

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO. 809 OF 2023
WITH
INTERIM APPLICATION NO. 15746 OF 2023**

Shahin Shaikh and Anr.

...Appellants

V/s.

Ayub Ubaidullah Shaikh

..Respondent

Ms. Jaitali Mathuria, for the Appellants.

Mr. J.S. Yadav, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

Dated : 4 October 2023.

P.C. :

1. By this Appeal, the Appellants challenge order dated 10 July 2023 passed by the City Civil Court allowing the application filed by the Plaintiff for restoration of the suit which was dismissed vide order dated 12 January 2023.

2. Plaintiff has filed Short Cause Suit No. 2748/2017 seeking injunctive relief against the Defendants from interfering in the business carried out in the suit premises or causing obstruction in installment of wooden weather frame, CCTV camera etc. The

Suit was instituted on 11 August 2017. Issues were framed on 7 February 2020. On 24 September 2021, Plaintiff was given last chance to lead evidence and the suit was adjourned to 21 January 2022. The rojnama of 7 October 2022 would show that the Advocate for the Plaintiff sought time and adjournment was granted subject to payment of costs of Rs.500/- and the suit was adjourned for recording evidence to 5 December 2022. On 5 December 2022, Plaintiff again sought an adjournment and by granting last chance, the suit was adjourned to 12 January 2023 for recording of evidence subject to payment of costs of Rs.1500/-. On 12 January 2023 Plaintiff failed to file Affidavit of examination-in-chief and requested for time. Recording that the time was sought without giving proper explanation, the suit was dismissed for want of prosecution on 12 January 2023. On the same day at 5.10 p.m. the Advocate for the Plaintiff filed application for restoration. Appellants filed reply opposing the application. By order dated 10 July 2023 the City Civil Court was pleased to allow the application for restoration and recalled the order dated 12 January 2023 subject to payment of costs of Rs.2,000/- by the Plaintiff to the Defendants. This is how the suit came to be restored.

3. The Appellants/Defendants are aggrieved by the order dated 10 July 2023 and have filed the present Appeal.

4. I have heard Ms. Mathuria, learned counsel for the Appellant and Mr. Yadav for the Respondent.

5. It is the submission of the learned counsel for the Appellants that several chances were given to the Plaintiff to file Affidavit of evidence. Last chance was given on 4 September 2021. Again last chance was given on 7 October 2022 by directing payment of costs of Rs.500/-. Once again last chance was given on 5 December 2022 subject to payment of costs of Rs.1500/-. That despite giving three “last chances” Plaintiff failed to file Affidavit of evidence, when the suit came up on 12 January 2023. She would submit that the handwritten application for restoration would show that no sufficient cause was shown for failure to file evidence. That in absence of showing any sufficient cause, which is a mandatory requirement under Order 9 Rule 9 of the Civil Procedure Code, the City Civil Court could not have restored the suit.

6. It is seen that the Plaintiff was quick enough to file application for restoration on the very same day when the suit was dismissed for want of prosecution on 12 January 2023. Therefore, it cannot be said that the Plaintiff was not vigilant enough to seek restoration of the suit. The suit could have been restored on 12 January 2023 itself and possibly because the application was moved at 5.10 p.m., the Court was required to adjourn the hearing of the application for filing of reply by the Defendant. In his application,

Plaintiff undertook to file the Affidavit of evidence within three working days. It appears that the Plaintiff has already filed the Affidavit of evidence. May be that the Plaintiff was not vigilant enough in filing the Affidavit of evidence despite grant of adequate opportunities. However for such conduct exhibited by the Plaintiff, the City Civil Court has already imposed costs of Rs.500 and Rs.1,500/- on previous occasions and while allowing the application for restoration, further costs of Rs.2,000/- are imposed. The power of the Court to set aside the order of dismissal of the suit in default is discretionary. Once the Court has recorded a finding that filing of application for restoration on the same day of dismissal of the suit, is a relevant factor to be taken into consideration for restoration of the suit, this Court would be loathe in interfering with the order passed by the City Civil Court. Infact the City Civil Court has relied upon the judgment of **Sanjay Dagadappa Kapase V/s. State of Maharashtra and Ors.**, 2009 5 Mh.L.J. 900 wherein this Court has held that the Court is empowered to restore the suit even on an oral application made before rising of the Court. Going by the ratio of that judgment, the City Civil Court could have allowed the application for restoration on 12 January 2023 itself as the application was filed before rising of the Court.

7. I therefore do not find any reason to interfere in the order passed by the City Civil Court. The Appeal being devoid of merits is **dismissed** without any orders as to costs.

8. With dismissal of the Appeal, Interim Application No. 15746/2023 filed for stay does not survive. The same is disposed of as having become infructuous.

**NEETA
SHAILESH
SAWANT**

SANDEEP V. MARNE, J.

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NEETA SHAILESH
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