
(2011) 08 BOM CK 0023
In the Bombay High Court
Case No : Writ Petition No. 11528 of 2010

Parwatibai Sarode and others

APPELLANT

Vs

Sajjankumar Saklecha and others

RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 2, Order 9 Rule 3, Order 9 Rule 4
Limitation Act, 1963 — Section 5

Citation : (2012) 5 BomCR 806 : (2012) 2 MhLj 367

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

Bench : Single Bench

Advocate : S.R. Sapkal holding for V.D. Sapkal, for the Appellant; S.A. Deshmukh holding for respondent Nos. 2 and 3 for S.R. Pande, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel for the parties. This petition is filed challenging the order dated 21-7-2008, passed below Exh.1 & 3 in MARJI No. 582/2008, by the 10th Jt. Civil Judge, Junior Division. Aurangabad.

2. The respondents herein, who are original plaintiffs, filed application for condonation of delay u/s 5 of the Limitation Act for restoration for Regular Civil Suit No. 1066/2004. On 30-10-2007. Regular Civil Suit No. 1066/2004 came to be dismissed for want of prosecution since plaintiffs were absent on the date of hearing of the said suit. It was stated in the application for condonation of delay that, on account of prolonged illness, the father of the plaintiff and subsequent death of his father in the month of April. 2008, he could not appear in the proceedings nor could he apply for restoration of the suit within the stipulated period. The death certificate of his father was also placed on record. The original plaintiffs also prayed in the said application for restoration of the suit by way of setting aside the order dated 30-10-2007.

3. The 10th Jt. Civil Judge. Junior Division, Aurangabad heard the said application on 21-7-2008 and upon satisfying himself that the delay is properly explained, condoned the delay and restored the Regular Civil Suit No. 1066/2004 to its original file. While deciding the application for condonation of delay and for setting aside the order dated 30-10-2007, the learned Judge has observed that the provisions of Order IX. Rule 4 of the CPC does not require hearing the other side in the proceedings of present nature. Therefore, aggrieved by the said order, this petition is filed.

4. The learned counsel appearing for the petitioners submits that Rule 2 and Rule 3 of Order IX of the CPC are not applicable in the present case. The present petitioners who are original defendants, were present on 30-10-2007 when suit was dismissed for non prosecution. He further submits that, only in cases where suit is dismissed under Order 2 or Rule 3 of Order IX of the Civil Procedure Code, it may not be necessary to give hearing to the other side. However, in the facts of this case, Rule 2 and Rule 3 of the Order IX is not applicable. Therefore, according to the learned counsel for the petitioners, the order impugned in this petition cannot be sustained since same is passed without hearing the petitioners.

5. On the other hand, learned counsel appearing for respondent Nos. 2 and 3 submits that, the reasons assigned by the trial Court are perfectly sustainable, this writ petition is filed belatedly and, therefore, this Court may not entertain this petition.

6. I have heard the learned counsel appearing for the petitioners and learned counsel appearing for respondent Nos. 2 and 3. The provisions of Rule 4 of Order IX of the CPC read thus :

4. Plaintiff may bring fresh suit or Court may restore suit to file :- Where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in Rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

The provisions of Rule 4 of Order IX of the CPC would be attracted in a case where suit is dismissed under Rule 2 or Rule 3. From careful perusal of the order dismissing the suit for non prosecution, it is abundantly clear that the defendants were present when such order was passed. The Rule 2 or 3 has no application in the instant case. Therefore, the conclusion reached by the trial Court that where a suit is dismissed under Rule 2 or Rule 3, it can be restored and Order IX. Rule 4 of the CPC does not require hearing the other side in the proceedings of present nature, is misconceived. When application is filed for condonation of delay by the original plaintiffs for restoration of the suit, it was necessary for the concerned Court to issue notices to the defendants/non applicants therein and after hearing them, to pass necessary orders on the application for condonation

of delay. Since there was delay in filing the application for restoration of the suit, the original defendants accrued some right in their favour and. therefore, it was incumbent upon the concerned Court to call upon the defendants to put forth their contentions. Therefore, in the light of aforesaid contentions, the impugned order dated 21-7-2008 cannot be sustained and same is quashed and set aside. However, the concerned Court will be at liberty to entertain the application filed by the original plaintiffs for restoration of the suit in accordance with law and taking into consideration the law of limitation. The Writ Petition is allowed to above extent. Rule made absolute in above terms.