

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.7198 OF 2019

**BHIMRAJ GENUJI AVHAD
VERSUS
TRIMBAK KERU BHANDARKAR (RAMOSHI) AND OTHERS**

...
Advocate for Petitioner : Mr. Deepak D. Chaudhari
Advocate for Respondent Nos. 1, 2, 4 & 5 : Mr. P. S. Mantri
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 27th JUNE, 2023

PER COURT :

1. By this petition filed under Article 226 and 227 of the Constitution of India, petitioner impugns the order dated 03/09/2016, passed by learned 6th Joint Civil Judge, Senior Division, Ahmednagar, in Regular Civil Suit No.871/2012 and the order dated 16/10/2018, passed by learned 4th Joint Civil Judge, Senior Division, Ahmednagar, in Civil Misc. Application No.191/2016.

2. Facts which are not in dispute are that:

On 23/10/2012 petitioner/plaintiff instituted the suit for specific performance of contract, cancellation of sale deed and perpetual injunction. Defendant No.2 appeared in the suit and filed his written statement. On 03/09/2016, the suit was dismissed in default. Thereafter, petitioner filed Civil Misc. Application No.191/2016 for restoration of the suit. On 14/02/2017, the

petitioner came to be arrested in Crime No.36/2017 and his bail application was rejected, he is in magisterial custody till date. Petitioner, therefore, filed applications Exhibits – 18 and 19 for adjournment of hearing, which were allowed. Thereafter by application Exhibit-22 the petitioner requested for recording his evidence by video conferencing. However, as the learned advocate representing petitioner failed to advance his submissions on the said application, the same is not decided till today. Thereafter application Exhibit-23 is filed for adjournment. Trial Court dismissed the restoration application in default for want of prosecution. Hence, the present petition.

3. Heard learned advocate for petitioner and learned advocate for respondent Nos.1, 2, 4 & 5. Perused the memo of writ petition, annexures thereto and the impugned orders.

4. Arrest and detention of petitioner in magisterial custody is not disputed. It appears that after arrest the learned advocate representing petitioner failed to attend the matter on due dates and represent petitioner, due to which application Exhibit-22 filed by petitioner for recording his evidence on video conferencing has remained undecided. Record indicates the lapses on the part of petitioner/ his advocate in not attending the matter on due dates. Petitioner obviously could not attend the matter as he is in

magisterial custody, but there is nothing on record to show as to why learned advocate for petitioner failed to attend the matter on due dates. Learned advocate for petitioner states that as the petitioner was in jail he could not instruct the lawyer properly and therefore, his lawyer failed to remain present before Trial Court.

5. Considering the peculiar facts of the case, so as to give reasonable and fair opportunity to the petitioner to contest his restoration application on merits, in the interest of justice, this Court is inclined to allow the writ petition. Hence, the following order:-

ORDER

- (I) Writ petition is allowed in terms of prayer clause 'B'.
- (II) Impugned order dated 16/10/2018, passed by learned 4th Joint Civil Judge, Senior Division, Ahmednagar, in Civil Misc. Application No.191/2016, is quashed and set aside. Civil Misc. Application No.191/2016 is restored.
- (III) Petitioner is directed to file his affidavit-in-lieu of examination-in-chief in the Trial Court within a period of two weeks from the date of receipt of writ of this order.
- (IV) Cost of Rs.10,000/- which is already deposited by the petitioner in this Court, shall be paid to the respondents.

- (V) Petitioner shall ensure that his advocate attends each and every date of hearing of Civil Misc. Application No.191/2016 and shall also argue application Exhibit-22 expeditiously.
- (VI) Trial Court shall decide the Civil Misc. Application No.191/2016 within a period of three months from the date of receipt of writ of this order.

(NITIN B. SURYAWANSHI, J.)