

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3946 OF 2017

Mr. Sandeep G. Pawar .. Petitioner
vs.
Dr. Kanayalal Alim Chand Purswani
(since deceased through Lrs. & ors.) .. Respondents

Mr. Ankit R. Tripathi i/b M/s. FF & Associates for the Petitioner.
Mr. Durgesh Kulkarni i/b Mr. S.W. Kulkarni for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 09 AUGUST 2017.

P.C. :-

1] Heard Mr. Ankit Tripathi, learned counsel for the petitioner and Mr. Durgesh Kulkarni, learned counsel for the respondents.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the order dated 1st October 2016 by which learned Appellate Bench of the Small Causes Court has declined to extend the time for bringing on record the legal representatives of the deceased respondent.

4] Mr. Tripathi, learned counsel for the petitioner, submits that though it is true that there was some lapse in the matter of

complying with the order regards bringing on record the legal representatives of the deceased respondent, there was absolutely no malafide involved. The petitioner, who is tenant in respect of suit premises have not gained anything by not bringing on record legal representatives of the deceased respondent. He submits that the impugned order will virtually result in dismissal of the appeal on a technicality and this is quite a disproportionate consequence *qua* the minor lapse on the part of the petitioner and the petitioner's advocate. He submits that this is a case where genuine misunderstanding between the advocate's clerk and the Registry, as a result of which, necessary amendment could not be carried out. Mr.Tripathi submits that taking into consideration all these factors, the impugned order may be set aside and the petitioner's application at Exhibit-27 may be allowed.

5] Mr. Kulkarni, learned counsel for the legal representatives of the deceased respondent, who have been made parties in this petition submits that this is virtually the third extension applied for by the petitioner. He submits that the application at Exhibit-27 was never made by the petitioner, but only by his advocate. He submits that there are no reasons set out in the application at Exhibit-27 and

in absence of any cogent reasons, the Appellate Bench, was entirely justified in rejecting the same. Finally, he submits that the appeal stands abated since, no legal representatives were brought on record within the prescribed period. He submits that the petitioner has not even applied for setting aside of the abatement by explaining delay in so apply. Mr. Kulkarni submits that the petitioner has gained time and continued in the suit premises despite eviction order. He submits that even the proceedings before the Appellate Bench were adjourned from time to time by citing pendency of the present petition. For all these reasons, Mr. Kulkarni submits that there is no case made out to interfere with the impugned order. He submits that the conduct of the petitioner is dis-entitled for any equitable relief under Article 227 of the Constitution of India.

6] Having considered the rival contentions and perused the material on record, though I am satisfied that the petitioner deserves to be granted yet another opportunity, the same shall have to be subject to the payment of costs as a condition precedent.

7] The petition did apply for leave to bring on record legal representatives of the deceased respondent within prescribed period

of limitation. Such leave was granted, however, the petitioner failed to actually carry out the amendment and bring on record the legal representatives. After expiry of the prescribed period, the petitioner applied for extension, the same was granted by the Appellate Bench. Even within the extended period, the petitioner failed to take necessary steps. Only thereafter, the petitioner, took out application (Exhibit-27) seeking for further extension .

8] The explanation furnished by the petitioner is that there was some misunderstanding between his advocate's clerk and the Registry officials. It is obvious that the exercise which was required to be undertaken by the advocate or advocate's clerk was not undertaken within the prescribed period. As contended by Mr.Tripathi the consequences of the impugned order do appear to be dis-proportionate. The petitioner will be deprived of a valuable right of the appeal against the eviction decree. At the same time, there is substance in the contention of Mr. Kulkarni that the petitioner, has been the beneficiary of the lapses. This is because in the meanwhile the petitioner has continued in possession of the suit premises, even though, technically, the appeal would have been construed as abated.

9] Upon cumulative consideration of the material on record and the circumstances which have been adverted to, subject to the petitioner's paying costs of Rs.10,000/- to the respondent, within a period of four weeks from today, the application at Exhibit-27 can be allowed and time extended for bringing on record the legal representatives of the deceased respondent. Once such extension is granted, the issue of abatement will also not arise, because such extension relates back in the ordinary course.

10] The impugned order dated 1st October 2016 is accordingly set aside. Application at Exhibit -27 is allowed, subject to the petitioners depositing costs of Rs.10,000/- before the Appellate Bench within a period of four weeks from today. Only upon deposit of costs within four weeks from today, the petitioner shall be permitted to carry out necessary amendment to bring on record the legal representatives of the deceased respondent within a period of 10 days thereafter. It is made absolutely clear that in case of failure to deposit the costs within four weeks from today or in case of failure to actually carry out the amendment within a period of 10 days thereafter the petitioner shall have no benefit of this order. Upon deposit of the

costs, the legal representatives of the deceased respondent shall be at liberty to withdraw the same unconditionally.

11] The Appellate Bench in such an eventuality will be at liberty to declare that the appeal stands abated and nevertheless shall be at liberty to recover costs of Rs.10,000/- from the petitioner.

12] The Appellate Bench is directed to expedite the disposal of Appeal No. 8 of 2014.

13] Rule is made partly absolute to the aforesaid extent.

14] All concerned to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)