

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

WRIT PETITION NO. 10925 OF 2015

Dinkar @ Dinesh Yashwant Jadhav,
deceased, through his legal
representatives :-

1. Smt. Kastur Dinkar @ Dinesh Jadhav,
Age 47 years, occup. Housewife
 2. Yogesh Dinkar @ Dinesh Jadhav,
Age 25 years, occup. Service,
Both r/o 4/1, Sane Guruji Housing
Zilla Peth, Jalgaon, Dist. Jalgaon
- .. Petitioners/
(Orig. L. Rs. of
deceased Deft.
No. 2A and 2B

versus

1. Kamalbai Khushal Warke, since
deceased through Legal Representatives:
 - 1A) Suresh Khushal Warke,
Age 50 years, occup. Advocate,
r/o Navi Peth, Jalgaon, Dist. Jalgaon
 - 1B Jayant Khushal Warke,
Age 50 years, occup. Service,
r/o Nav Sahyadri Housing Society,
Kawarnagar, Pune
 - 1C Mrs. Nilima Suresh Tekale,
Age 45 years, occup. Housewife,
r/o 207, Navi Peth, Jalgaon, Dist. Jalgaon
 - 1D Miss. Jaishri d/o Khushal Warke,
Age 43 years, occup. Service,
r/o Pune Hospital, Sadashiv Peth,
Pune
 - 1E Dilip Yashwant Jadhav,
Age 63 years, occup. Service,
- .. Respondents/
Resps No.1A

r/o Krushi Colony, near Khawaja Miya,
Jilha Peth, Jalgaon, Dist. Jalgaon

to 1 D are LR's
of Orig. Pltff./
Appellants

Mr. Pramod P. Dhorde, Advocate for petitioners

Mr. Suresh Khushal Warke - respondent no. 1A - party in person
present

Mr. Girish S. Rane, Advocate for respondents no. 1B to 1D

CORAM : SUNIL P. DESHMUKH, J.

DATE : 7TH APRIL, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard the parties finally, by consent.

2. Proceedings bearing regular civil suit no. 236 of 1986 were instituted for eviction by deceased respondent no. 1 - plaintiff against deceased defendant no. 2 - Dinkar Yadav. On appearance of defendants, upon trial, suit had been decided on 27-07-1993, resulting into dismissal of the same. Appeal carried therefrom at the instance of original plaintiff bearing regular civil appeal no. 238 of 1996 had been decided in favour of the landlord-original plaintiff (now represented by present respondents no. 1A to 1D) on 09-12-2004, reversing the judgment and decree passed by trial court.

3. It appears, during pendency of aforesaid appeal, original defendant no. 2 (respondent no. 2 before district court) expired.

Present petitioners who are the legal heirs of said deceased defendant no. 2 Dinkar were not brought on record.

4. Present petitioners had filed writ petition bearing No.1150 of 2005 before this court against aforesaid judgment and decree in regular civil appeal no. 238 of 1996 dated 09-12-2004. Writ petition was allowed on 24-07-2013 by Honourable single judge passing following operative order :

" (a) The impugned judgment and order dated 9th December 2004, passed by the 1st Ad hoc Additional District Judge, Jalgaon, in Regular Civil Appeal No.238 of 1996, is quashed and set aside. Regular civil Appeal No. 238 of 1996 is restored to the file of the learned District Judge, Jalgaon.

(b) The respondents herein will file appropriate application for bringing heirs and legal representatives of original defendant no. 2 Dinkar, in the District Court, on record, and serve copy thereof on other side. The petitioners will not oppose that application and the same application shall be allowed.

(c) The learned District Judge, Jalgaon, is requested to decide Regular Civil Appeal No.238/1996 within six months from the date of receipt of record and proceedings

(d) The respondents are at liberty to make application for bringing the subsequent events on record. If such application is made, the petitioners will be at liberty to file reply to that application. The learned District Judge will pass appropriate orders thereon.

(e) It is expressly made clear that all points are kept open."

5. It appears that pursuant to aforesaid order, the parties were expected to appear before the appellate court and accordingly application Exhibit-32 appears to have been moved on behalf of present respondents - landlords for bringing legal heirs of deceased defendant no. 2 in regular civil appeal no. 238 of 1996 on record. Present writ petitioners had not put in their appearance in the proceedings in the appellate court with reference to aforesaid order of high court. The District Judge, as such, issued notices to legal heirs of deceased defendant no. 2 which initially appear to have been returned unserved. In the circumstances, the substituted service had been effected and accordingly legal heirs of deceased defendant no. 2 were served in application Exhibit-32 for bringing them on record. Present writ petitioners – legal heirs of deceased defendant no. 2 chose not to cause appearance. Consequently, Exhibit – 32 had been allowed and thereafter again notices of regular civil appeal were issued to legal heirs of respondent no. 2 which appear to have been duly served on them.

6. Regular civil appeal no.238 of 1996 proceeded further and culminated into judgment and decree dated 12-03-2014 whereunder, the judgment and decree dated 27-3-1993 in regular civil suit no.236 of 1986 passed by 2nd Joint Civil Judge, Junior Division, Jalgaon, was set aside and the suit was decreed,

directing respondents (present petitioners-defendants) who were brought on record of said appeal, to deliver vacant possession of the suit property to the plaintiffs – landlords within two months from the date of judgment in said appeal i.e. 12-03-2014. Defendant No. 1-respondent no. 1 in said appeal was directed to pay to the plaintiffs Rs. 7200/- towards arrears of rent and inquiry into mesne profit under Order XX Rule 12 of the Code of Civil Procedure, 1908 ("The Code" for brevity) had also been directed.

7. Thereafter, it appears, an application Exhibit - 44 (writ petition page 97) had been moved on 03-05-2014 before the District Judge by respondent no. 2 Smt. Kastur (present petitioner no. 1) in said regular civil appeal no. 238 of 1996, requesting to stay the judgment and order in said appeal dated 12-03-2014.

8. Aforesaid application came to be rejected under order dated 30-09-2014, having regard to further events which had occurred in the interregnum.

9. Present petitioners had then on 20-05-2014 moved application bearing miscellaneous civil application no. 109 of 2014 (writ petition paper book page 53) before the district court pursuant to Order XLI, Rule 3A of the Code seeking condonation

of delay in filing application under Order XLI Rule 21 of the Code requesting re-hearing against decree in regular civil appeal no. 238 of 1996 dated 12-03-2014, claiming it to be *ex-parte*.

10. Present respondents opposed aforesaid application 109 of 2014. Parties accordingly were heard on delay condonation and having regard to the observations made in the judgment and decree dated 12-03-2014 in regular appeal no. 238 of 1996 and that the applicants (present petitioners) not being in position to wriggle out of the factual situation, District Judge-2, Jalgaon, by order dated 27-04-2015, making observations as are appearing in paragraph no. 5 of the same which read thus:

" 5. On perusal of ex-parte judgment and decree dated 12-03-2014 delivered in Regular Civil Appeal No.238 of 1996 and after going through the contents of Para No. 4 thereof, it is seen that on 23-08-2013 the Opponents appeared before the Court through their Advocate Shri Parakash B. Patil. They tendered the application Exh. 32 for bringing legal heirs of deceased Respondent No. 2 (Deceased husband of present applicant) on record. Since, the legal heirs of deceased husband of applicant did not appear before the Court on their own, therefore, notices were served upon them through Bailiff, however, the same returned unserved with the remarks that, the parties named in the notices did not reside on the given addresses. Thereafter, the mode of substituted service was also adopted for the service of notices upon them. Even then, the applicant or other legal heirs of deceased husband of applicant did not appear before the Court. The application Exh. 32 was allowed

and the applicant and the other legal heirs of deceased husband of applicant were brought on record and once again, notices of Appeal were served upon them. However, none of them appeared before the Court. ",

had rejected the request under miscellaneous civil application no. 109 of 2015 to condone delay in filing application for setting aside ex-parte decree in regular civil appeal no. 238 of 1996 and for re-hearing of the same.

11. Aggrieved by aforesaid order, petitioners are before this court.

12. Learned counsel Mr. Dhorde appearing on behalf of the petitioners strenuously urges to consider the request for condonation of delay caused in filing application seeking to set aside impugned claimed *ex-parte* decree, contending that petitioner no. 1 had been residing in the premises from 1970 initially with her husband and has continued to reside in the same after his death. It is further contended that after decision by high court in writ petition no. 1150 of 2005, she had not been in receipt of any notice or summons from the appellate court, submitting further that she had applied for setting aside *ex-parte* decree at appellate stage on 20-05-2014, however, since that application had been considered to be outside limitation, the same was disposed of.

13. It is being contended on behalf of the petitioners that they got knowledge about the decree in regular civil appeal no. 238 of 1996 dated 12-03-2014 on 21-04-2014. Thereafter, application had been moved for certified copies of requisite documents and those were received around 05-05-2014 and since there was vacation from 06-05-2014 to 08-06-2014, they could not move application earlier and accordingly had filed application on 10-05-2014 i.e. during vacation period so as to save limitation. (Writ Petition paper book page 56).

14. Learned counsel for petitioners further purports to contend that during the relevant period i.e. while decree was passed in appeal, petitioner no. 1 along with relatives had been on pilgrimage and as such could not be said to be aware of the decision rendered in the appeal.

15. Mr. Suresh Khushal Warke, respondent no. 1A (one of the heirs of deceased respondent no. 1 Kamalbai) appearing in person has vehemently submitted that all these proceedings are being taken up, carried on and procrastinated with a singular object to harass and vex decree holders to keep them away from the fruits of the litigation.

16. It is pointed out by him that the high court's order in writ petition no. 1150 of 2005 which has been quoted hereinbefore

is clear, lucid and amply bears out that having regard to undercurrent of the order, it was not only morally obligatory for petitioners, but it was necessary, incumbent and imperative for them to cause appearance before the district court immediately and ought to have caused appearance even before notices on Exhibit – 32 were served since it was an order passed in their favour by the high court by setting aside the appellate decree which was then in favour of the landlords-respondents herein in the writ petition at their instance. According to him, non appearance by petitioners before the district court is not only in defiance of the orders of the high court, but it shows scant respect to the legal proceedings. Over and above that, while the order of the high court had been duly followed in letter and spirit by present respondents-landlords by making an application Exhibit-32 for bringing legal heirs of deceased respondent no. 2 in appeal on record, present petitioners – respondents had deliberately kept themselves away in appeal; whiling away time and intentionally got notices issued to them. In spite of service, they did not appear and the record bears truth that they had been served not only once but thrice. Services were effected before Exhibit-32 had been allowed and thereafter when it had been allowed after present petitioners were made parties to regular civil appeal.

17. Party in person further refers to various aspects, stating that as a matter of fact the petitioners do not reside in Jalgaon at all, but they are residing at some other places and he purports to refer to various documents secured by him under Right to Information Act and also reports received back after service on the writ petitioners of notices in execution proceedings showing that they are not residing in suit premises and contends that present proceeding is nothing but abuse of process of law.

18. Mr. Rane, learned advocate appearing on behalf of respondents no. 1B to 1D, states that he subscribes to the arguments advanced by party-in-person and further refers to and submits that having regard to factual situation it glaringly surfaces that the pre-conditions for application for re-hearing under Order XLI rule 21 of the Code are not subsisting and no benefit can be derived by the petitioners from the same. He submits that this is not the case in which it can be said that petitioner no.1 was not duly served or, for that matter, she was prevented from causing appearance when the appeal was called for hearing.

19. According to learned counsel, present petitioners cannot be said to have not been served and the appeal had proceeded

ex-parte. As such, it is urged that no indulgence be given to petitioners and writ petition be dismissed.

20. The respondents refer to and rely on a decision of the supreme court in the case of *S. P. Chengalvaraya Naidu vs Jagannath*, reported in (1994) 1 SCC 1 to emphasize that a party playing fraud should not be assisted by the court.

21. After hearing the parties, position clearly appears to emerge that after the order was passed by high court in writ petition no. 1150 of 2005 on 24-07-2013, present petitioners were served on several occasions and it is contended by party in person that, in fact, petitioners were served thrice. Once while Exhibit-32 had been moved by present respondents before district court for bringing present petitioners as legal heirs of defendant no. 2 on record of appeal. However, the matter was not attended to by the petitioners. Thereafter, application Exhibit 32 had been granted and after having become parties to the regular civil appeal, once again they were served with notice of appeal. Despite that, the petitioners had chosen to remain away from the appeal proceedings pending before the district court.

22. The contention of the party-in-person about the writ petitioners residing at some different places other than suit premises referring to certain documents in that respect have not

been met with by writ petitioners nor are they in a position to explain occurrence of such record or for that matter have not been able to dispute said record as not being emanating from factual position.

23. Looking at the tenor of the order passed by high court in writ petition no.1150 of 2005 which is quoted hereinabove and further that it was the petition of the present petitioners and was decided in their favour, it is difficult to believe that they were not aware of the pendency of the appeal proceedings. In fact, clause (b) of said order in no uncertain terms refers to that the petitioners were not supposed to oppose the application which was to be made in procedural compliance for bringing legal heirs of deceased defendant no. 2 (respondent no. 2 in appeal) on record of the appeal. In the circumstances, petitioners ought to have shown due diligence in prosecution of appeal at the instance of present respondents-landlords.

24. Petitioners have not been in a position to come out of the observations as are appearing in paragraph no. 4 of the appellate court's judgment and in paragraph no. 5 in the impugned order by producing any material depicting that the same are not in accordance with the record.

25. With aforesaid and the observations as are appearing in paragraph no. 5 of the impugned order as well as the observations about factual position as appearing from paragraph no. 4 of the judgment in regular civil appeal no. 238 of 1996 and further the averments as are appearing in the application purportedly under Order XLI, rule 3A and section 151 of the Code which do not appear to be adhering to the factual position, it does not appear to be a case wherein indulgence can be shown to the petitioners.

26. Writ petition as such fails and thus stands dismissed with no order as to costs.

27. Rule stands discharged.

SUNIL P. DESHMUKH,
JUDGE

pnd