

(1)

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

WRIT PETITION NO.8992 OF 2014

Khan Shaheen D/o Haji Fazal Khan,
Age : 55 years, Occ. Service,
Tq. Vaijapur, Dist. Aurangabad ..PETITIONER
(Orig. Respondent No.14)

VERSUS

Sanjay @ Sunil Govind Dalvi,
Age : Major, Occ. Business,
R/o Rajnagar, Dhawan Wasti,
Tapowan Road,
Bhist Bagh, Savedi,
Ahmednagar ..RESPONDENT
(Orig. Applicant)

Mr Shaikh Mujtaba Gulam Mustafa, Advocate for petitioner;
Mr R.B. Dhaware, Advocate for respondent no.8

CORAM : NITIN W. SAMBRE, J.

DATE : 2nd November, 2017

ORAL ORDER:

Respondent no.1 is original appellant, before the first appellate court before whom the decree for partition and separate possession against the petitioner/co-plaintiff was assailed, who is served in present proceedings. Learned Counsel appearing on behalf of the petitioner informs this Court that rest of the respondents are formal parties and hence, they be deleted. The prayer accordingly stands allowed at the risk and peril of the petitioner. Petitioner to delete all respondents, but for respondent no.1, who though served is not represented and other respondents who are served.

(2)

2. The contentions raised in the petition are not controverted by contesting respondent no.1.

3. Respondent no.1 filed an appeal challenging the judgment and decree passed in Regular Civil Suit No.615 of 1990 on 27th November, 2003. As there was delay of 1193 days in filing said appeal, respondent no.1 filed Misc. Civil Application No.68 of 2007 before learned District Judge, Ahmednagar in April, 2007 for condonation of delay. In support of cause for condonation of delay, he also tendered an affidavit of examination-in-chief, dated 17th September, 2012.

4. Learned District Judge ordered “no cross” against the present petitioner as the petitioner remained absent on 6th November, 2012 and his further prayer for setting aside said order vide application Exh.93 (Exh.D to the petition) came to be rejected on 2nd September, 2014. Thus, the present petition.

5. From the record it could be noticed that learned District Judge ordered to file the affidavit of examination-in-chief of contesting respondent no.1 in support of claim for condonation of delay on 17th September, 2012. On 6th November, 2012, learned District Judge passed an order of “no cross”, which was sought to be re-opened, which prayer was rejected on 2nd September, 2014.

(3)

6. Having regard to the fact that respondent no.1 though duly served has not contested the claim for granting an opportunity to cross-examine the petitioner in support of claim for condonation of delay and in order to give an opportunity to the petitioner, in the interest of justice, order impugned needs to be set aside, subject to certain condition. Thus, the following order :-

The order impugned dated 2nd September, 2014 and earlier order of “no cross”, passed on 6th November, 2012, by the learned District Judge, Ahmednagar, are hereby set aside, subject to payment of costs of Rs.5,000/-, to be deposited before the learned District Judge within a period of four weeks from today. If costs as ordered is deposited, the learned District Judge would be free to deal with apportionment of costs between the parties or may relegate said amount to District Legal Services Sub-Committee.

The aforesaid order is passed keeping in mind that the petitioner has volunteered to deposit such costs within a period of four weeks from today and has further undertaken that on the next date of hearing he shall, without any adjournment, continue to conduct the proceedings of the appeal till its conclusion.

If costs as aforesaid is not deposited, the order of “no cross” shall stand revived and would operate.

(4)

With above observations, writ petition stands partly allowed.

(NITIN W. SAMBRE, J.)

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