

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

904 WRIT PETITION NO. 9757 OF 2016

RAMRAO BABASAHEB DESHMUKH DIED LRS PRAVIN
RAMRAO DESHMUKH AND ANOTHER
VERSUS
BHASKAR KALYANRAO DESHMUKH DIED LRS DHANAJI
BHASKAR DESHMUKH AND OTHERS

Shri. V.D. Salunke, Advocate, for petitioners.

Shri. K.R. Doke, Advocate, for respondents.

CORAM: T.V. NALAWADE, J.

DATE : 30 SEPTEMBER 2016

ORDER:

1) The petition is filed to challenge the order made on Misc. Application No.139/2010 which was pending in the District Court Osmanabad. The application filed by the present petitioners for relief of re-admission of the appeal and restoration of the appeal and for that condonation of delay is rejected by the District Court.

2) Regular Civil Suit No.217/1987 was filed against the petitioners and others for relief of possession.

The possession was claimed from 113 persons. 76 persons appeared but written statement was filed by only few defendants like the predecessors-in-title of the present petitioners. Similarly a suit, bearing Regular Civil Suit No.91/1987 was filed for injunction in respect of the same property by the person from whom possession was sought. Both the suits were decided together. The suit filed by the owner for possession was decreed and the suit filed by the persons against whom decree of possession was sought was dismissed.

3) Regular Civil Appeal No.175/2000 was filed by 76 persons. Stay was requested against the decree of possession. The stay was granted by the District Court subject to condition of deposit of Rs.5000/- by each of them. It appears that only few persons like predecessors-in-title of the present petitioners deposited the amount. The appeal was not prosecuted and during pendency of the appeal the predecessors-in-title of the present petitioners died. Due to death of the predecessors-in-title of the present petitioners the appeal came to be abated of those appellants on 12-8-2009. This order of abatement of

the appeal was not set aside and even in the application bearing M.A.No. 139/2010 no prayer was made for setting aside the said abatement and for granting permission to the successors of the deceased appellants to file proceeding for condonation of delay. When the proceeding was dismissed on 21-4-2010, the application, M.A. No.139/2010 was filed on 17-7-2010.

4) After considering all the circumstances, the District Court has refused to condone the delay and the application is rejected. The said application bearing M.A. No.139/2010 was filed only by present petitioners when the matter was dismissed as against 76 persons. Now the same two persons who were not on record as appellants have filed the present proceeding and so there is challenge to the right of the present petitioners to file the present proceeding. There is also challenge from the other side that when delay condonation application was rejected, it needs to be presumed that relief of restoration of the appeal itself was refused and due to that the provision of Order 43 Rule 1 (t) of the Civil Procedure Code is applicable. There is no need to discuss this

submission as proceeding was filed for condonation of delay caused in filing restoration application and not the appeal itself.

5) If merits are considered it can be said that the trial Court has considered the merits. When the predecessors-in-title of the present petitioners had contended that the land was acquired for rehabilitation of persons, the defendants, who were displaced, there was no record of acquisition and so the plaintiff proved the title over the suit property. The decree of possession was given in the suit filed in the year 1987. The District Court has observed that every tactics are being played by the persons against whom decree of possession is made to see that the decree is not executed.

6) Condonation of delay is a discretionary relief and at that time both the sufficient cause is required to be shown and some arguable case is also required to be shown. It is already observed that the present petitioners were not on the record of the appeal. Further there was virtually no arguable case to them. The District Court has

held that discretion cannot be used in their favour due to their conduct and approach. When the order involves use of discretion this Court is not expected to exercise writ jurisdiction if there is material in that regard. There is material of aforesaid nature on the basis of which the Court could have refused to use the discretion. Further, there is one more circumstance. When the application bearing M.A. No.139/2010 was dismissed on 21-11-2012, present petition came to be filed on 14-9-2016. The latches cannot be ignored if the petitioners pray for use of extraordinary jurisdiction. For these reasons also this Court holds that it is not possible to interfere in the order. In the result, the petition stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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