

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

905 SECOND APPEAL NO.335 OF 2015
WITH CA/8116/2015 IN SA/335/2015

SONABAI NANA SIRSAT AND OTHER
VERSUS
LANKABAI MARUTI KANDEKAR

...

Advocate for Appellants : Mr. Darak B.A.
Mr. S.R. Shirsath For R/sole.

CORAM : P.R.BORA, J.

DATE : 31th July, 2018.

PER COURT :

1) Heard learned counsel appearing for the respective parties.

2) Order dated 10th June, 2015 passed by learned District Judge, Beed in MCA No.303/2013 is questioned in the present appeal. Present respondent had filed Regular Civil Suit No. 384/2011 against the present appellants seeking perpetual injunction not to disturb her possession over the suit property. The said civil suit was filed on 2nd September, 2011.

3) As is revealing from the material on record, an application for temporary injunction was also filed by the present respondent below Exhibit-5 and the same was allowed on the date of filing of the said suit itself.

4) The record further reveals that though the present appellants were duly served with the summons in the said matter and have entered their appearance through their counsel, did not file their written statement and the suit was thus proceeded without their written statement.

5) The Trial Judge after having considered the pleadings in the plaint which remained unchallenged, decreed the suit vide the judgment passed on 21.11.2011.

6) It is the case of the present appellants that at the relevant time, appellant No.2, who was looking after the litigation, was away from his native place and his old mother could not take necessary steps to file any appeal or

application against the judgment so passed by the trial court. It is the further contention that after having come to know about the decree passed in the aforesaid civil suit, the applicants filed an application under Order IX Rule 13 of CPC, however, the same came to be rejected.

7) The present appellants, therefore, filed an appeal before the District Court. Since delay of about 1 year and 5 months had occasioned in filing the appeal, an application seeking condonation of delay was preferred. Two reasons were assigned for occurrence of the delay, first that, appellant No.1 – Sonabai was aged about 75 years and was, therefore, unable to take any step against the impugned judgment and decree and the other that appellant No.2, being sugarcane harvesting labour, was not in the village at the relevant time and after he returned to his village, he came to know about the decree passed in the civil suit.

8) The learned counsel submitted that

though all these reasons are genuine and were specifically stated in the application, the learned District Judge, without considering the same, passed a cryptic order, that too in absence of the appellants and their counsel, on 10th June, 2015 thereby rejecting the application. According to the learned counsel, the first appellate court has committed procedural error/mistake in deciding the application for condonation of delay. The learned counsel invited my attention to the provisions under Order 41 Rule 3-A of CPC and also to Rules 11 and 13 thereof to urge that if at all the appeal was to be dismissed by the first appellate court, the procedure, as laid down in Rules 11 and 12, ought to have been followed by the said court. The learned counsel further submitted that in the circumstances, the second appeal preferred by the present appellants deserves to be allowed and the matter needs to be remanded to the first appellate court for its hearing and decision on merits.

9) Learned counsel appearing for the respondent has opposed the submissions made on behalf of the appellants. The learned counsel submitted that the appellants were throughout negligent in prosecuting the matter. The learned counsel bringing to my notice *Roznama* in Misc.Civil Appeal No.303/2013, submitted that even after filing of the application, the appellants were not prompt enough in prosecuting the matter. The learned counsel submitted that in such circumstances, no interference shall be caused in the impugned order. The learned counsel further submitted that though a short order is passed by the court, the reasons as are assigned are sound and, therefore, no interference is called for.

10) After having considered the submissions advanced by the learned counsel appearing for the respective parties and on perusal of the impugned order and the other material on record, it does not appear to me that any interference may be

required in the impugned order. It is apparently revealed that the appellants were throughout negligent in prosecuting the matter. In Regular Civil Suit No.384/2011 though the present appellants were duly served, did not appear in the matter and the said suit was decided exparte. The material on record further reveals that the appellants thereafter preferred Misc. Civil Application No.604/2011 for setting aside the exparte decree passed in RCS No.384/2011 on 16.12.2011. The said application was also not diligently prosecuted by the appellants. It came to be rejected on 1st August, 2012 for the reason that the appellants and their advocate remained absent and no evidence was adduced by the appellants in spite of the opportunity given there for. Thereafter the appellants filed first appeal along Misc. Civil Application No.303/2013 before the District Court. The impugned order passed by the District Court on 10.6.2015 also indicates that on 10th June, 2015, neither the appellants were present before the court nor

their counsel was present. Misc. Civil Application No.303/2013 was preferred by the appellants on 2nd April, 2013. It is discernible that the appellants were not prompt in prosecuting the said application though it was pending for more than two years before the District Court and ultimately, the District Court was required to pass the order in absence of the appellants and their counsel.

11) From the facts as above, it is evident that the appellants were throughout negligent in prosecuting their matter. For occurrence of the delay of one year and five months, the reasons, which were assigned by the appellants, are rejected by the first appellate court. The First appellate court has rejected the request of the appellants on consideration of the facts involved in the case. The view taken by the first appellate court is a possible view. Considering the record of the case and the conduct of the appellants throughout, it does not appear to me

that the view taken by the first appellate court and the finding arrived can be in any way said to be perverse. I, therefore, do not see any reason to cause any interference in the order passed by the learned District Judge. Hence, the following order, -

ORDER

. The Second Appeal is dismissed. Pending civil application, if any, stands disposed of.

(P.R.BORA)
JUDGE

bdv/