

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

908 WRIT PETITION NO. 9732 OF 2015

GYANOBA BAMNAJI TARU
VERSUS
SMT. MUKTABAI RAM DHOTRE AND ANOTHER

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Advocate for Petitioner : Mr. Shailendra S. Gangakhedkar.
Advocate for Respondent No.1 : Mr. A. I. Deshmukh.
Advocate for Respondent No.2 : Mr. Sandeep D. Munde.

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CORAM : **V. K. JADHAV, J.**
DATE : 10th January, 2018.

ORDER:

. By filing this writ petition, the Petitioner / original Defendant No.2 has challenged the order passed by the lower Appellate Court dated 5th September, 2015 in Miscellaneous (RJE) Application No.129 of 2014 and also the order dated 30th July, 2014 passed in Miscellaneous Civil Appeal No.4 of 2012.

2 The learned counsel for Petitioner submits that Regular Civil Suit No.533 of 2009 came to be decreed by the Trial Court *ex-parte* against the present Petitioner and as such, the Petitioner has filed an application under Order IX Rule 13 of the Code of Civil Procedure before the Trial Court. The learned Judge of the Trial Court has rejected the said application bearing RJE No.4 of 2010 by order

dated 17th December, 2011. Being aggrieved by the same, the Petitioner has preferred Miscellaneous Civil Appeal No.4 of 2012 before the District Judge, Nanded. The learned Ad-hoc District Judge by order dated 30th July, 2014 dismissed the appeal bearing Miscellaneous Civil Appeal No.4 of 2012 with the observations that the Petitioner and his counsel remained absent and it appears that he is not interested in pursuing the matter. On the very next day of the said order i.e. on 31st July, 2014, the Petitioner has filed Miscellaneous (RJE) Application No.129 of 2014 for setting aside the order dated 30th July, 2014 and to re-admit the appeal bearing Miscellaneous Civil Appeal No.4 of 2012.

3 The learned counsel for Petitioner submits that the Trial Court has passed *ex-parte* decree against the Petitioner for partition and separate possession in respect of the ancestral property and the Petitioner is the real brother of the original Plaintiff. The learned counsel submits that though the application filed by the Petitioner for setting aside the *ex-parte* decree came to be rejected by the Trial Court, however, the miscellaneous civil appeal preferred against the said order, is to be heard by the District Court on merits. The learned Ad-hoc District Judge has dismissed Miscellaneous Civil Appeal No.4 of 2012 on 30th July, 2014 and on the very next day, the Petitioner has

filed Miscellaneous (RJE) Application No.129 of 2014 for setting aside the said order. Even in the earlier application Exhibit 16 on which the lower Appellate Court has passed the order dated 30th July, 2014, the Petitioner has specifically given reasons that his counsel is busy in the sessions trial and also mentioned the sessions case number in the application.

4 The learned counsel for Respondent submits that even though the miscellaneous civil appeal was ready for hearing since 9th November, 2012, under one or another pretext, the matter came to be adjourned at the behest of the Petitioner herein and thereafter, on 17th June, 2014 and 8th July, 2014, the Petitioner remained absent and even though the lower Appellate Court has given a specific warning to the Petitioner, on the day specifically fixed for hearing, again filed an application for adjournment. The learned counsel submits that the learned Ad-hoc District Judge-2, Nanded has rightly rejected the application bearing Miscellaneous (RJE) Application No.129 of 2014. No interference is required.

5 By order dated 30th July, 2014, the learned Ad-hoc District Judge has observed that the Petitioner is not interested in pursuing the matter. However, on perusal of the contents of application Exhibit 16,

it appears that the Petitioner has specifically mentioned in the application that his counsel is engaged in Sessions Trial bearing Sessions Case No.66 of 2008 and accordingly, sought an adjournment. It appears that on the very next day i.e. on 31st July, 2014, the Petitioner has filed Miscellaneous (RJE) Application No.129 of 2014 for setting aside the said order dated 30th July, 2014. The learned Ad-hoc District Judge, however, in paragraph 9 of the impugned order has incorrectly observed that the Petitioner has not mentioned the just cause for not arguing the matter on 30th July, 2014. On the other hand, in the application Exhibit 16 itself, the Petitioner has brought to the notice of the District Judge that his counsel is busy in sessions case.

6 In view of the above discussion, I deem it appropriate to give one more opportunity to the present Petitioner to argue the appeal bearing Miscellaneous Civil Appeal No.4 of 2012 before the District Judge, Nanded and the learned District Judge shall decide the said appeal on its own merits. Hence, the following order:

ORDER

- I. The writ petition is hereby allowed.
- II. Both the impugned orders dated 30th July, 2014

purportedly passed below Exhibit 16 and the order dated 5th September, 2015 in Miscellaneous (RJE) Application No.129 of 2014, are hereby quashed and set aside with the following directions:

- a) Re-admit the appeal bearing Miscellaneous Civil Appeal No.4 of 2012 to its original number.
- b) The parties shall appear before the Court on 12th February, 2018.
- c) On the day of appearance, the Petitioner shall argue the appeal and in case if the matter is adjourned at the behest of the other side or due to some other reasons, on the next date of hearing positively. The learned Judge shall dispose of the said appeal bearing Miscellaneous Civil Appeal No.4 of 2012 on its own merits.
- d) The Petitioner shall pay costs of Rs.5,000/- (Rupees Five Thousand Only) to the Respondent No.1 / Plaintiff on the day of his appearance before lower Appellate Court as aforesaid and in case the other side is not present, then to deposit the said amount before the lower Appellate Court.

- e) If the amount if so deposited, the same shall be paid to Respondent No.1 / original Plaintiff.

III. Till the appearance of Petitioner before the lower Appellate Court, the interim order passed by this Court on 7th April, 2017 would remain continued.

IV. The writ petition is accordingly disposed of.

[V. K. JADHAV, J.]

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