

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 450 OF 1996

1. Kishan S/o Kanhyalal Ahir Gavali,
2. Mohanlal S/o Kishanlal Ahir Gavali,
3. Dashrath S/o Kishanlal Ahir Gavali,
4. Parshu S/o Kishanlal Ahir Gavali,
5. Kaluram S/o Mahadu Ahir Gavali,
6. Nandlal S/o Mahadu Ahir Gavali,
All Major, R/o Gavlipura, Nanded.
7. Radhu S/o Gokul Ahir Gavali
Deceased per L.Rs.
- 7-a) Krishnabai W/o Radhu Gawali,
Age: 55 years, occu. Household,
- 7-b) Ishwarlal S/o Radhu Gawali,
Age: 40 years, Occu. Household,
- 7-c) Bhanulal S/o Radhu Gawali,
Age: 32 yrs, Occu. Household,
- 7-D) Meghraj S/o Radhu Gawali,
Age : 30 years, Occu: Rikshw Driverr,
- 7-e) Surajlal S/o Radhu Gawali,
Age: 26 years, Occu. Milk Vendor,
- 7-f) Satyanarayan S/o Radhu Gawali,
Age: 24 yrs, occu: Service,
All R/o Gawalipura, Nanded,
Ta. And District: Nanded.

- 7-g) Amrutabai W/o Hanumanlal Gurkhudde,
Age: 42 yrs, Occu. Household,
R/o Opp. Bus Stand, Beed.
- 7-h) Shardabai W/o Mohanlal Bhuriwale,
Age: 28 years Occu. Household,
R/o Kali Kudti, Jalna.
- 7-i) Chotibai W/o Mohanlal Lucknowwale,
Age: 28 yrs, Occu. Chowphala, Nanded,
Ta. And District Nanded.
8. Shankar S/o Gokul Ahir Gavali,
Now deceased per heirs and
Legal representatives.
- 8-A) Smt. Sumitrabai W/o Shankarlal Ahir Gawali,
Age: 65 years, Occu. Household,
R/o Gawalipura, Nanded.
Ta. & Dist. Nanded.
- 8-B) Hiralal S/o Shankarlal Ahir Gawali,
Age: 33 years Occu. Household,
R/o Gawalipura, Nanded.
- 8-C) Ratnabai W/o Indrachand Gawali,
Age: 24 years, Occu: Household,
R/o Hingoli, Dist. Hingoli.
9. Babu S/o Gokul Ahir Gavali,
Died through L.Rs.
- 9-a) Lalanbai W/o Babu Ahir-Gawali,
Age; 71 years, Occu. Household,
- 9-b) Gokul S/o Babu Ahir-Gawali,
Age: 38 years, Occu: Agri.,
- 9-c) Santosh S/o Babu Ahir Gawali,
Age: 71 years, Occu. Agri.
R/o Gawalipura, Station Road, Nanded
Ta. & Dist. Nanded.
- ..Applicants
(Ori. Defendants)

versus

Jijamata Dharmshala Public Trust
Through its President Shamraoji S/o
Sakharamji Kadam, Aged 65 years,
R/o Nanded

..Respondent
(Ori. Plaintiff)

.....
Mr. H.I. Pathan, Advocate for Applicants
Mr. R.N. Chavan, Advocate holding for
Mr. Vijay Sharma, Advocate for respondent
.....

CORAM : A.I.S. CHEEMA, J.

DATED : 16th JANUARY, 2015

ORAL JUDGMENT :-

1. This Civil Revision Application has been filed by original defendants against order dated 12-09-1995, in Miscellaneous Application (RJE) No. 55 of 1994 passed by 3rd Joint Civil Judge, Junior Division, Nanded, whereby dismissal order dated 07-04-1994, passed in Miscellaneous Application (RJE) 75 of 1993 was set aside on payment of costs of Rs. 500/-. It was directed that Miscellaneous Application (RJE) 75 of 1993 be restored to file.

2. Learned counsel for the applicants-original defendants points out that the respondent-trust-original plaintiff filed

Regular Civil Suit No. 444 of 1991 for recovery of possession. Referring to revision application, learned counsel for applicants pointed out that on various dates the suit got protracted by plaintiff for more than one year, for recording evidence and ultimately it was dismissed on 29-06-1993.

3. Learned counsel for applicants submits that, where for the adjournments taken in the suit, costs were imposed, the same were also not paid. Learned counsel then submits that the respondent-plaintiff filed Miscellaneous Civil Application (RJE) 75 of 1993 (Exhibit-C) to set aside the dismissal order of the suit under order IX, Rule 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C. For brief). Even in this, time was taken and there were directions to pay costs, but entire costs had not been paid and further adjournment was being sought. The application came to be dismissed on 07-04-1994.

4. Learned counsel for the applicants then pointed out that the respondent-plaintiff filed Miscellaneous Application (RJE) No. 55 of 1994 to restore Miscellaneous Application (RJE) No. 75 of 1993, which had been dismissed for default

on 07-04-1994. It is pointed out from the record that even this application was once dismissed in default on 10-04-1995, but again restored on the same date on the request of the respondent-plaintiff. However, the trial court after considering the evidence of the respondent-plaintiff recorded on commission, passed impugned order dated 12.09.1995 and restored Miscellaneous Application (RJE) No. 75 of 1993. It is submitted that looking to the earlier conduct of the respondent-plaintiff there was no justification to restore the Miscellaneous Application and thus, the impugned order is illegal and deserves to be set aside.

5. Learned counsel for applicants submits that conduct of the respondent-plaintiff needs to be kept in view. Referring to judgments in the case of **Bhalchandra Ganesh Naik and another Vs. Sona Hotel through its Proprietor Suresh Melwani and ors.** reported in **2009(3)Bom. C.R. 780** and also in the case of **Bank of Maharashtra Vs. Kalawatibai Sambhajirao Gaikwad and another** reported in **2001(3) Bom. C.R. 236**, learned counsel for applicants submits that in these matters, earlier conduct of the litigants was considered by the court and order of

dismissal of the suit was maintained.

6. Learned counsel for respondent-plaintiff argued that, respondent-plaintiff is a trust and the President was old person suffering from heart ailment. He could not climb the first floor where court was situated, and his evidence was required to be recorded on commission. Learned counsel submits that the trust would suffer great loss if suit does not get restored. It is argued that due to encroachment, plaintiff filed a suit for recovery of possession of the suit premises encroached by the applicants-original defendants. If the impugned order is not set aside, the respondent-plaintiff would suffer irreparable loss, in view of the fact that the fresh suit on the same cause of action will be totally barred.

7. In the present matter, looking to the various adjournments taken by the respondent-plaintiff in Miscellaneous Application (RJE) No. 75 of 1993 and even in Miscellaneous Application (RJE) No. 55 of 1994, it can be seen that the respondent -plaintiff was not vigilant in conducting the matter. The impugned order shows that on 07-04-1994 the matter was not conducted because it was

stated that the President of the respondent-plaintiff was Chief Guest of the function organized by the Municipal Council to give the name of late Advocate Shri Rathi to Law College Road. The trial court considered reasons for, absence of the President of the trust on 07-04-1994 and relying on the judgment in the case of **S.C. Sons (P) Ltd Vs. Smt. Brahma Devi Sharma and others** reported in **AIR 1986 Calcutta Page 437**, allowed the application, holding that sufficient cause was shown for non-appearance.

8. Rulings relied by learned counsel for the applicants are based on their own facts.

9. I am taking into consideration the argument that suit has been filed by the public trust for recovery of trust's land, which is alleged to have been encroached by applicants - original defendants. Plaintiff claims, the encroachment was revealed when the measurements were got done through District Inspector, Land Records. It is submitted by learned counsel for respondent-plaintiff that, if impugned order is set aside, the respondent-plaintiff will lose opportunity to contest Miscellaneous Application (RJE) No. 75 of 1993 for restoration of the suit. In that case, under order IX, Rule 9

of the C.P.C. fresh suit will get barred, the respondent-plaintiff would have no remedy. According to learned counsel, in the interest of justice, one opportunity should be given.

10. Considering the submissions, although it appears that the respondent-plaintiff has not been careful in conducting the matter before the trial court, however, as plaintiff is a public-trust, for failure of trustee to be careful, loss should not be caused to the trust and so an opportunity needs to be given subject to payment of heavy costs. The trial court while considering Miscellaneous Application (RJE) No. 55 of 1994 rightly held that on 07-04-1994 there was a reasonable cause for non appearance of President of the plaintiff-trust. However, considering earlier conduct of the respondent-plaintiff-trust opportunity should have been granted with heavy costs. Costs of Rs.500/- imposed was not at all sufficient. Impugned order suffers from being undue lenient as regards imposition of costs, and thus that part is illegal.

11. Looking to the submissions made in the matter, I proceed to give opportunity to the respondent-plaintiff

subject to heavy costs, and I pass following order.

:: ORDER ::

(i) Civil Revision application is partly allowed.

(ii) Order dated 12-09-1995, in Miscellaneous Application (RJE) No. 55 of 1994 passed by 3rd Joint Civil Judge, Junior Division, Nanded is maintained with modification regarding costs. Instead of costs of Rs. 500/- imposed by the trial court, costs of Rs.5000/- are imposed. Miscellaneous Application (RJE) No. 75 of 1993 shall be restored subject to payment of costs of Rs. 5000/- by present respondent-plaintiff on or before 16-02-2015. The costs shall be deposited in trial court.

(iii) However, If costs of Rs. 5000/-, as directed above, are not deposited on or before 16-02-2015, impugned order dated 12-09-1995 shall be treated as having been set aside, without back reference to this court.

(iv) Both parties are directed to appear before the trial court on 16-02-2015, and no fresh notice should be necessary.

(v) Learned counsel for both sides are informed and they take note of these directions.

(vi) Order accordingly.

(A.I.S. CHEEMA, J.)

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