

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

WRIT PETITION NO.3788 OF 2018

**KALYAN SHIVAJI THORAT AND ANOTHER
VERSUS
KACHARU MAHADU KHUDE THROUGH LRS ASHOK
KACHARU KHUDE AND OTHERS**

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Advocate for the Petitioners : Smt. P. V. Langhe
Advocate for the Respondents : Shri V. B. Garud

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 08th JANUARY, 2019.

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PER COURT :

1. When this Court (Coram : V. L. Achliya, J.) heard the petitioners on 13/04/2018, the following order was passed :-

"1. Perused the impugned order dated 16/03/2018. It is the contention of the petitioners that in compliance of the order dated 11/01/2011, cost was paid to the respondent – plaintiff. In spite of the compliance of the order, ministerial staff of the District Court, Aurangabad has not taken necessary steps to list the Appeal on board. The respondent – plaintiff though aware, the cost was deposited. The fact was suppressed from the Court which leads to passing of order dated 02/12/2016 rejecting the application.

2. *Learned counsel for the petitioners submits that pursuant to the order passed, wherein this Court has specifically observed that the order of payment of cost was duly complied and remanded the matter to decide the same afresh. The appellate authority has rejected the application seeking restoration of Appeal.*

3. *On perusal of the order, I am of the view that case is made out to entertain the petition. Hence, the following order is passed.*

ORDER

[i] Issue notice to the respondents, making it returnable on 13/06/2018. The petitioners are permitted to serve the respondents by all other modes of service including speed post in addition to the service through process of Court and submit affidavit of service.

2.

4. *Stand over to 13/06/2018."*

2. On 15/06/2018, this Court (Coram : Sunil P. Deshmukh, J.) has passed the following order and has granted interim relief to the petitioners :-

"1. *Not on board. Mentioned. Taken on board at the request of learned counsel for petitioners.*

2. *Learned counsel submits that under an inadvertent error, while the court had appreciated that*

writ petition is worth consideration and had issued notice on 13-04-2018, along with the same, had also passed order of interim relief. However, it appears that portion regarding interim relief had remained to be incorporated in the order and the same could be realized only on re-opening of the court after summer vacation of 2018. .

3. It is being urged, interim relief be granted, stating that grave urgency has cropped up since execution proceedings have reached to the stage of issuance of possession warrant.

4. Learned counsel further refers to that service by private notice has been effect on the respondents and yet they have not caused appearance on the due date.

5. In view of aforesaid, there shall be ad-interim relief in terms of prayer clause (D) till next date.

6. Stand over to 16-07-2018."

3. In view of the above, I have perused the impugned order dated 16/03/2018 passed by the District Judge- 12, Aurangabad, (Shri H. K. Bhalerao) by which, MARJI No. 4/2015 has been rejected.

4. A serious grievance has been made by the petitioners

that the impugned order is in fact copied and pasted by the learned Judge to the extent of almost 50 % of the earlier order. I have, therefore, personally verified the contents of the impugned order with the contents of the earlier order passed by the said learned Civil Judge dated 02/12/2016 which was set aside by this Court (Coram : Nitin W. Sambre, J.) vide order dated 27/11/2017 in the Writ Petition No. 12515/2016.

5. I find that the concerned Judge has copied and pasted first four paragraphs from the earlier order dated 02/12/2016 by re-numbering them in the impugned order.

6. *Insofar* as the merits of the matter are concerned, the legal heirs of Shivaji, who is the original defendant, had preferred MARJI No. 77/2010 praying for the restoration of Misc. Civil Appeal No. 93/2006 which they had filed for seeking quashing of the ex-parte judgment dated 18/12/1990 delivered by the Trial Court in Special Civil Suit No. 250/1989. The said MCA was dismissed in default on 19/01/2010. The Appellate Court allowed MARJI No. 77/2010 by order dated 11/01/2011 by imposing costs of Rs. 1,000/- and restored

MCA No.93/2006. As the costs were not deposited within time, the MCA No.93/2006 was not restored.

7. These petitioners then filed MARJI No. 4/2015 seeking restoration of the order dated 11/01/2011, by which, MARJI No. 77/2010 was allowed and MCA No.93/2006 was restored. MARJI No. 4/2015 was rejected by the order dated 02/12/2016. This Court, by order dated 27/11/2017 restored MARJI No. 4/2015 and transferred the amount of Rs. 50,000/- deposited by the petitioners in this Court, to the learned District Judge, Aurangabad. By the impugned order, MARJI No. 4/2015 has been once again rejected.

8. I have considered the strenuous submissions of the litigating sides. Shri Garud, learned Advocate vehemently submits that this petition deserves to be dismissed with costs considering the gross conduct of the petitioners and the deceased Shivaji. The endeavor of the petitioners is to have the 1989 suit restored after 30 years, when practically one generation of the litigating sides has been succeeded by the next generation.

9. It is obvious that the conduct of Shivaji and these petitioners cannot be countenanced. At every stage, they have faltered in litigation. They have acted negligently and their MARJI proceeding filed in 1993, the MCA filed in 2006 and further MARJI of 2010 have been rejected/dismissed in default on account of their conduct. Nevertheless, under the order of this Court (Coram : T. V. Nalawade, J.) dated 19/12/2016 and 23/12/2016 in Writ Petition No. 12515/2016, these petitioners have deposited Rs. 50,000/- in this Court. By order dated 27/11/2017, this Writ Petition was allowed and the amount was transferred to the District Court, Aurangabad. The Darkhast proceeding was also stayed by way of interim relief.

10. I find that when this Court (Coram : Nitin W. Sambre, J.) concluded that the costs of Rs. 1,000/-, though were deposited belatedly by these petitioners, was accepted by the respondents, the First Appellate Court should have restored MCA No.93/2006. This Court has considered the element of acquiescence on the part of the respondents in accepting the costs and, therefore, concluded that the order of the Appellate

Court dated 11/01/2011 was practically implemented.

11. In my view, the Appellate Court should have considered the above aspect and once it is noted that the respondents have acquiesced their objection of non-depositing of the costs, by accepting the costs, MARJI No. 4/2015 should have been allowed and more so by keeping in view that these petitioners were sufficiently penalized by this Court with the direction to deposit an amount of Rs. 50,000/-.

12. It also cannot be ignored, notwithstanding the negligent conduct of these petitioners, that an immovable agricultural land admeasuring 3 Acres is the suit property. These petitioners who derive their rights from deceased Shivaji, who is the original defendant, are in possession of the said land. They would be rendered remediless and would have to part with the said agricultural land.

13. In view of the above, this petition is partly allowed. The order dated 16/03/2018 is quashed and set aside and MARJI No.4/2015 is allowed subject to the petitioners re-depositing

the amount of Rs.50,000/- before the Appellate Court within FOUR WEEKS from today on or before 08/02/2019, if the said amount has been withdrawn from the First Appellate Court by these petitioners.

14. The litigating sides would appear before the First Appellate Court on 08/02/2019 and these petitioners would deposit amount of Rs. 50,000/-. There shall be no extension of time even by a day. The respondents, who are the L.Rs. of the original plaintiff Kachru, shall withdraw the said amount in equal proportions from the District Court as costs and without conditions, subject to proper identification through the learned Advocate and the procedure to be followed for withdrawal of amounts. If the above stated amount is not deposited on or before 08/02/2019, this order would stand recalled, this petition shall stand dismissed and the order of the Appellate Court dated 16/03/2018 shall then stand restored.

15. Since the Misc. Civil Appeal No. 93/2006 was restored by the order dated 11/01/2011, the passing of this order in this petition shall revive the order dated 11/01/2011 and the

MCA shall stand restored. The statement of these petitioners is recorded that they would advance their final submissions on the Misc. Civil Appeal No. 93/2006 within EIGHT WEEKS from the date of appearance. The Appellate Court shall decide MCA No. 93/2006 as expeditiously as possible and in any case on or before 30/06/2019.

16. It is made clear that if these petitioners prolong the hearing before the Appellate Court and choose to remain absent, the said Court would be at liberty to pass an appropriate order.

17. Needless to state, the protection granted by this Court to the extent of staying Regular Darkhast No. 5/2015 would continue till the decision in MCA No. 93/2006 and would be subject to the result of the said proceeding.

(RAVINDRA V. GHUGE, J.)

shp/-