

AGK

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

WRIT PETITION NO.11100 OF 2012

Kashinath Sadashiv Tamboskar
since deceased through LR.

... Petitioner

V/s.

D.B. Khade & Ors.

... Respondents

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Mr. A.R. Shaikh for the petitioner.

Mr. Yajuvendra Singh for respondent No.11.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 26, 2023

P.C.:

- 1.** The challenge in this writ petition is to the order dated 30 June 2012 dismissing notice of motion to recall order of dismissal of the suit for failure to take necessary steps.
- 2.** The predecessor of the petitioner filed S.C. Suit No.1156 of 1979 in the City Civil court seeking declaration of title based on adverse possession. On 6 November 1996 the Trial Court dismissed the suit for non-appearance of the parties.
- 3.** In the meantime, the Trial Court passed an order of no written statement against defendant No.1. On 6 March 1996 chamber summons filed by defendant No.1 to take written statement on record was allowed. By order dated 18 December 1995 defendant No.11 was directed to be added. The plaintiff

challenged the order of adding defendant No.11 by filing Civil Revision Application No.211 of 1997. This Court on 24 February 1997 dismissed the civil revision application. Pursuant thereto, the plaintiff amended the plaint and incorporated defendant No.11. On 6 March 1997 the suit was listed on board of the Trial Court. Plaintiff's advocate appeared. However, advocate for the defendants failed to appear. On 25 January 1998 the Trial Court issued notice to the plaintiff. On 5 July 1999 the Trial Court passed an order for proceeding with the suit *ex parte*. On 29 July 1997 the Trial Court adjourned the suit at the request of the advocate for the defendants. On 18 January 2020 the Trial Court listed the suit for framing of issues.

4. On 29 August 2000 none appeared for the plaintiff. Hence, the Trial Court dismissed the suit for non-prosecution. On 28 July 2008 plaintiff filed notice of motion for recalling of order of dismissing it for non-prosecution. On 3 March 2009 the Trial Court restored the suit by recalling order dated 29 August 2000.

5. On 19 September 2009 plaintiff filed affidavit of evidence. On 5 November 2009 plaintiff's arguments in the suit was over and the suit was fixed for judgment.

6. On 26 November 2009 while delivering the judgment, the Trial Court realized that the suit was already dismissed on 6 November 1996 and, therefore, plaintiff needs to take out notice of motion for recalling of said order. On 8 March 2012 petitioner took out notice of motion for recalling of order dated 6 November 1996. The Trial Court by the impugned order dated 30 June 2012

rejected the application for condonation of delay.

7. On perusal of the record, it appears that the order of dismissal of the suit was initially passed on 6 November 1996. However, after the dismissal of the revision application filed by the plaintiff on 24 February 1997, the plaintiff amended the suit on 5 March 1997. The Trial Court thereafter proceeded with the hearing of the suit. On 29 August 2000 the suit was again dismissed for non-prosecution. However, the suit was restored on 28 July 2008. The petitioner thereafter filed affidavit of evidence and after hearing final arguments, the Trial Court fixed the suit for judgment. Therefore, it appears that while restoring the suit on 28 July 2008, only order dated 29 August 2000 was recalled. Both the parties were under impression that the suit was pending. Plaintiff's father was conducting the suit. The petitioner lost his father and was not aware of the details of the litigation and, hence, in my opinion, in the peculiar facts of the case, the Trial Court ought to have allowed the notice of motion for restoration of the suit. Hence, following order:

- a) The impugned order dated 30 June 2012 dismissing notice of motion for condonation of delay and restoration of the suit is allowed;
- b) S.C. Suit No.1156 of 1979 is restored to the file of the City Civil Court;
- c) Considering the fact that the suit was already fixed for judgment, the Trial Court shall decide the suit within six months from today.

8. The writ petition stands disposed of in above terms. No costs.

(AMIT BORKAR, J.)