

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

WRIT PETITION NO. 394 OF 2010

GANPAT SHANKAR DHIWAR AND OTHERS
VERSUS
TARABAI BALKRISHNA CHINTAMANI.

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Advocate for the Petitioners : Shri Deshmukh Rajendra S. a/w Shri Amol
Joshi.

Advocate for the Respondent : Shri Kale Mahesh P. and Shri A.A.Khande.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 14th December, 2017

Per Court :

1 While issuing notice on 22.02.2010, this Court has granted
ad-interim relief in terms of prayer clause (E), which reads as under:-

"(E) *Pending the hearing and final disposal of this Writ
Petition, the further proceedings of Regular Civil Suit
No.117/1989 pending on the file of learned Joint
Civil Judge, Junior Division, Shrirampur, may kindly
be stayed.*"

2 I have considered the strenuous submissions of Shri
Deshmukh, learned Advocate for the Petitioners and Shri Kale and Shri
Khande, learned Advocates on behalf of the sole Respondent, at length.

3 The dates and sequence of events, which are not disputed, are
as under:-

- (a) Regular Civil Suit No.117/1989 was filed by the Petitioners/ Plaintiffs with regard to two Hectors of land on 04.03.1989.
- (b) On 16.04.1994, the said suit was dismissed in default.
- (c) On 24.04.1998, the Plaintiffs filed the restoration application bearing Miscellaneous Civil Application No.11/1998, which was allowed on 24.09.1998.
- (d) The Respondent/ Defendant moved Miscellaneous Civil Appeal No.109/1998 for challenging the said order before the first Appellate Court.
- (e) On 31.10.2002, the Appellate Court dismissed MCA No.109/1998.
- (f) The record and proceedings, which were called for by the Appellate Court, were returned to the Trial Court.
- (g) On 10.12.2002, since the parties claim to be unaware about the restoration of the suit, the Trial Court dismissed the suit in default for the second time.
- (h) Miscellaneous Civil Application No.1/2008 was filed by the Plaintiffs on 01.02.2008 seeking restoration of the suit. The Plaintiffs contend that the request for condonation of delay was also made.
- (i) By order dated 16.12.2008, Miscellaneous Civil Application No.1/2008 was allowed subject to certain conditions.

- (j) On 28.01.2009, which was the first date of appearance after the second restoration, the legal heirs of the deceased Plaintiff Nos.3 and 11, who had passed away on 21.12.2006 and 27.10.2003, respectively, moved an application Exhibit-27 for leave to be brought on record.
- (k) By the impugned order dated 07.11.2009, the application Exhibit-27 was rejected.

4 In the light of the submissions of the learned Advocates, I find the above dates and events to be decisive and quite peculiar. The issue is only as regards bringing the legal heirs of the deceased Plaintiff Nos.3 and 11, on record in the suit. There is no dispute that when these two Plaintiffs passed away, the suit was not in existence as it was dismissed in default for the second time on 10.12.2002 and was restored on 16.12.2008. As such, there was no occasion for these legal heirs to make an application for being brought on record until the suit was restored and Exhibit-27 was filed on the very first day after restoration.

5 The issue is that neither had the legal heirs signed Exhibit-27, nor was it supported with an affidavit, nor did they make an application for formally seeking condonation of delay in the light of the above factors. There can be no debate that the insistence on following the procedure cannot overbear the intention of the Court to do justice. However, since

the law mandates that the legal heirs have to file a formal application on record if there is factual delay, though under fortuitous circumstances, as the dates and events recorded above would evidence, the said application will have to be allowed in order to take up the application for permitting the legal heirs to be brought on record.

6 Considering the above, this Writ Petition is partly allowed as under:-

- (a) The impugned order dated 07.11.2009 is quashed and set aside.
- (b) At the request of the Plaintiffs, Exhibit-27 is directed to be filed so as to enable the legal heirs of the deceased Plaintiff Nos.3 and 11 to file a proper application bearing their signatures and verification as well as an application for condonation of delay supported by an affidavit as is required by law. These steps shall be taken by the legal heirs of the deceased Plaintiff Nos.3 and 11 on or before 31.01.2018.
- (c) The litigating sides agree to appear before the Trial Court on 31.01.2018, or any date prior thereto, if the same is already granted by the Trial Court as the suit is pending.
- (d) After filing of proper applications and affidavits as above on or before 31.01.2018, the Defendant would have the liberty to file her reply within TWO WEEKS, which is on or before

15.02.2018.

- (e) The Trial Court shall hear the parties on the application for condonation of delay, which shall be decided on or before 31.03.2018. If the delay is condoned, the application for bringing the legal heirs on record shall be decided by the Trial Court on or before 30.04.2018.
- (f) Needless to state, the peculiar facts recorded as above and time spent by the Plaintiffs in this Court from 14.12.2009 till 31.01.2018, or the date on which the application is filed, shall be considered as a good ground for condonation of delay.
- (g) However, if the applications as directed above, are not filed within the time prescribed, this order shall stand recalled and the impugned order dated 07.11.2009 shall then stand restored. The legal heirs shall not seek extension of time.

kps

(RAVINDRA V. GHUGE, J.)