

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9597 OF 2014

Smt. Laxmibai Chandrabhan Daunde

...Petitioner

vs.

Mr. Keshav Kalu Kote

...Respondent

Mr. Sanjeev Sawant a/w Mr. B. K. Barve, Mr. Sandeep Barve and Ms. Sheetal Tanpure i/b B. K. Barve & Co. for the Petitioner.

Mr. Sandip D. Shinde for Respondent Nos.1 and 2.

Mr. A. R. Metkari, AGP for Respondent No.3.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 20th November, 2017

P.C.:

. Heard. Rule. Rule is made returnable forthwith with the consent of the parties.

2. The Petitioner herein happens to be the Decreeholder in Regular Civil Suit No.26/2007 which was decided by Civil Judge, Senior Division, Niphad (Nashik). The only Defendant in the said suit was the Government of Maharashtra through the Collector, Nashik. During the pendency of the suit, the Respondent herein had filed an application below Exh.21 seeking leave to be impleaded as Defendant to Regular Civil Suit No.26/2007. It was contended that the suit property is in fact the trust property of "Shree Devi Devsthan Inam Class-3". The lower court has considered all the contentions raised in the said application seeking impleadment and has held that the price of the land has been determined as per the provisions of Tenancy Law and it was considered that the land has been deleted from inam patrak vide mutation entry No.344. The Court had specifically observed that the Plaintiff had filed the suit for relief of seeking declaration and injunction and that the suit property is owned and

possessed by the Plaintiff which is without any encumbrances and therefore the Government of Maharashtra through the Collector, Nashik has no right or authority to forcibly take possession of the suit property without consent of the Plaintiff. The Court further observed that the Government of Maharashtra had appeared in the said suit and had not filed written statement. The Court had observed that the third parties who had filed application seeking impleadment were not in possession and were not 'vahivatdar' of Shree Devi Devstan Inam Class-3" and therefore they were not necessary or proper parties to the suit. It is further observed that Order 1 Rule 10 of CPC refers only to the questions involved between the parties and not to the question between the parties to the suit and the third party and therefore the application filed below Exh.21 by the third party came to be rejected by order dated 26/6/2008.

3. It is pertinent to note that the said order refusing impleadment of the present Respondent was not challenged before any Court and, therefore, it attained finality. The suit was decreed and the learned Court had declared that the Plaintiff is the bonafide purchaser of the suit property described in plaint para no.1 without any encumbrances and the Defendant Government of Maharashtra has no right to take forcible possession of the suit properties from the Plaintiff without her consent. There was an order of injunction passed against the Defendant Government of Maharashtra. The suit was decreed on 13/11/2008.

4. Learned counsel for the Petitioner submits that the Respondent herein had filed RTS proceedings before the Revenue Authority. The Additional Commissioner had rejected their applications on 21/3/2017. Learned counsel for the Respondent as of today has no instructions as to whether the said order is challenged any further.

5. It is pertinent to note that third party who had not challenged the rejection of their impleadment to the suit had preferred an appeal before the District Court along with an application seeking condonation of delay of 1 year and 11 months. In the application seeking condonation of delay, the applicant had brought to the notice of the Court that their application seeking impleadment was rejected by the trial Court. There was no explanation for the inordinate delay in filing the application seeking condonation of delay for filing the appeal and the only submission was that the application seeking condonation of delay should not be rejected on technical grounds.

6. The Decreeholder had filed their written say. The learned court while considering the application seeking condonation of delay has noted contentions of the Respondent Trust that the State of Maharashtra did not take proper instruction in contesting the suit. It was contended before the lower court that the Applicants were not aware about the decision of the suit. Upon perusal of the application it is clear that the applicant therein had not contended that he had no knowledge about the decision of the suit. Although the parties had burdened the Court with citations of the Apex Court in respect of the settlement pursis in case of condonation of delay, the learned court has only considered that it is necessary to see as to whether the applicants are interested in the subject matter of the suit. Without hearing the Government of Maharashtra, the learned Appellate Court has arrived at a conclusion that the State has not contested the suit and this would be the observation against the party which was not a party before the Court.

7. Learned Court has erroneously held that even in case of doubt where a person is interested in the subject matter, he must be allowed to file an appeal and therefore condoned the delay of 1 year and 11 months

on depositing cost of Rs.3,000/-.

8. As of today the learned counsel for the Respondent submits that by virtue of section 96 of the Code of Civil Procedure right would accrue upon the third party to file an appeal from the original decree. Section 96 of the Code of Civil Procedure reads as follows:---

“96. Appeal from original decree.- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by courts of small causes, when the amount or value of the subject matter of the original suit does not exceed ten thousand rupees.”

Clause (2) of section 96 of CPC refers to the original decree to be challenged in the eventuality the decree is passed ex-party. In the present case application seeking impleadment was rejected way back on 26/6/2008 whereas the decree was passed on 13/11/2008 and in the interregnum the order was not challenged before any higher court. It would be a hazardous situation if any third party would claim the right from the original decree without being impleaded in the original suit or unless he established his locus to file an appeal.

9. Learned counsel for the Respondent has placed reliance on the judgment reported in AIR (36) 949 Bom 141 wherein the Hon'ble Division Bench of this Court was considering the dispute between the province of

Bombay vs. Western Indian Automobile. In that case the Court was considering the fact that the Province of Bombay is not a party to the petition. The petition was under the Industrial Disputes Act. In fact the learned Single Judge of this Court had issued notice upon the Province of Bombay, and pursuant to that notice the Province of Bombay appeared before the learned Judge and submitted its point of view before the Court; and a preliminary point is taken that inasmuch as the Province of Bombay was not a party to the petition, it is not competent for the Province of Bombay to prefer an appeal from the decision of the learned Judge. The Court has specifically observed that although the Civil Procedure Code does not in terms lay down as to who can be a party to an appeal. But it is clear, and this fact arises from the very basis of appeals, that only a party against whom a decision is given has a right to prefer an appeal. Even in England the position is the same. But it is recognised that a person who is not a party to the suit may prefer an appeal if he is affected by the order of the trial Court, provided he obtains leave from the Court of Appeal. Therefore, whereas in the case of a party to a suit he has a right of appeal, in the case of a person, not a party to the suit who is affected by the order he has no right, but the Court of Appeal may in its discretion allow him to prefer an appeal.

10. In the judicial discretion of the said Court, the party was allowed to prefer an appeal in the facts of the case. In the present case the application seeking impleadment was rejected and was not prosecuted any further. Moreover the Respondent had not sought leave to file an appeal and had filed an application seeking condonation of delay as if to say that right had accrued upon him to prefer an appeal. The Hon'ble Division Bench of this Court even then had expressed that it would be the discretion of the Court as to whether to grant leave or not.

11. The learned counsel for the Respondent had then placed reliance on the judgment of the Apex Court reported in AIR 74 SC 994 In the case of State of Punjab & Ors. Vs. Amar Singh. The facts of the said case are not relevant to the facts of the present case.

12. In the present case the State of Maharashtra which was an aggrieved party had not challenged the said judgment. Moreover, it is a case that since the written statement was not filed by the State of Maharashtra, the Learned Appellate Court had presumed that the State had not contested the said suit.

13. The present case is a suit for declaration of ownership over the suit property as against the State of Maharashtra as the Defendant was inclined to acquire the suit properties which were purchased by virtue of a registered sale deed.

14. In the facts of the case this Court is of the opinion that the Respondent seeking condonation of delay had no right to file an appeal before the Appellate Court and therefore the order allowing condonation of delay application dated 17/7/2014 deserves to be quashed and set aside. Petition is allowed. Order dated 17/7/2014 is hereby quashed and set aside. Rule is made absolute in the above terms.

15. Learned counsel for the Respondent orally prays to stay the present order. In the facts of the case the prayer is rejected.

(SMT. SADHANA S. JADHAV, J.)