

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

WRIT PETITION NO. 13740 OF 2017

LATIKA PRABHAKAR KOTHAWALE DIED LRS
MAKARAND PRABHAKAR KOTHAWALE AND OTHERS
VERSUS
SURESH KRUSHNAJI DASARE DIED LRS SHASHANK
SURESH DASARE AND ANOTHER

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Advocate for Petitioners : Mr Pradhan Laxman K

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CORAM : V.K. JADHAV, J.

Dated: November 27, 2017

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PER COURT :-

1. I find no substance in this writ petition.

2. The petitioner-original plaintiff has moved application Exh.27 and 24 in a pending suit R.C.A. No.237/2006. Being aggrieved by the judgment and decree passed in R.C.S. No.424/1999, respondent-defendant have preferred the aforesaid R.C.A. before the District Court, Ahmednagar. Said appeal was fixed for hearing before the Lower Appellate Court, however, said appeal came to be dismissed in default on 10.11.2009 since respondent/defendant remained absent when the

appeal was called for hearing. Consequently, respondent-defendant has filed Misc. Civil Application No.148/2011 for restoration of the said appeal. It further appears that during the pendency of the said application seeking restoration of the appeal, original respondent-defendant Suresh Krushnai Dasare died on 27.1.2011. It further appears that L.Rs of respondent No.1-A and 1-B herein were brought on record within time in the said pending Misc. Civil Application No.148/2011 as legal heirs of Suresh Krushnaji Dasare (deceased).

3. On hearing of the said Misc. Civil Application No.148/2011 the learned judge of the lower appellate court by order dated 17.1.2014 allowed the said application and restored the appeal to its original position. However, names of the legal heirs i.e. 1-A and 1-B herein are not shown in the memo of the appeal as legal heirs of respondent-defendant for a considerable period. Respondent-original defendant (legal heirs of original defendant) has therefore, filed an application

Exh.27 pointing out to the Court that inadvertently legal heirs of defendant remained to be mentioned in the appeal memo and they may be permitted to do so. Meanwhile, present petitioner/original plaintiff has also filed an application Exh.24 in the said R.C.A. No.237/2006 claiming therein that the appeal stands abated since L.Rs. are not taken on record in the appeal memo within a statutory period of 90 days. Lower appellate court has rightly observed while allowing application exh.27 that it was just a ministerial act which remained to be performed. L.Rs. of the original defendant (appellant in R.C.A.No.237/2006) were already brought on record in the pending restoration application of the said appeal, and, as such appeal cannot be dismissed as abated for want of taking L.Rs. on record in the appeal memo specifically. I do not find any fault in the order passed by the Lower Appellate Court while allowing the application Exh.27 and rejected the application Exh.24.

4. Learned counsel has placed his reliance on a

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judgment in case of Balwant Singh Vs. Jagdish Singh and others in Civil Appeal No.1166/2006, wherein the Supreme Court has considered the provisions of Order 22 Rule 9 with the observations that all these provisions of order 22 have to be given their true and correct meaning and must be applied whenever called for. In the facts of the said case, the Supreme Court has observed that except for a vague averment that the legal representatives were not aware of the pendency of the appeal before this Court, there is no other justifiable reason stated in the one page application. The supreme court has observed that, cumulative effect of all these circumstances is that the applicants have miserably failed to show any 'sufficient cause' for condonation of delay of 778 days in filing the application in question.

5. In the instant case, facts are totally different. Legal representatives of the respondent-defendant were already brought on record in the restoration proceeding well within time and only ministerial act of mentioning them in the appeal memo in the light of the order

passed by the Court in the restoration application remained to be performed. Learned counsel, at this stage requested for directions of expeditious disposal of the pending appeal before the lower appellate court. The petitioner is at liberty to file such an application before the lower appellate court for expeditious disposal of the pending appeal.

6. In view of the above, Writ Petition is hereby dismissed. No costs.

(V.K. JADHAV, J.)

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