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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 400 OF 2014
IN
SECOND APPEAL NO. 731 OF 1995

Smt. Laxmi Ganpat Aherkar and others .. Applicants
Vs.
Malharrao Tukaram Aherkar and others .. Respondents

Mr.P.K.Hushing, Advocate for the Applicants.
Ms.Savita A.Prabhune, Advocate for Respondents No.2a(i), 2c, 2d.

CORAM : R. G. KETKAR, J.
DATE : 20th MARCH, 2015

P.C. :

. Heard Mr.P.K.Hushing, learned Counsel for the applicants and Ms.Savita A.Prabhune, learned Counsel for respondents No.2a(i), 2c, 2d.

2. Ms.Prabhune states that she appears on behalf of all the heirs and legal representatives of respondent No.2 except respondent No.2-b. Respondent No.2 died on 21/12/1997 leaving behind respondents No.2a to 2d. Ms.Prabhune relied upon the decision of the Apex Court in the case of *Balwant Singh Vs. Jagdish Singh*, (2010) 8 SCC 685 and in particular, paragraph 15 thereof. In paragraph 15, the Apex Court reproduced paragraph 13 of the decision of *Perumon Bhagvathy Devaswom Vs. Bhargavi Amma* (2008) 8 SCC 321. In particular, she relied upon paragraph 13(v) of decision in the case of *Perumon Bhagvathy Devaswom* (supra). She

submitted that once appeal is admitted, the litigant is not expected to visit the Court or his lawyer every few weeks to ascertain the position or keep checking whether contesting respondent is alive. He merely awaits the call or information from his Counsel about the listing of the appeal. She submitted that in the present case, there is total lack of diligence. There is inaction on the part of the appellants in taking steps.

3. It is material to note that Second Appeal was admitted on 14/08/1996 as it involves following substantial question of law.

“Whether the Courts below were justified in holding that there had been no partition to the suit property by meets and bounds earlier to the filing of the suit ?”

4. In the present case, on 04/03/2002, following order was passed.

“Printing dispensed with. Appellant(s) to supply requisite copies of the paper-book in accordance with Rule 10(iii) of Chapter VII read with Rule 2 of the Chapter IX of the Bombay High Court Appellate Side, Rules, 1960. However, if any party insists and/or the Roznama pleading and interrogatories and their replies if any are necessary and will be required at the time of hearing of the appeal, only then those documents be included in the paper-book. In all other cases inclusion of those documents are dispensed with i.e. paper-book as aforesaid be supplied within eight weeks failing which appeal to stand dismissed for non-prosecution without further reference to the Court.

Appellant(s) to remove other office objection(s), if any within Eight weeks from today, failing which the appeal will stand dismissed for non-prosecution without further reference to the Court.

4.3.2002”

5. Office note shows that advocate for the appellants did not file paper-book and decree forms within the stipulated time i.e. on or before 29/04/2002. In view of the conditional order dated 04/03/2002, appeal stood dismissed for non prosecution without reference to the Court.

6. In the case of of *Kalipada Das Vs. Bimal Krishna Sen Gupta*, AIR 1983 Supreme Court 876, it is held that

“Supplying paper-books is a procedural requirement devised to facilitate rendering justice. In other words, it is a procedural step in aid of justice, and not substantive justice itself. Undoubtedly, Court's orders have to be obeyed. The institution of judiciary may not be able to function if there is no sanction behind the Court's order. But penalty of failure to comply with Court's order providing a procedural stage in aid of justice must be commensurate with the gravity of the lapse. If the penalty imposed is disproportionate to the gravity of the lapse or omission, the procedural stage instead of becoming a step in aid of justice would be a road block to justice.”

It was further held that

“The appellant's failure to comply with the Court's order directing to prepare paper books and supply its copies within stipulated time and the appeal filed by appellants was dismissed on that count by the High Court, the order of dismissal of appeal passed by the High Court would be improper as the omission or lapse arising out of non-compliance with the High Court's order was not of such a serious gravity as to close the door of the Court to the appellants by dismissing the appeal.”

7. In view of the decision of the Apex Court in the case of **Kalipada Das** (*supra*) in my opinion, office was not justified in dismissing the appeal for non filing of paper-book. In fact, the same can be said about order dated 04/03/2002 passed by this Court. In view thereof, reliance placed by Ms.Prabhune on the decision in the case of **Balwant Singh** (*supra*) does not advance the case of

respondent.

8. Mr.Hushing submits that within 2 week from today, applicants will file private paper-book and decree forms. He further states that applicants will reconstruct the papers and proceedings of Second Appeal within 2 weeks from today. In view thereof, I am satisfied that applicants have made out a sufficient cause for condoning delay as also for extension of time by 2 weeks for filing of the paper-book and decree forms.

9. In the light of the above discussion, Civil Application is allowed in terms of prayer clauses (a) to (d) with no order as to costs. The applicants shall file private paper-book and decree forms within 2 week from today. The applicants shall also reconstruct the papers and proceedings of Second Appeal within 2 weeks from today.

(R. G. KETKAR, J.)