

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2703 OF 2013

Ashok Shankar Patil ... Petitioner
Vs.
Madhukar Gangadhar Sor (decd) through LRs
Kalyabai Madhukar Sor and others ... Respondents

Mr. Sagar V. Kasar for Petitioner.
Mr. Chetan S. Damre for Respondents No.1(a) to 1(d), 2, 3 & 4(c).

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 22, 2016

P.C. :

Heard Mr. Kasar, learned Counsel for petitioner and Mr. Damre, learned Counsel for respondents No.1(a) to 1(d), 2, 3 & 4(c) at length. On the motion made by Mr. Kasar, leave to delete rest of the respondents is granted as they are not the contesting respondents. Rule. Mr. Damre waives service for respondents No.1(a) to 1(d), 2, 3 & 4(c). At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgments and orders dated 03.10.2012 passed by the learned Adhoc District Judge-1, Malegaon below exhibits-52 and 53 in Civil Appeal No.16 of 2002. By order dated 03.10.2012, below exhibit-52, the learned District Judge rejected the application for condonation of delay in filing application for bringing legal representatives of respondent No.4(2) Zipru Chima Waghmode on record. By order dated 03.10.2012, below exhibit-53, the learned trial Judge rejected the application for setting aside abatement against respondent No.4.

3. In support of this Petition, Mr. Kasar submitted that respondent No.4(2) Zipru Chima Waghmode died on 06.06.2006. Petitioner acquired knowledge only after receipt of Bailiff's report dated 05.04.2011, and thereafter, application was filed on 30.06.2012 for condoning the delay at exhibit-52 and for setting aside abatement at exhibit-53. He submitted that the learned District Judge held that as respondent No.4(2) died on 06.06.2006 and the application is moved on 30.06.2012, no case is made out for condonation of delay. He submitted that the learned District Court should have considered whether the petitioner acquired knowledge only after Bailiff submitted report on 05.04.2011 or not and the learned District Judge should have considered whether sufficient cause is made out or not.

4. On the other hand, Mr. Damre supported the impugned orders. He has invited my attention to the reply dated 29.08.2012 filed on behalf of the respondents. In that reply, it was contended that the petitioner was aware of death of respondent No.4(2) and that the contention that respondent No.4(2) died on 06.06.2012 is false. Respondent No.4(2) Zipru Chima Waghmode died on 06.06.2006. Mr. Damre, therefore, submitted that as the petitioner was aware of death of respondent No.4(2), the learned District Judge rightly rejected the applications.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the impugned orders does not indicate that the appellate Court has considered whether respondent No.4(2) was represented by his Advocate or not and that, if he was represented by Advocate, whether the Advocate, in turn, informed death of respondent No.4(2) to the petitioner herein. Apart from that, though the contention was advanced on behalf of the respondents that the petitioner herein was

aware of the death of respondent No.4(2), the said contention is also not dealt with in the impugned orders. The learned District Judge also did not consider whether petitioner acquired knowledge only after receipt of Bailiff's report dated 05.04.2011 or not. In view thereof, impugned orders cannot be sustained and same are liable to be set aside thereby restoring applications exhibits-52 and 53 for deciding it afresh. Hence, the following order:

- a. Impugned orders dated 03.10.2012 passed by the learned Ad-hoc District Judge-1, Malegaon below exhibits-52 and 53 in Civil Appeal No.16 of 2002 are quashed and set aside;
- b. Applications at exhibits-52 and 53 are restored to the file of the District Court and the same shall be disposed of in accordance with law;
- c. All contentions, on merits, are expressly kept open;
- d. Liberty to apply to the District Court for expeditious disposal of the appeal is granted. If such application is made, the learned District Judge may pass appropriate order;
- e. All the parties, including the District Court, to act upon the authenticated copy of this order;
- f. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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