

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5825 OF 2016

Rajubai w/o Ganpati Jagtap and others

Petitioners

Versus

Kondiba S/o Lahanu Shinde
died through LRs

Gahinath S/o Kondiba Shinde & others

Respondents

Mr. S.S. Gangakhedkar advocate for the petitioner

Mr. R.G. Hange advocate for Respondent Nos. 1(A) to 1(E) & 2 to 4

CORAM : **RAVINDRA V. GHUGE, J**

(Date : 17th July, 2017.)

PER COURT :-

1 The petitioners are aggrieved by the order dated 13.4.2016 passed by the Trial Court, by which Application Exhibit 23 seeking recalling of 'no say' order, has been rejected.

2 I have considered the submissions of the learned Advocates for the respective sides.

3 Mr. Hange, learned Advocate has strenuously supported the impugned order and has prayed for the dismissal of this petition.

4 The petitioners are the original defendants in RCA No.34/2007, filed by respondents herein, seeking declaration of ownership and for perpetual injunction. On 24.6.2011, the said

suit was dismissed in default. The original plaintiffs filed Miscellaneous Civil Application No.129/2015 on 5.3.2015, which is almost after three years and nine months from the date of the 'DID' order.

5 The grievance of the petitioners is that, the Appeal Court has passed 'no say' order on 20.11.2015. The opportunity to the petitioners to oppose the application for condonation of delay caused in filing the restoration application has been taken away. Exhibit 23 was, therefore, filed on 23.3.2016, praying for recalling the 'no say' order and for permitting the petitioners to file their Say for opposing the application for condonation of delay, which is still pending.

6 Mr. Hange has contended that negligence and laxity /laches on the part of the petitioner does not warrant recalling of the 'no say' order. As they failed to file their Say within time, the Trial Court has rightly passed the order. Exhibit 23 was filed after about four months. As such, it was delayed by three months.

7 I find that the circumstances emerging in this matter are quite peculiar. The plaintiffs have filed their restoration Application after three years and nine months from the date of the 'DID' order. The petitioners have filed Exhibit 23, praying for

recalling the 'no say' order, after three months. It cannot be ignored that, the right to canvass that the delay is inordinate, would be lost, if the petitioners are not allowed to file their Say. The Trial Court should have passed an equitable order by imposing costs on the petitioners.

8 Considering the above, this petition is partly allowed. The impugned order dated 12.4.2016 is quashed and set aside and Exhibit 23 is allowed on the following conditions:-

- a) The petitioners shall deposit a total costs of Rs.4,000/- collectively before the Trial Court on or before the 24th day of August, 2017.
- b) The Written Say filed by the petitioners to the Miscellaneous Application No.129/2015 for condonation of delay, shall be taken on record.
- c) After the costs are deposited, the original plaintiffs shall withdraw the said amount in equal proportions without conditions.
- d) Needless to state, the Trial Court shall decide the condonation of delay application filed by the original plaintiffs on it's own merit.

(RAVINDRA V. GHUGE , J)