

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.11918 OF 2012

**1. Hardit Singh Kartar Singh
(Since deceased through his
Legal heirs and representatives)**

**1A. Smt. Rajinder Kaur Hardit Singh
Kartarsingh, Age: 57 years,
Occu: Housewife,**

**1B. Shri. Manpreetsingh Harditsingh
Kartarsingh, Age: 32 years,
Occu: Business,**

**1C. Shri. Meherban Singh Harditsingh
Kartarsingh, Age: 30 years,
Occu: Business,
(All are R/at: 13, T/4D, Flat No.301,
Goipal Nagar, Tal: Bhiwandi,
Dist: Thane.**

.. Petitioners

Versus

**1. Harjit Singh S/o Jagatsingh Sud
Age: Adult, Occu: Business,
R/at: M. H. No.536, Agra Road,
Narpoli, Bhiwandi, Dist: Thane.**

2. Smt. Kulwantkau H. Sud,

Age: Adult, Occu:

R/at: M. H. No.536, Agra Road,
Narpoli, Bhiwandi, Dist: Thane.

3. Shri. Manprat Singh H. Sud,

Age: Adult, Occu:

R/at: M. H. No.536, Agra Road,
Narpoli, Bhiwandi, Dist: Thane.

4. Shri. Gurjeet S. H. Sud,

Age: Adult, Occu:

R/at: M. H. NO.536, Agra Road,
Narpoli, Bhiwandi, Dist: Thane.

.. Respondents

Mr. S. U. Dhakephalkar, for the Petitioners.

Mr. K. S. Patil, for the Respondent Nos.2 & 3.

Respondent Nos.1 and 4 already deleted.

CORAM : R.M. SAVANT, J.

DATE : 14th OCTOBER, 2015

ORAL JUDGMENT

1. Rule, with the consent of the Learned Counsel for the parties i.e. Learned Counsel for the Petitioners Mr. S. U. Dhakephalkar and Learned Counsel Mr. K. S. Patil for the Respondent Nos.2 and 3 made returnable forthwith and heard.

2. The Writ Jurisdiction of this Court is invoked against the order dated 30.07.2012 passed by the Learned Civil Judge Senior Division,

Thane, by which order the Misc. Application No.943 of 2011 seeking condonation of delay of two years in filing the application for restoration of the suit in question came to be rejected.

3. The suit in question being Regular Civil Suit No.552 of 1988 came to be dismissed for non-prosecution on 25.11.2009. It is thereafter on 15.11.2011 that the application for restoration came to be filed and in view of the fact that there was delay of two years in filing the same, the instant application being Misc. Application No.943 of 2011 came to be filed. The reasons for the delay of two years have been mentioned in paragraphs 10 to 13 of the Misc. Application and the sum and substance of the reasons is that the Applicants were labouring under an impression that the suit was pending in the Trial Court and that their earlier advocate did not inform them of the stage at which the suit was from time to time, though inquiries were made by the Applicants with him from time to time. The said application was considered by the Trial Court and has by the impugned order dated 30.07.2012 rejected the same. The rejection is on the ground that the Applicants have not led any evidence in support of their case made in the application. In so far as the impugned order is concerned, the same is sought to be challenged on the ground that in the absence of pursis filed by the Applicants, the Trial Court could not have proceeded with the hearing of the application without calling upon the

Applicants to support their case in the application by leading oral evidence. In support of the said contention reliance is sought to be placed on the judgment of a Learned Single Judge of this Court reported in 2006(5) Mh.L.J. 80 in the matter of Holya Lasha Mahale and another. Vs. Raghunath Holya Mahale, wherein the Learned Single Judge has held that unless the Court passes an order under Order 19 Rule 1 calling upon the parties to prove particular fact involved in the application for condonation of delay by filing an affidavit. In the absence of the contention of the parties that they do not intend to lead evidence and/or they have closed evidence, it was held that it was inappropriate on the part of the First Appellate Court to dispose of the matter on the basis of the pleadings of the parties.

4. The Learned Counsel appearing on behalf of the Respondent Nos.2 and 3 opposes the application. It was the submission of the Learned Counsel that since the Applicants did not show their intention to lead evidence that the Trial Court proceeded with the hearing of the application. In my view, since the dismissal of the suit acts to the prejudice of the Applicants i.e. Petitioners herein the least that was expected from the Trial Court was to call upon the Applicants to support their case by oral evidence and in the event the Applicants had failed to do so, then the Trial Court could have proceeded with the hearing of the application. That

having not been done, a final indulgence is required to be shown to the Petitioners/Applicants in the matter of prosecuting the said Misc. Application 943 of 2011. In that view of the matter, the impugned order dated 30.07.2012 is quashed and set aside and the matter is relegated back to the Trial Court for a de-novo consideration of the said Misc. Application No.943 of 2011. Since the Applicants intend to lead evidence in support of their case, the Trial Court would give them an opportunity to do so and only in the event they fail to do so, the Trial Court would then proceed with the hearing of the application. The parties to appear before the Trial Court on 28.10.2015. The Trial Court thereafter to decide the matter within two months of 28.10.2015. In the facts and circumstances of the case, it would be just and proper to impose costs of Rs.10,000/- on the Applicants to be paid over to the Respondent Nos.2 and 3 on or before 28.10.2015. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute, with parties to bear their respective costs of the Petition.

[R.M. SAVANT, J]