

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 SECOND APPEAL NO.163 OF 2019
WITH
CA/3686/2019 IN SA/163/2019

Sushil s/o Shirish Ostwal,
Age 40 years, Occupation Business,
R/o Near State Bank, Savedi,
Ahmednagar.

Tq. and Dist. Ahmednagar.

..Appellant.

VERSUS

1. Lachmandas s/o Bansilal Rathod
(Died Thr. LRs. 2 to 4)
- 1-A. Shivshankar s/o Lachmandas Rathod,
Age 74 years, Occupation Business,
R/o 2993, Gank Bazzar, Ahmednagar,
Tq. Dist. Ahmednagar.
- 1-B. Raghuveer s/o Lachmandas Rathod,
Age 64 years, Occupation Business,
R/o 103-3555, Nehrunagar,
Kurla (East) Mumbai.
- 1-C. Ramesh s/o Lachmandas Rathod,
Age 62 years, Occupation Business,
R/o. 105, Jidnesh Jyoth, Joshiwadi,
Tatya Lane, Ilaknagar, Dombivali
(East), Mumbai.
2. Suratsingh Chandanmal Ostwal
(Died Thr. LRs.)
- 2-A. Hirabai Suratsingh Ostwal (Died)
- 2-B. Shashindrakumar or Shailendra
Suratsingh Ostwal (Died. Thr.LRs.)

- 2-B-I. Lalita w/o Shashindrakumar Ostwal (Died).
- 2-B-II. Sushant s/o Shashindrakumar Ostwal, Age 30 years, Occupation Business, R/o "Suratsingh Oswal Bhavan", In front of State Bank of India Savedi Branch, Nagar – Manmad Road, Savedi, Ahmednagar.
- 2-B-III. Sushant s/o Shashindrakumar Ostwal, Age 30 years, Occupation Business, R/o As above.
- 2-C. Sanjay Suratsingh Ostwal (Died. Thr.LRs.)
- 2-C-I. Vina wd/o Sanjay Ostwal, Age 51 years, Occupation Household,
- 2-C-II. Sanjana d/o Sanjay Ostwal, Age 24 years, Occupation Student,
- 2-C-III. Snehal w/o Ashish Khabia, Age 26 years, Occupation Household,
- All R/o Old Labour Court, Near State Bank Savedi, Ahmednagar.
- 2-D. Satish s/o Suratsingh Ostwal, Age 54 years, occupation Business, R/o Agricultural Market Produce Committee, Market Yard, Gulteakdi, Pune.
- 2-E. Sharad s/o Suratsingh Ostwal, Age 56 years, Occupation Business, R/o Agricultural Market Produce Committee, Market Yard, Gulteakdi, Pune.

- 2-F. Sunil s/o Suratsingh Ostwal,
Age 52 years, occupation Business,
R/o "Suratsingh Oswal Bhavan",
In front of State Bank of India
Savedi Branch Nagar – Manmad
Road, Savedi, Ahmednagar.
- 2-G. Suresh s/o Suratsingh Ostwal,
Age 57 years, Occupation Business,
R/o as above.
- 2-H. Saroj Manojkumar Bora,
Age 51 years, occupation Business,
R/o as above.
- 2-I. Sunanda w/o Shirish Ostwal,
Age 40 years, occupation Business,
R/o Near State Bank, Savedi,
Ahmednagar, Tq.Dist.Ahmednagar.
3. Sushila Chandrasen Rathod,
Age 84 years, Occupation Household,
R/o Rathod Chouk, Raypur (Chhatisgad).
4. Sulochana Ramchandra Rathod,
Age 90 years, Occupation Household,
R/o Chhaya Talkiers, Tophkhana,
Ahmednagar Tq.Dist.Ahmednagar.
5. Usha Rameshlal Pardesi,
Age 70 years, Occupation Household,
R/o Ramchandra Khunt, Ahmednagar
Tq. Dist. Ahmednagar.
6. Manakchand Bansil Rathod,
Age 70 years, Occupation Household,
R/o Sarjapura, 5, Misal Lane, No.6,
Daware Lane, Ahmednagar
Tq. Dist. Ahmednagar.

7. Ramchandra Bansilal Rathod,
Age 60 years, Occupation Household,
R/o as above.
8. Beckchand Bansilal Rathod (Died Thr.L.Rs.)
- 8-A. Kasturabai Beckchand Rathod,
Age 70 years, Occupation Household,
R/o as above.

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Advocate for Appellant : Mr. Gandhi Amol S.
Advocate for Respondent No.1A to 1C : Ms. Anjali Bajpai - Dube
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 12-03-2019.

ORAL ORDER :

1. At the outset the learned counsel representing appellant Mr. A. S. Gandhi has made a statement that, the present appellant had deleted the names of legal representatives of respondent No.2 before the learned lower Appellate Court.
2. Under such circumstance, no necessity to issue notices to them.
3. Issue notice to legal representatives of respondent No.1.
4. Learned advocate Ms. Anjali Bajpai – Dube waives notices for respondents No.1A to 1C.
5. Heard learned advocate appearing for the appellant as well as

the respondents No.1A to 1C. It appears that, the matter has a very chequered history. Taking into consideration the scope of this second appeal I do not find that, that chequered history is required to be reproduced here. But only the fact can be mentioned that, the suit for redemption of mortgage was filed in the year 1968 in respect of the mortgage deed which was executed on 08-11-1924. It can be seen from the documents those have been produced on record as well as the submissions by the learned advocates that, apart from the learned trial Court, First Appellate Court, then the executing Court, again First Appellate Court, up to the Apex Court the matter has travelled up and down. Now as regards the present second appeal is concerned it is only required to be seen as to what right appellant intended to canvass. Present appellant was the applicant / objection petitioner in Execution Petition No.216 of 1982 who had filed application at Exhibit 347. After giving the history the objection in respect of maintainability of the execution proceedings was filed, the objections were allowed by order dated 15-07-1988 and it was held that the execution proceedings is not maintainable. That was challenged before this Court in Civil Revision Application No. 57 of 1989 (Old No.527 of 1988), the said civil revision application was allowed. It has been stated that, in the said civil

revision application the present respondents No.1 to 4, the judgment debtors had deleted the names of respondents No.5A and 5B against whom the decree was passed when the appeal came to be allowed by the First Appellate Court wherein the Judgment and decree of dismissal of the suit was challenged. It has been stated that, with ill intention and with some ulterior motive the decree holders had not added him as legal representative of Shirish Ostwal. Though they were having knowledge about the fact that, he possess the premises i.e. the premises in which hotel Dhanesh is being run. According to him since he was a party to the civil revision application, the said order is not binding on him. He was not made as a party as legal heir of Shirish Ostwal and therefore he is not bound to hand over the possession of the suit property. He therefore, placed his claim as per Order XXI of Rule 97 and 98 of the Code of Civil Procedure and also prayed that the execution petition be dismissed for non-joinder of necessary party.

6. The decree holders filed their say at Exhibit 349 and it was contended that widow of Shirish was taken on record in the civil revision application but she never appeared and filed her say. In the execution proceedings also she was made as a party but she has not

appeared. It is stated that, the city survey extract does not bear the name of any legal heir of deceased Shirish and further it is stated that as per the city survey record by way of release deed and partition deed name of Shashindrakumar, Satish, Sharad, Sanjay and Suresh were brought on record. It is stated that, Suresh executed gift deed in favour of Shashindrakumar and therefore name of Suresh was deleted. So also the Shop Act license of the hotel does not show the name of any legal heir of deceased Shirish. It was specifically stated that, the objection has been filed only at the instance of other judgment debtors just to prolong the matter and keep the executing party away from the fruits of the decree that was passed in 1974.

7. After hearing both sides, the learned executing Court, that is 3rd Jt. Civil Judge, Senior Division, Ahmednagar rejected the said application on 06-12-2017.

8. Present appellant then intended to prefer first appeal, and therefore approached the District Court, Ahmednagar on 03-11-2018. However, there was a delay of 302 days in preferring the said appeal, and therefore he filed civil delay Miscellaneous Application No.21 of 2019. It was heard by learned District Judge-10,

Ahmednagar and after hearing both the sides, the said application has been rejected. Now the present appellant intends to challenge the said order refusing to condone the delay by learned District Judge – 10, Ahmednagar dated 13-02-2019 in this second appeal.

9. Learned advocate appearing for the appellant has taken me through the history of the litigation and made submissions as to how he was not brought on record in civil revision application and other heirs were deleted. He harped upon the fact that, it was a duty of the Judgment debtor to bring him on record though in their say the other heirs had specifically stated that the appellant is possessing the suit property. He also pointed out the fact that, possession warrant was issued by the learned executing Court on 28-09-2018 and in pursuant to the same the the bailiff had gone to the spot with panchas and even in the panchanama it was specifically stated that, present appellant was present and he claimed that he is in possession of the property and he will not hand over the possession. Thereafter, the possession warrant was returned without executing it. Thereafter, another application for granting police aid for execution of the possession warrant was filed by the decree holder and the said application came to be allowed on 18-12-2018. In the

meantime the present appellant had also filed Writ Petition No.111 of 2019 before this Court challenging the issuance of said possession warrant. The said writ petition came to be dismissed on 04-01-2019 with specific directions that the petitioner i.e. present appellant should deposit some of Rs.10 Lakhs with the executing Court to show his bonafides and then pursue to have his own remedies. According to the appellant he has deposited the said amount and then he pursued his application before the First Appellant Court. According to the learned advocate for the appellant since the appellant was not brought on record as legal representative and the suit property is in his possession, his vital rights are involved and therefore he ought to have been given an opportunity by the learned executing Court to raise his objections, show his rights, and therefore, the substantial questions of law are involved in this case.

10. Per contra, the learned advocate for legal representatives of respondent No.1 has taken me through the affidavit-in-reply and also some other orders those were passed by this Court in civil revision application, writ petitions that was earlier filed by another legal heirs, relinquishment/ release deed, property extract, shop act license etc. It has been submitted on behalf of the respondents

that, both the Courts below have taken a correct decision. The present appellant had the knowledge about the proceedings which were going on. The points which have been confirmed up to the Hon'ble Supreme Court have been tried to be raised again and again. Under such circumstance, no rights can be said to have accrued to the appellant. Further there was no sufficient and satisfactory explanation for the delay of 302 days when it may appear that simultaneously the present appellant was pursuing his remedy with this Court in the writ petition.

11. The first and the foremost fact that is required to be noted is that, the scope of this second appeal is limited, therefore we cannot go into the merits of the case. However, only relevant fact can be taken note of. When this suit or proceeding has chequered history, it is hard to believe that present appellant was unaware about the proceedings. He claims that, he was not brought on record in civil revision application. It is to be noted that, the said civil revision application was decided on 21st June 2007, wherein it was held that the execution petition is maintainable. Therefore, even if for the sake of arguments it is accepted for a moment that, he was not brought on record in civil revision application yet he had the

knowledge about the decision of this Court in civil revision application in 2007 itself. There was no attempt on his part to appear *suo motu* and at a very belated stage it appears that he has tried to invoke Order XXI Rule 97 or 98 of Code of Civil Procedure. Another important point to be noted is that, he has not given any date when he come in possession of the property in his application Exhibit 347. That would have more clarify as to since when he is trying to canvass his rights. It will not be out of place to mention here that, Writ Petition No.6752 of 2012 was filed by Shashindrakumar Ostwal, Writ Petition No.11344 of 2017 was filed by the Sharad Ostwal, under such circumstance it appears that, one after another the legal representatives of Suratsingh have taken the endeavour to prolong the matter. Present appellant has not come with a case that, he is having any cross terms with his uncles. Therefore, his own knowledge about pendency of the proceeding was itself not clarified by him.

12. Now it is to be noted that, his application under Order XXI Rule 97 and 98 of Code of Civil Procedure came to be rejected on 06-12-2017, however he has filed the first appeal with delay condonation application only on 03-11-2018. In order to explain the said delay

of 302 days, the applicant has contended that, after his application was rejected by the executing Court, his advocate had advised him not to file appeal and this is the only ground on which delay was sought to be condoned. In fact if he was advised not to prefer any appeal then even at a subsequent stage why he has filed itself a question. Then another question crops up as who subsequently advised him to prefer an appeal at least after delay of 302 days. Under such circumstance the said reasons that he was earlier advised not to file a appeal and now he is filing appeal after 302 days, cannot be said to be a satisfactory and reasonable explanation as contemplated under Section 5 of the Limitation Act. In order to get the delay condoned, the applicant is not only require to give a good and reasonable explanation but it should be satisfactory also. Just blaming the advocate without naming him that he had given him wrong advise rather it proves to be a wrong advise later on, it cannot be said to be a sufficient ground to condone the delay. Another fact that is also required to be considered is that, in the meantime the present appellant had challenged the possession warrant before this Court in Writ Petition No.111 of 2019. One more fact that is required to be stated is that, though the application for condonation of delay was preferred on 03-11-2018, it appears that,

it was intentionally or for some other reason kept under office objection and the same came to be registered only on 14-01-2019 before the First Appellate Court. Even in that application he could have preferred application for stay to the proceedings of the possession warrant, however instead doing that, he preferred the above said writ petition. The said writ petition has been dismissed by this Court on 04-01-2019 and then again he has pursued the said application for condonation of delay before the First Appellate Court. That means, as per the convenience of the appellant, he has tried to shuffle the forums and see that the matter is protracted. There is no substantial question of law involved in this second appeal, hence it is **not admitted**, and for adopting such kind of tactics cost of Rs.5,000/- is imposed.

13. The appellant to deposit cost of Rs.5,000/- (Five thousand) within 15 days in this Court and after the deposit of the cost, it be given to the legal representatives of respondent No.1. Appeal is disposed of accordingly. Civil Application No.3686 of 2019 also stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.