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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7962 OF 2013

Mahernigar A. Mulla & Ors.

...Petitioners

V/s.

Dhondiram R. Sable & Anr.

...Respondents

Mr.S.S. Patwardhan for the Petitioners.

Mr.Mahindra B. Deshmukh for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 27TH AUGUST, 2018.

P.C. :-

1. By this petition filed under Article 227 of the Constitution of India, the petitioners have impugned the order dated 24th April, 2013 passed by the learned District Judge – 1, Sangli rejecting the application below Exhibit – 1 in Civil Miscellaneous Application No.288 of 2012 filed under section 5 of the Limitation Act *inter-alia* praying for condonation of delay in filing the appeal.

2. The petitioners are the legal heirs of Ahmed Babalal Mulla.

3. Some time in the year 1998, RCS No.36 of 1998 was filed by the respondents herein against Ahmed Babalal Mulla, predecessor of the petitioners. In the said civil suit, a written statement was filed by the father of the petitioners admitting the claim of the respondents. On 28th July, 1999, the learned Civil Judge, Junior Division after

considering the written statement, passed a decree in favour of the respondents directing the father of the petitioners to execute a Deed of Re-conveyance in respect of the suit property. The respondents applied for execution of the said decree on 3rd July, 1999 on 2nd December, 1999.

4. It is the case of the respondents that the application for execution of the decree was served upon the father of the petitioners. He did not appear in the said execution proceedings. Some time in year 2002, the predecessor of the petitioners expired. An application was thereafter served upon the petitioners by the Executing Court. On 3rd December, 2008 the petitioners applied for setting aside the said decree passed by the learned trial Judge. The said application was rejected by the trial Court. The petitioners filed a Writ Petition No.9238 of 2001 in this Court. By an order dated 30th July, 2012 passed by this Court, the said writ petition was allowed to be withdrawn in view of the statement made by the petitioners that they seek to pursue such remedy as is permissible in law for setting aside the decree in question.

5. The petitioners thereafter filed Miscellaneous Civil Application No.288 of 2012 *inter-alia* praying for setting aside the decree passed by the learned trial Court and applied for condonation of delay in filing the application (Exhibit-1). The said application was

resisted by the decree-holder. By an order dated 24th April, 2013, passed by the learned District Judge – 1, the said application for condonation of delay came to be rejected by recording reasons.

6. Mr. Patwardhan, learned counsel appearing for the petitioners invited my attention to various documents annexed to the writ petition and would submit that the original plaintiffs had obtained a decree fraudulently against the predecessor in title of the petitioners. The predecessor in title of the petitioners had not given any consent for passing any decree in favour of the original plaintiffs. He submits that the father of the petitioners was not served with any notice of execution application filed by the original plaintiffs. He invited my attention to some of the observations made by the learned District Judge in the impugned order dealing with evidence of the process server. He submits that the process server admitted in the cross-examination that he had not met the father of the petitioners when he made an attempt to serve the notice on 7th July, 2000.

7. It is submitted by the learned counsel that the petitioners had inadvertently filed the writ petition in this Court instead of filing civil miscellaneous application before the learned District Court and thus the learned District Judge ought to have condoned the delay. It is submitted by the learned counsel that in fact the said application was not under section 5 of the Limitation Act, 1963 but was under

section 14 of the Limitation Act, 1963 on the ground that the petitioners were prosecuting the writ petition in good faith and with due diligence.

8. A perusal of the decree dated 28th July, 1999, passed by the learned Civil Judge, Junior Division indicates that the said decree was passed after hearing the plaintiffs and the learned advocate for the defendant Ahmed through whom the petitioners are claiming rights. The learned trial Court had considered the written statement in which the predecessor of the petitioners had admitted the claim of the original plaintiffs.

9. Learned District Judge has considered the oral evidence of the witnesses including the evidence of the process server who had admitted that the notice was sought to be served upon Ahmed on 7th July, 2000. Since he had refused to accept the service, notice was served upon the said son of Ahmed Mulla. On 3rd November, 2001, again the notice was served. Though he did not meet Ahmed, the notice was pasted on the conspicuous part of the house of Ahmed under Order V Rule 17 of the Code of Civil Procedure, 1908.

10. Learned District Judge in the impugned order has considered all these aspects in great detail. Learned District Judge has also held that the son of the deceased Ahmed whose name was mentioned by the bailiff / process server was not examined as a

witness to prove that he was not served with any notice by the bailiff / process server.

11. Though the learned counsel for the petitioners has contended that the written statement was a collusive written statement and the learned advocate who had appeared for the original defendants, could not have filed the said written statement, learned advocate was not examined as a witness before the District Court.

12. Insofar as the submission of the learned counsel for the petitioners that the application before the learned District Judge (Exhibit – 1) was not under section 5 of the Limitation Act is concerned, a perusal of the said application as well as the order passed by the learned District Judge clearly indicates that the application was filed for condonation of delay under section 5 of the Limitation Act and not under section 14 of the Limitation Act.

13. Be that as it may, in the impugned order passed on 30th July, 2012 in the Writ Petition No.9328 of 2011, the petitioners did not seek any protection under section 14 of the Limitation Act and simplicitor withdrew the said writ petition with liberty to avail the remedy as is permissible in law. I am not inclined to accept the submission of the learned counsel for the petitioners that the application below Exhibit – 1 was under section 14 of the Limitation Act. Be that as it may, this Court while permitting the petitioners to

withdraw the said writ petition did not give any such benefit under section 14 of the Limitation Act.

14. The impugned order passed by the learned District Judge on 24th April, 2013 is a reasoned order and is passed after considering the oral and documentary evidence. The petitioners could not explain the delay of more than 12 years in filing the application for setting aside the decree passed by the learned trial Judge. No infirmity can be found in the impugned order passed by the learned District Judge. The petition is devoid of merit and is accordingly dismissed. There shall be no order as to costs.

(R.D. DHANUKA, J.)