

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

919 WRIT PETITION NO. 9632 OF 2015

MAHEBOOB PASHA SHAIKH AND OTHERS
VERSUS
ARJUN VITHAL LASKARE AND OTHERS

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Advocate for Petitioners : Mr. Mahendra B. Kolpe.

Advocate for Respondent No.1 : Mr. Vivek B. Kulkarni.

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CORAM : **V. K. JADHAV, J.**

DATE : 24th January, 2018.

ORDER:

. Being aggrieved by the order passed by the learned District Judge-1, Osmanabad about dismissal of Regular Civil Appeal and the rejection of the application filed subsequently for setting aside the order of dismissal and restoration of the appeal, the original Appellants before the lower Appellate Court / original Defendants have approached this Court by filing the present writ petition.

2 Brief facts giving rise to the present writ petition are as follows:

The Respondent / Plaintiff has instituted a suit bearing Regular Civil Suit No.297 of 2000 for possession and *mesne* profit. The Petitioners / original Defendants have resisted the said suit by filing

their written statement. After the full-fledged trial of the suit, the learned Judge of the Trial Court has partly decreed the suit with proportionate costs and directed the present Petitioners to hand over the possession to the Respondent / Plaintiff within two months from the date of the order and further directed separate inquiry in respect of the *mesne* profit. Being aggrieved by the same, the Petitioners herein preferred Regular Civil Appeal No.130 of 2007 before the District Judge, Osmanabad. However, on 13th January, 2010 when the appeal was called for hearing, the Appellants and their counsel remained absent and as such, the learned District Judge has kept the matter on 16th January, 2010 for passing of the order of DID. On 16th January, 2010, the lower Appellate Court has dismissed the appeal in default. The Petitioners thereafter, filed Miscellaneous Application No.64 of 2010 for setting aside the said order of DID and for restoration of the appeal. However, by order dated 9th January, 2014, the learned District Judge has dismissed the said application also in default.

3 The learned counsel for Petitioners submits that the Petitioners have engaged the counsel to argue the matter on their behalf before the lower Appellate Court. However, the said counsel could not remain present before the Court when the appeal was called

for hearing due to his ill-health. The Petitioners were not present in the Court as the appeal was pending before the Court for hearing. The learned counsel submits that while passing both the impugned orders, the lower Appellate Court has not given the details as to how many times the appeal and the application bearing Miscellaneous Application No.64 of 2010 called for hearing. The learned counsel submits that the Petitioners are ready to pay the costs to the Respondents. The Trial Court has decreed the suit and accordingly possession warrant has been issued against the Petitioners.

4 The learned counsel for Respondent / original Plaintiff submits that the lower Appellate Court has dismissed the appeal in default as the Petitioners and their counsel remain absent on 13th January, 2010 and 16th January, 2010 respectively. Even thereafter, the Petitioners have not prosecuted their application diligently and that application bearing Miscellaneous Application No.64 of 2010 also came to be dismissed in default. The learned counsel submits that in the year 2010 when the appeal was called for hearing, the counsel could not appear due to his ill-health. However, in the pending application bearing Miscellaneous Application No.64 of 2010 there was no reason for the Petitioners to remain absent before the Court.

5 It appears that the matter pertains to the immovable property and the Trial Court has passed the decree directing the Petitioners to hand over the possession. On perusal of the impugned order dated 16th January, 2010, it appears that the lower Appellate Court has passed the three lines order without giving details as to how many times the appeal was called for hearing. It is also not clear as to when the appeal was ready for hearing. It appears from the impugned order that the Petitioners and their counsel remained absent on 13th January, 2010 and on 16th January, 2010 and as such, the DID order came to be passed. The same is the case with Miscellaneous Application No.64 of 2010. Though it was filed in the year 2010, it was taken up for hearing on 9th January, 2014 and dismissed in default on the same day. In absence of any specific reason for such dismissal, I am inclined to allow this writ petition. However, the Petitioners are also required to be saddled with costs owing to their inaction to some extent in pursuing the appeal and Miscellaneous Application No.64 of 2010. Hence, the following order:

ORDER

- I. The writ petition is hereby allowed.

- II. The impugned order dated 16th January, 2010 passed by the District Judge-1, Osmanabad in Regular Civil Appeal No.130 of 2007 and the order dated 9th January, 2014 passed by District Judge-1, Osmanabad in Miscellaneous Application No.64 of 2010, are hereby quashed and set aside.
- III. Miscellaneous Application No.64 of 2010 is hereby allowed subject to costs of Rs.10,000/- (Rupees Ten Thousand Only) to be paid by the Petitioners to the Respondent / original Plaintiff within four weeks before the lower Appellate Court.
- IV. The lower Appellate Court shall restore Regular Civil Appeal No.130 of 2007 to its original number and after hearing both the parties dispose of the same in accordance with law.
- V. The writ petition is accordingly disposed of.

[V. K. JADHAV, J.]