

(1993) 10 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition No's. 2958, 2975, 2956, 2969, 2976 of 1991 and 4026 of 1993

Shaikh Abdul Rafi Abdul Aziz and Another

APPELLANT

Vs

Aspy Beharam Talathi and Another

RESPONDENT

Date of Decision : 22-10-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 2, Order 9 Rule 5
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Article 122, 3

Citation : (1994) ACJ 749 : (1994) 1 BomCR 712

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : Ujjwala Shirke, in W.P. Nos. 2958, 2975, 2956, 2969, 2976 of 1991 and 4926 of 1993, for the Appellant; K.S.V. Murthy, for Respondent No. 1, in W.P. Nos. 2958, 2975, 2969 of 1991, A.K. Chaphekar, in W.P. Nos. 2958, 2975, 2956 of 1991, P.H. Puri and K.S.V. Murthy for Respondent No. 1 in W.P. Nos. 2956, 2976 of 1991 and 4926 of 1993 and Sabnis, for Chaphekar, in W.P. No. 2969 of 1991, for the Respondent

Judgement

M.F. Saldanha, J.—This group of writ petitions essentially challenges an order dated 1st August, 1990, passed by the learned Member, Motor Accident Claims Tribunal, Satara, permitting the restoration of six compensation applications that had been dismissed for default as early as on 8th September, 1986. Strange as it may seem the order restoring those applications has been challenged by the original owner of the vehicle and the issues involved have been seriously canvassed. A few dates would be material.

2. On 1st September, 1984 an accident took place near Being Village, Taluka-Vai, District-Satara and the claim for compensation arises in relation to this incident. On 27th March, 1985 notices were directed to be issued to the present petitioners and to the Insurance Company who is the respondent No. 2. The record indicated that upto 27th February, 1986 the notices were returned

unserved, no steps were taken by the claimants for service and that the claimants as well as their Advocate remained absent. On 8th September, 1986 all the applications were dismissed and it is contended that this order was under the provisions of Order 9, Rule 5 of the CPC in so far as it had resulted because of failure to pay the process fee for service of notices. The claimants state that a "Lok-Adalat" was held at the end of April 1989 which was attended by their Advocate Mr. Puri and it was on this date that they came to know that their claim petitions had been dismissed. On 2nd June, 1989 the applications for setting aside the order of dismissal dated 8th September, 1986 were filed and on 1st August, 1990, the applications in questions came to be allowed. The order that is under challenge is a short one. The Member has gone into the question of considerable delay in making the applications and held that the claimants should not be deprived of their right to agitate for compensation due to them merely because of inaction or error or even negligence on the part of the Advocate and has therefore exercised his discretion in condoning the delay and restoring the original petitions on payment of costs of Rs. 200/-.

3. Prima-facie, the delay in making the application being considerable, a Court would be reluctant to restore the applications in question unless very cogent reasons were set out. In this case, it was pointed out to the learned Member that the Advocate concerned was from Bombay and that right upto April 1989 he was unaware of the order of dismissal. This was quite obvious as otherwise he would have most certainly ensured that an application be made for restoration. I need to however take a serious view of the practice followed by some members of the Bar, whereby they undertake litigation in courts where they do not normally practice. This is highly improper and to my mind professional misconduct because the chances of their remaining present when the matter is listed for hearing are relatively remote and the type of excuse put forward as in the present case only means that there is one more set of litigations by way of restoration proceedings. The courts are over burdened with these unnecessary applications and it is extremely unfair and unjust to the clients. There is invariably a local bar available and it is but proper that an advocate of one's choice from that bar should be briefed in all such situations though there may be no bar for an outside advocate to appear in the matter also. By following such a procedure delays will be cut down and there will be no excuse for absenteeism. The learned Member was certainly justified and more so on the facts of the present case in holding that where the applicants have contended that they are legally entitled to compensation that their claims cannot be nullified merely because they have engaged an advocate who has not bothered to attend to the proceeding after filing it. On that consideration, the order of restoration is undoubtedly justified. In this context, Mr. Murthy, learned Counsel appearing on behalf of the respondents had relied on the decision of the Supreme Court reported in Rafiq and Another Vs. Munshilal and Another, , in the case of Rafiq and another v. Munshilal and another, wherein the Supreme Court had laid down the principle that a party should not suffer for the misdemeanor or inaction of his

counsel. This principle is squarely applicable to the facts of the present case.

4. In support of the petition Miss Shirke, has relied heavily on the provisions of Order 9, Rule 5 and pointed out that since the summons had been returned unserved and since within the prescribed period of one month from the date of return, no application for issue of fresh summons was made, that it is mandatory for the Court to dismiss the suit. She points out that in such a case sub-Clause (2) of Rule 5 prescribes that the plaintiff may bring a fresh suit subject to the law of Limitation. It is consequently contended that no restoration application was competent and for that matter no fresh application was competent because of the bar of limitation. On this basis Miss. Shirke contends that the order of restoration was in breach of the provisions of Order 9, Rule 5 and will therefore have to be quashed. Miss Shirke has also dealt with the submission canvassed on behalf of the original applicants, whereby it was contended that since the suit was dismissed on the ground that the defendants had not been served that it would be covered by Order 9, Rule 2 in which case Order 9, Rule 4 left the option open to the plaintiff to pray for restoration of the original suit or to file a fresh suit. Miss. Shirke contends that Rule 2 has wrongly been applied to the facts of this case, because this Rule only contemplates the situation where the original summons has not been issued for failure to pay costs, whereas Rule 5 deals with a situation where the parties have to apply for fresh summons because the earlier summons have been returned. Miss Shirke has drawn my attention to a decision of the Rajasthan High Court, reported in 1962 Allahabad Law Journal, page 268, in the case Paritosh Chandra v. Devki Nand and others, wherein a learned Single Judge of that Court held that there is no remedy of restoration provided in case of dismissal of the suits under Rule 5 and that the Court would not be justified in restoring the suit in exercise of its inherent jurisdiction. The learned Counsel also drew my attention to a decision of the Calcutta High Court, reported in Shaw and Co. Vs. B. Shamaldas and Co., in the case of Shaw & Co. v. B. Shamaldas & Co., wherein again the High Court has taken the same view. The learned Counsel, therefore, contended that the order of the Tribunal be set aside and that the applications be treated as having been dismissed.

5. I have already dealt with the main contention canvassed by Mr. Murthy, who also submitted before me that this Court will have to be guided by the principle of ensuring that the litigant was not prejudiced because of what has happened and further that this Court ought not to exercise its jurisdiction under Article 227 of the Constitution if the order of the lower Court appears to be basically just and fair merely because technicalities were pleaded. Mr. Murthy also advanced the contention that the proceeding in question was not a suit and that the Rules of procedure prescribed under the CPC were guiding principles but were not mandatory as far as the Tribunal is concerned.

6. Basically, the essential principle to be borne in mind by all the courts is that the orders passed must advance the course of justice and not impede. The decision of the Supreme Court reported (*supra*) is not only a decision of the

superior Court but happens to be a decision of a later date and prescribes over-riding considerations which must out-weigh technical pleas. In the present case the debate as to whether one rule of the CPC or the other applied to the case is not only hyper-technical but it indulges in legal hair-splitting and I am in agreement which has been pointed out by the learned Counsel for the respondents that the procedural provisions of the CPC cannot be used as a mandatory bar where the interest of justice would require that the proceedings must be restored. I have no hesitation in holding that the learned Member out of a sense of propriety and fair-play took cognizance of the fact that those who had put in a claim of compensation should not be refused a hearing because of the negligence on the part of their Lawyer. That to my mind was a correct approach and it was wholly unnecessary on the complexion of this case to go into a microscopic examination of whether Rule 2 or Rule 5 of Order 9 was applicable. To my mind, this would be academic because the applicants had contended that the date of knowledge was close to the time when they filed the restoration applications which were therefore in time and I do not see the wisdom behind insisting that fresh applications be filed which would only put the clock back. If the present restoration applications were in time by virtue of various considerations so would the fresh applications be, and it would only subject the original applicants to additional time and expenditure. This to my mind must be avoided. The learned Member of the Tribunal has rightly done so.

7. It is in these circumstances, that no interference is justified by this Court particularly under Article 227 of the Constitution. The writ petitions fail. Rule is accordingly discharged. In the circumstances of the case, there shall be no order as to costs.

Rule discharged.