

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

**CIVIL APPLICATION NO.10025 OF 2017
IN
SECOND APPEAL NO.153 OF 1994**

TRYAMBAK S/O DEVILAL JAYASWAL AND OTHERS
VERSUS
ALKA JAGANNATH KHAIRNAR AND ANOTHER

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Advocate for Applicants : Miss A.S. Jadhav h/f Mr P R
Katneshwarkar

Advocate for Respondents 1 : Mr Pradeep R. Patil

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CORAM : V.K. JADHAV, J.

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Reserved on : February 08, 2019
Pronounced on : February 18, 2019

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PER COURT :-

1. This Civil Application has been filed by the original respondents (original defendants) in Second Appeal No.153 of 1994 for recalling the ex-parte judgment and order in the aforesaid Second Appeal dated 5.6.2017 and further to re-hear the said second appeal.

2. The learned counsel for the applicants submits that, after receipt of the notice of the said second appeal, applicant nos. 1, 2 and 3 have given the Vakalatnama to Advocate Shri K.U.Nikam. The vakalatnama has been given

to Shri K.U Nikam for the reason that he had conducted the case in the District Court on their behalf and the applicants have a full faith in him. However, Advocate Shri K.U.Nikam did not practice in the High Court and, therefore, he has handed over the said vakalatnama to Advocate Shri Abhijit Subhash Joshi alongwith Advocate Shri H.H. Padalkar. This Vakalatnama came to be filed in High Court on 8.8.2013 in the aforesaid second appeal. The applicants, however, remained under the impression that Advocate Shri K.U.Nikam is looking after their matter. They could not get any communication from Advocate Shri Nikam for a long time. On some occasion when the applicants had been to Aurangabad from Kannad, they met Advocate Mr. Nikam and Advocate Shri Nikam informed to them that it is an admitted appeal and it will take some time for final hearing. However, somewhere in May 2017 Advocate Mr. K.U. Nikam died. On 6th or 7th June of 2017 the respondent/original plaintiff Alka Khairnar had distributed the sweet in the locality at Kannad by declaring that she won the matter in the High Court. The applicants, therefore, immediately approached to Advocate Shri Nikam for enquiry, however, they found that Advocate Mr. Nikam died in May, 2017. Thus, with the help of the

clerk of the said Advocate Shri Nikam, they had taken search as to what happened in the matter. They found that vakalatnama of one Advocate Mr. Joshi and H.H.Padalkar came to be submitted in the said second appeal, however, their names did not appear in the judgment. On further enquiry, it has been revealed that Advocate Mr. Abhijit Joshi had already left Aurangabad four years back and he is in service in Pune. However, while leaving Aurangabad permanently, Advocate Shri Joshi had entrusted the matter to Advocate Mr.H.H. Padalkar. On making enquiry with Advocate Shri Padalkar, he had informed to the applicants that his name was not shown in the matter and mistakenly the name of **Advocate Mr. Palodkar** was shown. Thus, he could not attend the matter. In consequence of which the second appeal was decided ex-parte. Learned counsel submits that, the matter relates to an immovable property pending since 1994 till 2017. The Lower Appellate Court has set aside the judgment of the trial court. The applicants were not given hearing in the matter due to mistake pertaining to the name of the Advocate. Learned counsel submits that, even said Advocate Abhijit Joshi has also filed his affidavit pointing out therein that on 1.9.2013 he was

appointed as a Law Officer in 'Magnum Opus I.T. Consulting Pvt. Ltd.' Pune and since then he is residing at Pune. He left practicing Bench at Aurangabad in the year 2013 itself.

3. Learned counsel for respondent no.1 however has strongly resisted the application. He submits that, second appeal was pending since 1994. The parties and their counsel remained absent when the matter was called out for final hearing. It is difficult to believe that for years together the applicants did not meet their Advocate and finally they have carried out all these exercise after disposal of the aforesaid second appeal. This Court has decided the appeal on merits by assigning the reasons. Thus, there is no substance in this application. The application is liable to be rejected.

4. In view of the submissions made above by the learned counsel on behalf of the applicants, I have just called upon the office to place on record the copies of daily board of the relevant dates of the aforesaid second appeal no.153 of 1994. On careful perusal of the same, I find that the name of Advocate representing the present applicants/original defendants have been shown as “**Advocate Shri Palodkar**”

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instead “**Advocate Shri Padalkar**”. It is also necessary to mention here that Advocate Shri Palodkar is also a practicing Advocate in the High Court since many years. I have not only perused the daily board of the dates on which the second appeal was finally heard, but, even before that whenever said second appeal was listed on board for final hearing on daily board, erroneously name of Advocate Mr. **Palodkar** was shown instead of name of Advocate Mr. **Padalkar**. In view of the above, I find much substance in the submissions made on behalf of the applicants. In Second Appeal, parties presence is hardly required. It is also obvious that the applicants have handed over the vakalatnama to the counsel representing them in the District Court for the reason that the said appeal filed by the applicants came to be allowed by setting aside the judgment and decree passed by the Trial Court. The applicants are not at fault. They should get an opportunity of hearing. Even, it is also difficult to fix a responsibility on any of the employees of the High Court for the reason that there is some similarity in the name of Advocate Mr. Padalkar and Advocate Mr. Palodkar. Thus, considering the entire aspect of the case, I am inclined to allow this Civil Application. The judgment

and order dated 5.6.2017 is hereby recalled. Second Appeal No.153 of 1994 is hereby restored to its original position. Second Appeal No.153 of 1994 shall be placed before the appropriate Court as per the present assignment. Civil Application is accordingly disposed off.

(V.K. JADHAV, J.)

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