

WRIT PETITION NO. 5999 OF 2015

VILAS SANDU TUPE
VERSUS
SANJAY KUMAR AJMERA AND OTHERS

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Advocate for Petitioner : Mr. R. S. Misal
Advocate for Respondent No. 1 to 9: Mr. Narendra D. Sonwane

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CORAM : V.K. JADHAV, J.
Dated: January 15, 2016

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PER COURT :-

1. By consent of learned counsel for respective parties, heard finally at admission stage.

2. The petitioner/original plaintiff had instituted R.C.S. No.225 of 2005 for a decree of ownership and perpetual injunction. The suit was partly decreed and the plaintiff was declared as owner of the suit property. However, the relief of perpetual injunction was refused. Present respondents/original defendants preferred an appeal bearing R.C.A. No. 171 of 2008. The lower appellate court dismissed the said appeal and confirmed the judgment and decree passed by the trial court in R.C.S. No. 225 of 2005. Being aggrieved by the same, the present respondents/original defendants preferred a Second Appeal before this Court and this Court, at admission stage, by order dated 10th October, 2014, quashed and set aside the judgment and decree passed by the lower appellate court, in R.C.A. No. 171 of 2008 and remanded the matter to the lower appellate court for consideration and appreciation of the issues and evidence brought before it in the light of law laid down by the Apex Court in the matter of scheme of Section 91 and 92 as observed in the

case of **Gangabai** as referred in the said judgment. After remand, during pendency of the said Regular Civil Appeal, which is re-numbered as R.C.A. No. 2 of 2015 before the District Judge, Vaijapur, the present petitioner/original plaintiff has filed an application Exh.32 alongwith an application for condonation of delay for permission to file the cross-objection in the appeal since the relief of decree for perpetual injunction was refused by the trial court. The lower appellate court, by order below Exh.32 in R.C.A. No. 2 of 2015, rejected the application for condonation of delay Exh.32. Hence this writ petition.

3. Learned counsel for the petitioner/original plaintiff submits that during pendency of R.C.A. No. 171 of 2008 (before remand), the petitioner/original plaintiff had filed his cross-objection, though not in the format, however, the same was not considered at that time by the lower appellate court. Learned counsel thus, submits that considering the same, the application moved by the petitioner Exh. 32 is a mere formality and the lower appellate court should have condoned the delay on that ground alone.

4. Learned counsel for respondents submits that no such say or cross-objection was filed before the lower appellate court in R.C.A. No. 171 of 2008 (before remand) and only after remand of the matter by this Court to lower appellate court, the present petitioner/original plaintiff has filed application Exh. 32. Learned counsel submits that there is inordinate delay in filing application to permit the petitioner/original plaintiff to file cross-objection. Learned lower appellate court has rightly rejected the application

Exh.32. There is no substance in the writ petition and the same is liable to be dismissed.

5. On careful perusal of the judgment and decree passed in R.C.A. No. 171 of 2008, it appears that the lower appellate court, at that time, had taken point No. 4 for determination and also recorded answers for it. The said point No. 4 is in the manner as 'whether the plaintiff has proved his possession over the suit property?'. This Court, while deciding Second Appeal No. 452 of 2013, in paragraph No. 16 of order dated 10.10.2014, has observed and directed that the matter be remanded to the learned lower appellate court for consideration and appreciation of issues and evidence brought before it in the light of law laid down by the Apex Court in the matter of scheme of section 91 and 92 as observed in the case of **Gangabai** (*supra*). In light of these observations, the lower appellate court, even after remand, is required to consider and appreciate all the issues including the issue of possession of plaintiff over the suit property. Thus, a separate cross-objection is not required to be filed by petitioner/original plaintiff. Furthermore, as per the provisions of Order 41 Rule 33 of C.P.C., court of appeal shall have power to pass any decree although the respondents may not have filed any appeal or cross objection.

6. In light of above observations, the writ petition is disposed of. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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