
(2009) 07 BOM CK 0247

In the Bombay High Court

Case No : Misc.C.A. No. 677 of 2009 in Writ Petition No. 2158 of 2009

Sanjay Dagadappa Kapse

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 06-07-2009

Acts Referred:

Citation : (2010) 1 ALLMR 263 : (2009) 6 BomCR 203

Hon'ble Judges : Reis F.M., J; Bobde S.A., J

Bench : Division Bench

Advocate : R.V. Gaikwad, for the Appellant;

Final Decision : Allowed

Judgement

1. Heard.

2. The applicant/petitioner has filed this application for restoration of the writ petition, which was dismissed in default. We see no reason why the petitioner filed this application if the petition has been dismissed in default and it came to the notice of the Advocate on the very same day. The Advocate could have sought restoration of the matter on an oral application. We are constrained to make this observation since too often applications or motions in writing for restoration come up for orders before the Court, though the dismissal came to the knowledge of the Advocates on the same day.

3. In P.D. Shamdasani Vs. The Central Bank of India Ltd., ; a Special Bench of this Court observed in that case, the negligence was exceedingly slight and the discretion not to restore the matter was exercised on wrong basis. In regard to matters which are dismissed for non appearance and an application is made by the party for restoration, it was observed as follows:

But it is I think, a good working rule, which again was laid down by Sir Norman Macleod in Sorabji v. Ramjilal that if a person whose suit has been dismissed summarily appears on the same day, and produces some not unreasonable

excuse for his absence, prima facie the Court ought to exercise its discretion in his favour. Of course the applicant has no absolute right to ask the Court to waive its rules in his favour but it is a good working rule that if he applies at once, and thereby shows that his failure to appear was not due to desire to cause delay, but was bona fide, he ought to generally to be given the right to have his case restored on payment of costs thrown away. It is, after all, a very serious matter to dismiss a man's suit or summons, or whatever it may be, without hearing it and that course ought not to be adopted unless the Court is really satisfied that justice so requires. In this case, in my view, the judgment of the learned Judge could only be justified if we were prepared to lay down the principle that wherever there has been any negligence or any carelessness on the part of the applicant in failing to attend the Court when his case was called on, then he ought not to be subsequently entitled to have his case restored to the list. I do not think that is the rule which has been acted upon in the past, or ought to be acted upon. Whether the negligence is of a kind which should be excused or not must depend on the facts of the particular case....

4. In view of the law laid down in Shamdasani's case, we are of the view that the applicant ought to have resorted to the settled practice of this Court instead of filing this application.

5. Having regard to the number of applications, which are filed, we reiterate the observations of this Court in Shamdasani's case and hold that where a matter is dismissed in default on account of slight negligence on the part of the party or Advocate in appearing before the Court, an oral application for restoration may be considered if made before the rising of the Court and it is not necessary for the party to file an application for restoration in writing.

In view of the uncontroverted averments therein, the application is allowed. The writ petition is restored to file.