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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.299 OF 2014

Apurga w/o Zumber Rao Maske
Age - 44 years, Occ - Agriculture
R/o MSEB Quarters, 132 KV Station,
Idgah Road, Beed,
Taluka and District - Beed

APPELLANT

VERSUS

1. Nanabhau s/o Bajirao Arsul
Age - 69 years, Occ - Agriculture
R/o Bensur, Taluka - Patoda,
District - Beed
2. Ramkisan s/o Bajirao Arsul,
Age - 69 years, Occ- Agriculture
R/o As above (Died)
3. Shriram s/o Ramkishan Arsul
Age - 34 years, Occ and Resident of
as above

RESPONDENTS

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Mrs. A. N. Ansari, Advocate for the appellant
Mr. Shivaji K. Naikwade, Advocate for respondent No.1
Mr. R.P.Shendge h/f Mr. N. L. Jadhav, Adv. for respondent No.3

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 17th JANUARY, 2017

ORAL JUDGMENT :

1. Heard learned advocates for the parties.
2. Question that arises, in the facts and circumstances of the

case, substantially is -

“ Whether the parties shall be afforded an opportunity of hearing the delay condonation application preferred by present appellant, by remitting the matter and restoring the application to its position as had been subsisting before the impugned order had been passed, by setting aside the same? ”

3. Present second appeal has been preferred by original defendant No.3 in Special Civil Suit No.136 of 1995, which came to be decided on 15th July, 2000 along with Regular Civil Suit No.49 of 1997 and the sale deed executed in favour of defendant No.3 - present appellant had been set aside.

4. The appellant, in the circumstances, purported to prefer civil appeal, however that was delayed by nine years. Memo of civil appeal had been lodged along with miscellaneous application for condonation of delay referring to various reasons, *inter alia* primarily putting forth medical reasons.

5. While the appellant and her advocate were absent, on 28th February, 2014, an order came to be passed in their absence by District Judge -1, considering that there is nine years delay on

the ground of sickness due to diabetes and no medical evidence had been adduced. The decree is of 2000 and as such, it was considered that the reasons given may not be proper and the court purported to reject the application.

6. Learned advocate Mrs. Ansari, appearing for the appellant, submits that on the face of it, the impugned order appears to have been passed in default of appearance of appellant and her advocate before the court. It is contended that there is unilateral finding in her absence having regard to the reasons which *prima facie* appears to have weighed with the court that no evidence is being produced. In the circumstances, she contends that the appellant deserves an opportunity before the first appellate court to buttress her claim deserving condonation of delay.

7. Mr. Naikwade, learned advocate for respondent No.1 - original plaintiff contends that it is difficult to conceive that nine years' delay would be caused for medical reasons and the court, albeit in the absence of the applicant and her advocate, has rightly considered that nine years' delay cannot be said to have been reasoned out on medical grounds. The court has observed that there is no evidence and the decree is of 2000, no fault should be found with the impugned order.

8. Having regard to the facts and circumstances, as are contended, there appears to be some substance in the contention of the applicant, taking into account the impugned order as passed that suggests that what has weighed with court that decree is of 2000 and appellant has not adduced evidence. However, it is very difficult to adjudge and make a judgment on the scanty reasons given in the impugned order especially when order was being passed in default of appearance. The impugned order has been passed in default and purportingly on reasons referable to section 5 of the Limitation Act. In the circumstances, a contest by an opportunity of hearing the application would be a healthier approach in the matter. However, in the process, the inconvenience caused to the original plaintiff would have to be suitably compensated.

9. In view of aforesaid, the substantial question as framed hereinbefore would be required to be answered holding that an opportunity be allowed to the parties to contest the application by imposing costs for the lapse on behalf of the appellant to appear before the court.

10. As such, the impugned order is set aside. Miscellaneous Civil Application No.431 of 2009 stands restored to its position as

was subsisting prior to the impugned order. Parties shall appear before the concerned court on 1st February, 2017. Second appeal, as such, stands allowed subject to payment of costs of Rs.5000/- to be paid to original plaintiff. The amount of costs be deposited before the first appellate court by 10th February, 2017. In case of failure to deposit the amount of costs, this order shall be deemed to have been recalled without further reference to the court. Second appeal, accordingly stands disposed of.

11. In view of disposal of second appeal, civil application No.4397 of 2014 does not survive and stands disposed of.

[SUNIL P. DESHMUKH, J.]

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