

(2011) 10 BOM CK 0063

In the Bombay High Court

Case No : Civil Revision Application No. 188 of 2010

Gopalrao Ambadasrao Borikar

APPELLANT

Vs

Anantrao Ramrao Deshpande and Others

RESPONDENT

Date of Decision : 11-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, 10

Citation : (2012) 5 BomCR 322

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : G.A. Borikar Party in Person, for the Appellant; A.S. Deshmukh, Advocate for respondent No. 1 and Mr. Manoj Shelke, Advocate holding for Mr. R.S. Deshmukh, Advocate, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. With the consent of the parties, the matter is taken up for final hearing.

2. This Civil Revision Application is filed challenging order dated 23092010 passed by the Joint Civil Judge, Senior Division, Parbhani below Exhibit1 in Misc. Civil Application No. 45 of 2010. The revision applicant further prayed to condone the delay in filing the application for restoration of Special Civil Suit No. 01 of 1996.

3. The background facts which are stated in Civil Revision Application are as under :

On 01.01.1996 the revision applicant filed Special Civil Suit No. 01 of 1996 for recovery of damages against the respondents before the learned Civil Judge, Senior Division, Parbhani. On 01.01.1997 respondent No.1 herein filed application u/s 10 of the CPC to stay the above suit alleging that the above stated suit filed by the applicant is subsequent. On 12.03.1997 the trial Court stayed the hearing of the suit. The revision applicant challenged the said order

by way of filing Civil Revision Application No. 388 of 1997 in which this Court was pleased to grant interim relief.

4. On 07.06.2004 the revision applicant herein filed Civil Application in Civil Revision Application No. 388 of 1997 praying therein conversion of the Civil Revision Application in the Writ Petition. This Court rejected the prayer of the applicant for conversion, however, granted liberty to file appropriate proceedings.

5. The revision applicant herein filed Writ Petition No. 135 of 2005. On 03.09.2007 writ petition came up for hearing. Since this Court was of the opinion that, the matter can be decided finally, the applicant filed notes of arguments in the said writ petition.

On 04.09.2007 the writ petition came to be adjourned to 24.09.2007 directing respondent No.1 to apply for adjournment before the trial Court and applicant herein should not press for continuing cross examination. Again writ petition was listed on 24.09.2007 when this Court continued the direction which was given on 04.09.2007 thereby respondent No.1 to pray for adjournment in the suit and revision applicant herein will not oppose such prayer for adjournment. Again writ petition was listed on 12.12.2007 when this Court adjourned hearing of the writ petition. However, continued order dated 04.09.2007 till final disposal of the writ petition.

On 06.02.2008 the applicant filed Civil Application No. 3039 of 2008 in writ petition praying therein for vacating interim order dated 04.09.2007. However, the Court directed to hear Civil Application alongwith writ petition at the time of final hearing of the writ petition.

6. On 11.09.2009 Special Civil Suit No. 01 of 1996 which was pending before the Joint Civil Judge, Senior Division, Parbhani came to be dismissed for non prosecution. It is the case of the revision applicant that, on 10.03.2010 when writ petition was taken up for hearing, Counsel for respondent No.1 herein informed this Court about dismissal of Special Civil Suit No. 01 of 1996 and that is why the revision applicant herein filed Civil Misc. Application No. 45 of 2010 for restoration of Special Civil Suit No. 01 of 1996 before the Civil Judge, Senior Division, Parbhani alongwith application at ExhibitG for condonation of delay alongwith orders of this Court dated 04.09.2007, 24.09.2007, and 12.12.2007. However, on 23.09.2010 Joint Civil Judge, Senior Division, Parbhani rejected the application at ExhibitG for condonation of delay. Hence, this Civil Revision Application.

7. The revision applicant who is party in person invited my attention to the orders passed by this Court on 04.09.2007, 24.09.2007, and 12.12.2007 in writ petition No. 135 of 2005 and submitted that, by the said orders the respondent No. 1 herein was given liberty to apply for adjournment and the revision applicant was told not to oppose the said adjournment. Therefore, according to party in person, there was no occasion for the revision applicant to remain present before the Court. Since writ petition was pending and order which was

initially passed on 04.09.2007 not to oppose the prayer of respondent No.1 for adjournment was continued and therefore, Joint Civil Judge, Senior Division, Parbhani should not have dismissed Special Civil Suit No. 01 of 1996 for want of prosecution. He further invited my attention to the provisions of Order 17 Rule 2 explanation of the CPC and submitted that, substantial part of recording of evidence has been completed and therefore, suit cannot be dismissed for want of prosecution. Even if the revision applicant was absent, it was open for the concerned Court to proceed with the suit on merits and therefore, according to party in person, the order of dismissal of suit for want of prosecution cannot be sustained. According to him, the application for condonation of delay in filing the application for restoration of the suit should not have been rejected, since there was no occasion for the revision applicant to attend the proceedings of Special Civil Suit No. 01 of 1996 in view of the orders passed by this Court in writ petition No.135 of 2005. Therefore, he would submit that, the application may be allowed.

8. On the other hand, learned Counsel for respondent No.1 would submit that, on the date on which the suit was fixed for hearing, the revision applicant herein remained absent and therefore, the order of dismissal of suit for want of prosecution cannot be faulted. According to him, even for adjournment for hearing of the suit, this Court directed the respondents to give consent for such adjournment and therefore, his presence on each date of hearing in civil suit was necessary. Therefore, he would submit that, Civil Revision Application may be rejected.

9. I have given due consideration to the rival submissions. At the outset, it would be relevant to reproduce the orders passed by this Court in writ petition No. 135 of 2005. On 04.0.2007 in the said writ petition, this Court passed the following order.

1. Shri. Deshmukh, learned Advocate for the respondent submits that he would apply for adjournment in Special Civil Suit No. 1 of 1996, which is to come up before the trial Court on 6.9.2007. Shri. Borikar, petitioner in person states that he would not object the adjournment. Statement of petitioner in person is accepted and taken on record.

2. Written arguments filed by petitioner are taken on record and marked Exhibit "A" for identification.

3. To be heard on 24.9.2007 at 2.30 p.m.

Said order was continued till 24.09.2007. Order dated 24.09.2007 reads thus :

Party in person Mr. Borikar seeks two weeks time. He makes a statement that he would not object adjournment of Special Civil Suit No. 1 of 1996 pending in the trial Court and to come up tomorrow for hearing. Statement is accepted and taken on record.

S.O. 9th October, 2007 at 0230 p.m.

Again writ petition was heard on 12.12.2007 when this Court passed the following order:

Heard Shri. Borikar petitioner in person and Shri. A.S. Deshmukh, the learned Advocate appearing on behalf of the respondent. Shri. Deshmukh states that the present writ petition is arising out of the order dated 12.03.1997 passed by the Joint Civil Judge, Senior Division, Parbhani in Special Civil Suit No. 01/1996 filed by the petitioner abovenamed. Shri. Deshmukh submits that other parties in the said suit have not been joined as party respondents to the writ petition and without the said parties, writ petition cannot be adjudicated and in fact, is not maintainable. To cure the said defect, the petitioner to amend the petition joining other defendants to the said suit as party respondents to the above petition. The said amendment to be carried out by the petitioner in five weeks.

In the meantime, the statement of the petitioner recorded on 04.09.2007, and thereafter on 24.09.2007 and continued by this Court on 28.11.2007 to continue till then.

On amendment being carried out, the petitioner to file an application for issuing notice to the said respondents.

10. Therefore, from reading the three orders which are reproduced hereinabove in writ petition No. 135 of 2005 would make it abundantly clear that, respondent No.1 herein was suppose to ask for the adjournment in Special Civil Suit No. 01 of 1996 and revision applicant herein was suppose to accord consent for such adjournment or not to oppose such adjournment. In fact, it was the statement of the revision applicant that he will not oppose adjournment. However, the said statement formed part of the orders passed by this Court. Therefore, in the aforesaid background, I find considerable substance in the arguments of the revision applicant that, he was bound by his statement made before this Court not to oppose adjournment and he had no occasion to attend each and every date of hearing in Special Civil Suit No. 01 of 1996. I find considerable substance in another arguments advanced by the revision applicant that, if at all the revision applicant was not present, it was open for the concerned Court to proceed with the suit on merits since substantial part of evidence has been completed in the said suit.

11. It is not in dispute that, there was delay of 182 days in filing the application for restoration of the suit. The revision applicant herein did place on record alongwith application for condonation of delay, the orders passed by this Court in writ petition. Therefore, the concerned Court should have taken liberal approach in the matter.

12. For the aforesaid reasons, I find that the order impugned in this Civil Revision Application cannot be sustained. The reasons given by the revision applicant herein in the application for condonation of delay and grounds taken in this Civil Revision Application are sufficient to hold that, the order passed by the concerned Court on the application for condonation of delay cannot be sustained,

same is quashed and set aside. The application filed by the applicant for condonation of delay is allowed, the delay in filing the application for restoration of Special Civil Suit No. 01 of 1996 stands condoned. The concerned Court to proceed with the hearing of application for restoration of the suit filed by the revision applicant.

The revision applicant to appear before the concerned Court on 08.11.2011 at 1100 a.m. The concerned Court to hear the revision applicant and the respondents and pass appropriate orders in the application filed for the restoration of the Special Civil Suit No. 01 of 1996 as expeditiously as possible, however, within two months from the first date of hearing i.e. 08.11.2011.

13. Civil Revision Application is allowed on the above terms and stands disposed of. Rule made absolute as indicated above.