
(2011) 11 BOM CK 0104
In the Bombay High Court
Case No : Writ Petition No.7840 of 2011

Patel Engineering Limited

APPELLANT

Vs

United Real Estate and Builders Private Limited

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Citation : (2012) 2 ALLMR 453 : (2012) 2 BomCR 147

Hon'ble Judges : R M Savant, J

Bench : Single Bench

Advocate : V R Dhond, with Mr. Ashish Kamat with Mr. Shauilesh Poria and Mr. Amit Kanani instructed by M/s. Hariani and Co, for the Appellant; Alpana Ghone with Ms. P L Bachani instructed by y I R Joshi and Co., for the Respondent

Judgement

R M Savant, J.

1 Rule, with the consent of the parties made returnable forthwith and heard.

2 The above Petition takes exception to the order dated 27/4/2011 passed by the learned Judge, City Civil Court, Mumbai by which order Notice of Motion No.1840 of 2010 filed by the Petitioners who are the original Defendants in Short Cause Suit No.2987 of 2002 came to be rejected.

3 Shorn of unnecessary details a few facts can be stated thus :The Respondents have filed Short Cause Suit No.2987 of 2002 for injunction. Suffice it to say that the said suit came to be dismissed for non-prosecution on 23/2/2005 on account of noncompliance by the Plaintiffs in the matter of service of writ summons. It appears that for some reason, the application for restoration was not made by the Plaintiff, and was ultimately made in March 2010 by filing Notice of Motion No.845/10 for restoration. The said motion was served on the Defendants with a covering letter that the same would appear on board on 9/4/2010. The defendants and their lawyer were present in the court on 9/4/2010, but the board of the said Court was discharged, and the next date given was 26/4/2010. On the said day, the learned Judge did not sit, however against the Suit number

of the present suit which was appearing at Sr.No.32 and against matters at Sr.Nos.31 to 36 the date 2/7/2010 was written. The Defendants went away in view of the fact that the next date was 2/7/2010. To the surprise of the Defendants, they received a letter dated 25/6/2010 from the Solicitors of the Petitioners stating that the said Notice of Motion No.845/10 was allowed on 11/6/2010. On receiving the said letter the Defendants made inquiries, and on such inquiries it was revealed to them that though the said Motion was adjourned to 2/7/2010 on 26/4/2010, it had thereafter appeared on board on 4/5/2010, and thereafter on 11/6/2010 on which dates they did not remain present as they were labouring under the impression that the said Motion would be heard on 2/7/2010. The said Notice of Motion came to be allowed on the said day i.e. 11/6/2010. Resultantly, the delay came to be condoned and the suit came to be restored to file.

4 On the basis of the aforesaid facts the Defendants filed Notice of Motion No.1840 of 2010 for setting aside the said order dated 11.6.2010 on the ground that in view of the fact that they were labouring under an impression that the said Notice of Motion No.845 of 2010 would be heard on 2/7/2010, they could not participate in the proceedings, resulting in the said proceedings being decided exparte against them. The said Notice of Motion No. 1840 of 2010 was opposed by the Plaintiffs by filing their reply. The learned Judge considered the said Notice of Motion filed by the Defendants, and as indicated above, by impugned order dated 27/4/2011 rejected the same. The Notice of Motion has been rejected on the ground that the Defendants ought to have made inquiries if there was some confusion. A finding was recorded by the trial Court after observing that looking to the board of the said day i.e. 26/4/2010 and the dates written against the suit of the Plaintiffs and other matters appearing from Sr.Nos.31 to 36, there is sufficient reason for some confusion. The Court thereafter has also observed that since the order passed in Notice of Motion No.845 of 2010 has been set aside and the suit was restored and Plaintiff has deposited the cost of Rs.5,000/, the relief sought by the Defendants could not be granted. The trial Court further observed that the bracketing the group of cases by the Sheristadar which include the suit in question is at the most a technical error and should not be highlighted and capitalized to drag the matter back.

5 Heard the learned counsel for the parties and perused the reasons mentioned in the impugned order.

6 It is required to be noted that as observed by the learned Judge, City Civil Court, Mumbai, that in so far as the suit in question which was appearing at Sr.No.32 on the said date i.e. 26/4/2010, the date 2/7/2010 was appearing outside the bracket of the cases from Sr.Nos.31 to 36. The learned Judge also accepts the said position, and observed that there is scope for confusion, but thereafter has totally misdirected himself by stating that if there was any doubt in the mind of the Defendants, the Defendants were required to make an inquiry. The said observation in my view is unwarranted, if the Defendants were

labouring under an impression that the date given on 26/4/2010 was 2/7/2010 in view of the said date being written outside the bracketed portion on 26/4/2010, therefore there was no question of there being any doubt as they had left the court on the basis that the next date would be 2/7/2010. It is also required to be noted that the learned Judge accepts the fact that the bracketed portion and the date mentioned outside it, is an act of the Sheristadar of the Court, but thereafter the learned Judge seeks to sort of trivialize the issue by observing that it is merely a technical error and should not be highlighted and capitalized to drag the matter back. In the said process the learned Judge has lost sight of the fact that the Notice of Motion which was an application for restoration of the suit which had been dismissed for default about 5 years back, has been decided in the absence of the Defendants.

7 In my view, the aforesaid facts have led to a miscarriage of justice inasmuch as the Defendants were precluded from appearing before the trial Court on the day fixed as they were labouring under an impression that the date given was 2/7/2010, on account the date mentioned outside the bracketed portion. In my view, the Notice of Motion could not have been decided in the manner done by the learned Judge. It is true that the parties have to be given an opportunity to prosecute the proceedings on merits and cannot be thrown out on technical grounds. Further the reasons mentioned by the trial Court that since there is compliance of the order passed on Notice of Motion No.845 of 2010, no interference was called for with the order restoring suit, in my view, is unsustainable, as the said fact cannot be a consideration to test the legality and propriety of the said order.

8 In that view of the matter so as to offer a proper opportunity to the parties, the impugned order dated 11/6/2011 is required to be quashed and set aside, and is accordingly quashed and set aside. Resultantly, the Notice of Motion No.1840 of 2010 filed by the Defendants is required to be allowed the consequence would be that the order passed on Notice of Motion No.845 of 2010 dated 11/6/2010 would stand set aside and the said Notice of Motion would be heard afresh by the learned Judge, City Civil Court, Mumbai. Since the suit is of the year 2005, the learned Judge, Civil Court, Mumbai is directed to hear and decide the said Notice of Motion within a period of six weeks from the first appearance of the parties before him. The parties to appear before the City Civil Court, Mumbai on 23/11/2011, on which day, the learned senior counsel for the Petitioners states that an affidavit in reply to the said Notice of Motion No.845 of 2010 would be filed by the Defendants in the City Civil Court, Mumbai.

9 Rule is accordingly made absolute in the aforesaid terms with the parties to bear their respective costs.