

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2148 OF 2023

Ayub Adam Hodekar

...Petitioner

Versus

Sarpanch, Gram Panchayat & Ors.

...Respondents

Mr. Sachindra B. Shetye, Ms. Sarika Shetye, Mr. Akshay Pansare & Mr. Vrushali Shiwgan for the petitioner.

Mr. C. D. Mali, AGP, for the respondent State.

Mr. Rohan P. Surve for respondent No.1.

Mr. Sachin Chavan for respondent No. 5a to 5d in WP/2148/2023 & for respondent Nos. 3a to 3d & 4 in WP/2171/2023.

Coram : Sharmila U. Deshmukh, J.

Date : July 14, 2023.

P. C. :

1. The petition questions the order dated 17th November, 2021 dismissing the petitioner's application seeking restoration of Civil Misc. Application No. 45 of 2018 preferred for restoration of Civil Appeal No. 31 of 2014.

2. Regular Civil Suit No. 172 of 2010 was filed seeking declaration of injunction in respect of notice issued by the Tahsildar as regards the structure in which the petitioner claims possession. The said suit came to be decided on 6th February, 2014 as against which

the said Civil Appeal 31 of 2014 was preferred. As none appeared in the Civil Appeal the same was dismissed for non-prosecution as against which application came to be filed seeking restoration of the appeal which is rejected giving rise to the present petition. The appellate Court while declining the restoration of Appeal has observed that after filing of the Appeal, the appellant as well as his advocate were absent on many dates of hearing. The Appellate Court has declined to accept the explanation tendered by the appellant that he was in service of the Airport Authority, Mumbai and as such, he was residing in Mumbai and unable to be in touch with his advocate. The Appellate Court did not accept the explanation for the reason that the petitioner should not be more diligent in conducting his case.

3. Heard Ms. Sachindra B. Shetye, learned counsel for the petitioner, Mr. C. D. Mali, learned AGP for the respondent State, Mr. Rohan P. Surve, learned counsel for respondent No.1 and Mr. Sachin Chavan, learned counsel for respondent No. 5a to 5d in WP/2148/2023 & for respondent Nos. 3a to 3d & 4 in WP/2171/2023.

4. Learned counsel for the petitioner submits that sufficient explanation was tendered seeking restoration of the Civil Appeal which was dismissed for default. He would contend that there was specific contention that the appellant is in service of Airport Authority, Mumbai and due to

death of his Advocate's father neither petitioner nor his counsel could attend the Court.

5. Per contra, learned counsel appearing for the respondent submits that the appellant was not diligent for prosecuting the proceeding. He would further submits that the virtue of this proceeding the order of the Tahsildar remain to be effected and as such, the construction which is unauthorized is protected.

6. Considered the submissions.

7. It is not disputed that the petitioner is in the service of Airport Authority, Mumbai and as such it is probable that he is residing in Mumbai and the proceeding which are carried out in Ratnagiri at his behest had been entrusted to his advocate. It appears that due to the death of his Advocate's father the Advocate could not attend the proceedings. No doubt, it is expected of the litigant to be diligent in prosecuting the proceedings and to be informed about the status of the proceeding and be in constant touch with his advocate to ensure that no adverse order is passed. However in the present case, it cannot be said that no explanation has been tendered for the absence of the petitioner and his counsel. In my opinion, it will be in the interest of justice, to permit the petitioner to contest the matter on merits and his appeal should not be thrown out at the threshold for non prosecution.

8. In view of the above, the impugned order dated 17th November, 2021 is hereby quashed and set aside and the Civil Appeal No. 31 of 2014 is restored to file. The writ petition stands allowed.

9. Since the Appeal is of the year 2014, the Appellate Court may decide the Appeal expeditiously taking into consideration the docket of the Appellate Court.

10. Learned counsel for the parties submit that the parties will appear before the Appellate Court on 8th August, 2023.

[Sharmila U. Deshmukh, J.]