

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

**APPEAL FROM ORDER 72 OF 2018 WITH
CIVIL APPLICATION NO. 5156 OF 2018**

URMILABAI DINKARRAO MUNDE AND OTHERS
VERSUS
RAM ANANDA CHATE (DIED) LRS SITABAI AND OTHERS

...
Advocate for the Appellants : Shri H. K. Munde
Advocate for the Respondents : Shri S. D. Munde
...

CORAM : RAVINDRA V. GHUGE, J.

DATED : 19th NOVEMBER, 2018.

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PER COURT :

1. The petitioners are the original applicants before the Appellate Court in Misc. Civil Application No. 17/2017, seeking restoration of their Regular Civil Appeal No. 27/2003. They are aggrieved by the impugned order dated 23/02/2018, by which, the Appellate Court has rejected the application for restoration.

2. I have considered the strenuous submissions of the learned Advocates for the respective sides.

3. The learned Advocates for the respondents have

strenuously supported the impugned order and pray that the present AO deserves to be dismissed with heavy costs.

4. With the assistance of the learned Advocates, I have gone through the record available and have considered their contentions.

5. Ram Ananda Chate was the original plaintiff in Regular Civil Suit No. 14/2002 which was filed for seeking recovery of possession of the portion encroached by Urmilabai and Dnyanoba. By judgment dated 01/01/2003, the suit was decreed and the defendants Urmilabai and Dnyanoba were directed to deliver the possession of 23 R. land belonging to the plaintiff upon which they have encroached from the eastern side. Aggrieved by the said judgment, the defendants preferred Regular Civil Appeal No.27/2003 before the Appellate Court. The said Appeal was pending for almost 11 years. On 30/04/2014, the Appellate Court dismissed the Appeal in default as the Advocate representing the appellants was not present.

6. The original defendants realized that their Appeal was dismissed for non prosecution, after the original plaintiff initiated execution proceedings and the possession warrant was issued to the extent of 23 R. land, which the defendants were directed to surrender to the plaintiff. After realizing that this order has been passed in RD No. 8/2014, that the original defendants approached the Appellate Court for seeking condonation of delay and restoration of the Appeal. In the meanwhile, original defendant No. 2 Dnyanoba had passed away. So also, the original plaintiff Ram Ananda had also passed away. The application for condonation of delay was allowed.

7. By the impugned order, the Appellate Court has rejected the application seeking restoration for the reason that the original defendants could not assign appropriate reasons for non conducting the Appeal for 11 years. Another reason for rejecting the application was that the original defendant Urmilabai did not step into the witness box to indicate as to why the Appeal was not pursued in 11 years. I have also found in the impugned order that the Appellate Court has

considered the issue as to why L.Rs. of Dnyanoba were not brought on record with promptitude.

8. I find that the Appellate Court has misdirected itself while deciding the application for restoration. What is required to be seen in a restoration application is as to whether the applicants derived any undue advantage or laches can be attributed to the conduct of the applicants. No litigant would benefit from ignoring his proceeding and no litigant can be said to derive any advantage by neglecting his proceedings leading to its dismissal for non prosecution.

9. In a Regular Civil Appeal, normally the issue of recording additional evidence would not arise unless an application is filed under Order XLI Rule 27 of the Code of Civil Procedure. Such an application, if filed, will have to be considered alongwith the main Appeal, in view of the law laid down by the Honourable Apex Court in the cases of (1) *Malayalam Plantations Limited Vs. State of Kerala and another* [(2010) 13 SCC 487] = [AIR 2011 SC 559]. (2) *Union of India Vs. Ibrahim Uddin and another* [(2012) 8

SCC 148] = [2013 AIR SCW 2572]. (3) A. Andisamy Chettiar Vs. A. Subburaj Chettiar [(2015) 17 SCC 713].

10. In my view, the Appellate Court should have considered whether oblique or ulterior motives or laches could be attributed to the conduct of the applicant and if these aspects are missing, the Appellate Court was required to see as to whether the appellants would be rendered remediless if their Appeal, pending for 11 years, was not restored. The record reveals that after the Appeal was dismissed on 30/04/2014, the original defendants and the L.Rs. of the deceased Dnyanoba, approached the Appellate Court on 09/09/2014, which is within six months, for seeking restoration of their Appeal. This time span cannot be termed as being an inordinate delay and hence the application for condonation of delay was also allowed.

11. In the above backdrop, the refusal of the Appellate Court in restoring the Appeal would practically render the original defendants remediless against the judgment and decree of the Trial Court. It also cannot be ignored that the suit property is

an immovable portion of agricultural land. I am of the view that the Appellate Court should have adopted a pragmatic approach rather than taking a pedantic view in such set of facts and circumstances.

12. While allowing this petition, the rigors of litigation being suffered by the original plaintiffs and their L.Rs. can be softened by imposing costs and by directing the Appellate Court to decide the Appeal within a specific time period.

13. The learned Advocate for the respondents prays for heavy costs and also submits that the Appellate Court be directed to decide the Appeal within three months from today.

14. In view of the above, this Appeal is allowed. The impugned order dated 23/02/2018 is quashed and set aside. MCA No. 17/2017 stands allowed.

15. In view of the above, RCA No. 27/2003 stands restored with the following directions :-

- (a) All the litigating sides shall appear before the Appellate Court on 15/12/2018.
- (b) These petitioners shall deposit an amount of Rs.

14,000/- (Fourteen Thousand only) before the Appellate Court on or before 15/12/2018.

(c) The four respondents, who are L.Rs. of Ram Ananda, shall withdraw the said amount of costs in equal proportions without conditions.

(d) All the litigating sides shall advance their oral submissions in RCA No. 27/2003 on or before 31/12/2018. They are at liberty to enter their written notes of submissions.

(e) The Appellate Court shall decide the said Appeal as expeditiously as possible and shall deliver its judgment on or before 31/01/2019.

(f) The interim protection granted by this Court on 24/08/2018, staying the warrant of possession shall continue till 31/01/2019 or till the decision in RCA No. 27/2003, whichever is earlier.

(g) Needless to state, the Appellate Court would consider the said Appeal on its own merits.

16. The pending Civil Application does not survive and stands disposed off.

(RAVINDRA V. GHUGE, J.)

shp/-