit property were not traceable are contrary to each other. Therefore, it is clear that respondent No. 1 has not come with clean hands and has not put up bonafide case. It appears that the reasons given are not true.

14 Mr. Naphade, learned Counsel appearing for the respondent No. 1 emphasised on the fact that the said Mr. Ugade was looking after about 25 suits in various courts. However, the resolution of the company shows that four persons are authorised to look after and to take various steps in the suit. Not only that the plaint has been verified by Mr. Abdullah Patel and the said Marji Application i.e. restoration application is also verified by said Abdullah Patel, who is one of the four persons mentioned in the said resolution. Thus apart from Mr. Ugade other persons were available to look after the said suit.

15. There cannot be any quarrel with the proposition on which Mr. Naphade is relying namely that rigid view cannot be adopted and the procedural law is handmade of justice. He relied on **Firdous Omer (supra)** to substantiate said contention. However, the Court cannot ignore that several opportunities were given to the plaintiff and still the

plaintiff failed to file affidavit of evidence. Thereafter the suit was adjourned from time to time for passing dismissal order before actually dismissing the suit for non-prosecution. The judgment in **Shiv Cotex (supra)** of the Supreme Court is squarely applicable to the facts of the present case as noted hereinabove. The learned Judge in the impugned order has clearly misconstrued the said judgment. In the facts and circumstances of this case, the Writ Petition deserves to be allowed in terms of prayer clause (a).

16 Hence, the Writ Petition is allowed in terms of prayer clause (a) and disposed of accordingly. However, there is no order as to costs.

(MADHAV J. JAMDAR, J.)