

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

WRIT PETITION No. 9526 of 2017

Minabai W/o Champalal Shinde,
age 44 years occupation agriculture and housewife
R/o at post Borgaon Taluka Amalner District Jalgaon

**...Petitioner
(Orig. plaintiff)**

VERSUS

1. Subersingh S/o Ajabsingh Patil (died)
through legal representatives:
- 1/A. Vimalbai W/o Subersingh Patil,
age 49 years occupation housewife
R/o at post Bhortake Taluka Amalner District Jalgaon.
- 1/B. Bakhatbai Ajabsingh Patil,
age 72 years occupation and R/o as above
- 1/C. Sandip S/o Subersingh Patil,
age 29 years occupation agriculture R/o as above.
- 1/D. Manoj S/o Subersingh Patil,
age 25 years occupation & R/o as above.

**...Respondents
(Original defendants)**

Mr Bipinchandra K. Patil, *Advocate for petitioner*
Mr Girish S. Rane, *Advocate for respondents.*

CORAM : SUNIL P. DESHMUKH, J.

DATE : 9th October, 2018

ORDER:

1. Heard learned counsel for the parties.
2. Petitioner is aggrieved by order passed on 18th

January 2016 dismissing miscellaneous civil appeal bearing No. 37 of 2014 in default. Learned counsel for petitioner submits that while learned counsel on behalf of petitioner has requested the court to pass appropriate order, it was under assumption it would be on merits. However, from the same, it appears that the appellate court has observed that petitioner/appellant is not interested in prosecution of the miscellaneous civil appeal. Learned counsel submits that such had not been intention of petitioner and it is not that petitioner is not interested in prosecuting the matter. He, thus, submits that petitioner may have an opportunity to deal with the miscellaneous civil appeal on merits.

3. On the other hand, learned counsel Mr Rane appearing for respondents-defendants submits that miscellaneous civil appeal had been preferred in 2014 against rejection of application for temporary injunction Exhibit – 6 at the instance of petitioner. Factually, according to instructions, since 2013 there had been temporary injunction operating against present respondents and while petitioner's counsel had requested to pass appropriate order giving indication that the petitioner had not been interested in prosecution of the appeal, order came to be passed. Learned counsel further refers to that while miscellaneous civil appeal has been dismissed in 2016, the writ

petition has been preferred in 2017 which indicates that petitioner is not seriously interested in prosecuting the litigation. He, therefore, submits that no indulgence be given to the request made under writ petition and the situation may be met with by directing the trial court to proceed with the suit.

4. After hearing learned counsel as aforesaid, it appears that whether the petitioner intended to have disposal of the matter not on merits is difficult to be appreciated in the circumstances and order is challenged and since an opportunity is being sought under writ petition, situation can be balanced by awarding certain costs to be paid to other side for lack of proper prosecution.

5. In the circumstances, impugned order is set aside. Miscellaneous civil appeal No. 37 of 2014 is restored before the District Judge-1, Amalner District Jalgaon, subject to payment of costs of Rs. 5000/- (Rs. five thousand only) to be deposited before the appellate court within a period of eight weeks from the date of receipt of writ of this order.

6. In case of failure to pay costs within stipulated time, this order in writ petition stands recalled without further reference to the Court.

7. It is expected that the appellate court should proceed with miscellaneous civil appeal expeditiously.

**(SUNIL P. DESHMUKH)
JUDGE.**

Madkar