

**(2012) 07 BOM CK 0028**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 283 of 2012**

Engineers Combine, a Registered Partnership with Office at  
T-3 Central Mansion, Near State Bank of India, Ponda, Goa  
403401

APPELLANT

Vs

Union Bank of India and Goa State Infrastructure  
Development Corp. Ltd.

RESPONDENT

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**Date of Decision : 05-07-2012**

**Acts Referred:**

Constitution of India, 1950 — Article 227

**Citation : (2012) 07 BOM CK 0028**

**Hon'ble Judges : F.M. Reis, J**

**Bench : Single Bench**

**Advocate : C. Mascarenhas, for the Appellant; S. Redkar, Advocate for Respondent No. 1 and Shri M.S. Sonak, Advocate, for the Respondent**

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## Judgement

F.M. Reis, J.—Heard Shri C. Mascarenhas, the learned Counsel appearing for the petitioner, Shri S. Redkar, the learned Counsel appearing for respondent no.1 and Shri M.S. Sonak, the learned Counsel appearing for respondent no.2. At the outset, Shri C. Mascarenhas, the learned Counsel appearing for the petitioner, upon instructions, seeks to delete grounds at para 14(e) of the petition. Leave granted. Amendment to be carried out forthwith.

2. Rule. Heard forthwith with the consent of the learned Counsel appearing for the parties. The learned Counsel appearing for the respondents waive service.

3. The above petition challenges the order passed by the learned Civil Judge Junior Division at Margao date 24/11/2011 whereby the application filed by the petitioner to recall an order passed by the learned Judge dated 23/06/2011 came to be dismissed.

4. Shri C. Mascarenhas, the learned Counsel appearing for the petitioner has assailed the impugned order on the ground that the petitioner on the relevant date was seeking a first adjournment on account of the absence of the petitioner

and further that there was a miss communication between the petitioner and his advocate whereby an impression was given to the learned Judge that the petitioner was not present in the Court to continue with the recording of evidence. The learned Counsel further pointed out that the petitioner has filed his affidavit in support of the fact that he was present in the Court when the matter was called out. The learned Counsel further pointed out that by dismissing the suit grave prejudice has occasioned to the petitioner as the petitioner would be deprived of a monitory claim which he is otherwise entitled in law. The learned Counsel has taken me through the impugned order and pointed out that the learned Judge has failed to note that the petitioner was seeking his first adjournment to lead evidence and as such the reason given by the learned Judge to dismiss the said application is untenable. The learned Counsel, as such, submits that the impugned order be quashed and set aside and the suit be restored.

5. Shri M.S. Sonak, the learned Counsel appearing for respondent no.2 has supported the impugned order. The learned Counsel has pointed out that the conduct of the petitioner does not entitle him for any exercise of discretion in their favour under Article 227 of the Constitution of India. The learned Counsel further pointed out that after the suit was dismissed the respondent no.2 has already encashed the Bank Guarantee and as such even in case the suit is restored it should be clarified that the temporary injunction order which was operating does not get revived. The learned Counsel further pointed out that in case the petitioner is entitled in law for any restitution of the amount the same would have to be considered in accordance with law. The learned Counsel further pointed out that considering the conduct of the petitioner no interference is called for in the impugned order.

6. Shri S. Redkar, the learned Counsel appearing for respondent no.1 has adopted the submissions of the learned Counsel appearing for respondent no.2. The learned Counsel pointed out that the petitioner is unnecessarily delaying the proceedings on false grounds.

7. I have considered the submissions of the learned Counsel and I have also gone through the records. No doubt the learned Judge whilst passing the impugned order has deprecated the conduct of the petitioner in the manner in which the adjournment was sought to be taken by the petitioner. But however, taking into consideration that it is not in dispute that the petitioner was seeking adjournment for the first time for recording his evidence, I find that refusal of the adjournment by the learned Judge is not justified. Though the grounds which are given by the petitioner have been disputed by the respondents, nevertheless, in the interest of justice taking into consideration the overall facts of the case and nature of the dispute in the suit, I find that the petitioner should be given an opportunity to proceed with the suit subject to payment of costs. The records reveal that on the previous date of hearing though the PW1 was present in Court, the evidence could not be recorded for want of time. On the previous

occasions after filing of the affidavit in evidence and during the examination of PW1, there was also delay in recording of evidence as it appears that there were allegations to the effect that some documents which were part of the records were misplaced. It is well settled by the Apex Court in the judgment reported in State Bank of India Vs. Km. Chandra Govindji, at para 7 thereof, that:

7. In ascertaining whether a party had reasonable opportunity to put forward his case or not, one should not ordinarily go beyond the date on which adjournment is sought for. The earlier adjournment, if any, granted would certainly be for reasonable grounds and that aspect need not be once again examined if on the date on which adjournment is sought for the party concerned has a reasonable ground. The mere fact that in the past adjournments had been sought for would not be of any materiality. If the adjournment had been sought for on flimsy grounds the same would have been rejected. Therefore, in our view, the High Court as well as the learned District Judge and the Rent Controller have all missed the essence of the matter.

8. Taking note of the ratio laid down by the Apex Court in the said judgment I find that on the relevant date in the peculiar facts of the case, the learned Judge could have exercised discretion and granted an adjournment to the petitioner even on payment of costs. It is made clear that petitioner shall not be given any indulgence in case the petitioner delays further in disposing the suit.

9. With regard to the contention of Shri M.S. Sonak, the learned Counsel appearing for respondent no.2, I find that taking into consideration that the Bank Guarantee has already been encashed, it is clarified that the temporary injunction which was in operation shall not be revived upon the restoration of the suit. Merely because the said amount came to be encashed after the suit filed by the petitioner came to be dismissed for non-prosecution is not a ground to refuse the restoration of the suit if the petitioner is otherwise entitled. But however, the petitioner, if so advised, shall take necessary steps in accordance with law if they are so otherwise entitled to seek for the recovery of the amount. All contentions of the parties on that count are left open.

10. In view of the above, I find that the impugned orders dated 23/06/2011 & 24/11/2011 deserves to be quashed and set aside subject to payment of costs of Rs.10,000/-. At the request of the learned Counsel appearing for the respondents, the said costs of Rs.10,000/-deposited by the petitioner in the Court shall be paid to the Goa State Legal Services Authority. The Registry is directed to transmit the costs of Rs.10,000/-to the Goa State Legal Services Authority. In view of the above, I pass the following order:

#### ORDER

(i) The impugned order dated 23/06/2011 and order dated 24/11/2011 are quashed and set aside.

(ii) The Regular Civil Suit No.34/2007/F is restored to the file of the learned Civil

Judge Junior Division, Margao.

(iii) The learned Judge is directed to proceed with the suit in the light of the observations made herein above, in accordance with law.

(iv) Rule is made absolute in the above terms.

(v) The petition stands disposed of accordingly.

(vi) The parties are directed to appear before the learned trial Court on 1/08/2012 at 10.00 a.m.