

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

933 WRIT PETITION NO. 11335 OF 2018

SAYYAD NOOR SAYYAD SANDU MUSALMAN
VERSUS
SK. MAJID SK. USMAN MUSALMAN DECEASED THOROUGH LRS
ISMAIL SK. AJIT MUSALMAN AND OTHERS

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Advocate for Petitioners : Mr. Munde Santosh V.
Advocate for Respondent Nos. 2 to 4, 7 & 9 to 13 : Mr. G. R. Sayed.

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CORAM : V. K. JADHAV, J.
DATED : 12th December, 2019

PER COURT:-

1. This Writ Petition has been preferred by the original defendant. One Jainabee Shaikh Musalman had instituted Regular Civil Suit No. 75 of 1999 for declaration, possession and mesne profit against the present petitioner/original defendant and the trial court, by judgment an decree dated 22.12.2000 decreed the said suit exparte. However, Jainabee Shaikh Musalman/original plaintiff died afterwards. The petitioner/original defendant filed Civil Misc. Application No. 14 of 2002 against the legal heirs of Jainabee Shaikh Musalman under Order IX rule (13) of CPC for setting aside the exparte judgment and decree passed by the trial court. By order dated 16.08.2006, learned Civil Judge, Junior

Division, Pachora dismissed the said application in default. Consequently, the petitioner/original defendant filed an application bearing Civil Misc. Application No. 5 of 2007 for setting aside the order of dismissal in default along with an application for condonation of delay of 5 months and 23 days caused in filing the said application. By order dated 11.02.2009 below Exhibit 1 in Civil Misc. Application No. 5 of 2007, the Civil Judge, Junior Division, Pachora rejected the application. Being aggrieved by the same, the petitioner/original defendant filed Misc. Civil Appeal No. 25 of 2009 before District Court, Jalgaon and the District Judge-2, Jalgaon, by judgment and order dated 02.07.2018 in Misc. Civil Appeal No. 25 of 2009, dismissed the appeal. Hence this Writ petition.

2. Learned counsel for the petitioner/original defendant submits that the petitioner had been to Surat to earn his livelihood and since there was flood on account of heavy rains and since he was also suffering from spondylosis, he could not communicate about change in his address to his counsel representing him in the said suit. In view of the same, as there was no communication between the petitioner and his counsel, the said delay has been

occurred. The said delay is not intentional one. The suit pertains to the immovable property and the original decree has been passed *exparte*.

3. Learned counsel for the respondents submits that the petitioner/original defendant has not explained the delay satisfactorily. There is inaction on the part of the petitioner to pursue the application bearing Civil Misc. Application No. 14 of 2002 and thereafter, delay has been caused in filing the application for setting aside the dismissal of the said application bearing Civil Misc. Application No. 5 of 2007. Learned counsel submits that no case is made out to condone the delay. Both the courts below have rightly rejected the application filed by the petitioner herein. There is no substance in the Writ petition. The Writ Petition is liable to be dismissed. In the alternate, learned counsel submits that by order dated 11.10.2018, for entertaining this petition, this Court has directed the petitioner to deposit an amount of Rs.25,000/-. As an alternate argument, learned counsel submits that delay may be condoned on costs of Rs.25,000/-. Learned counsel submits that in the event this Court allows the Writ petition on costs, respondent no.2, on behalf of all the respondents, may be permitted to

withdraw the said amount deposited before this Court. Learned counsel submits that even the consent by other respondents would be filed to that effect, if so needed.

4. On going through the contents of this Writ Petition and on perusal of the annexures, it appears that the judgment and decree passed in Regular Civil Suit No. 75 of 1999 is almost an exparte decree. The dispute pertains to the agricultural land. It is the case of the petitioner that he had been to Surat to earn his livelihood and due to change in his address on account of flood and also due to his illness, he could not communicate with his counsel. However, the petitioner is responsible for the delay and because of his inaction, the earlier application bearing Civil Misc. Application No. 14 of 2002 could not be prosecuted diligently. However, considering the entire aspect of the case, I am inclined to allow this Writ petition with costs of Rs.25,000/- which is already deposited before this Court by the petitioner. Hence I proceed to pass the following order:

ORDER

I. The Writ Petition is hereby allowed.

II. The order dated 11.02.2009 passed in Civil Misc. Application No. 5 of 2007 by the Civil Judge, Junior Division, Pachora and the judgment and order dated 02.07.2018 passed in Misc. Civil Appeal No. 25 of 2009 by District Judge-2, Jalgaon are hereby quashed and set aside.

III. The application bearing Civil Misc. Application No. 5 of 2007 is hereby allowed on costs of Rs.25,000/- to be paid by the petitioner to the respondents. The delay of 5 months and 23 days caused in filing Civil Misc. Application No. 5 of 2007 is hereby condoned and the order dated 16.08.2006 passed below Exhibit 1 in Civil Misc. Application No. 14 of 2002 is hereby quashed and set aside.

IV. Since the said costs of Rs.25,000/- is already deposited by the petitioner before this Court, as suggested by learned counsel for the respondents, the cheque of the said amount shall be issued in the name of respondent no.2 after verifying the consent given by the other respondents in favour of respondent no.2.

V. The trial court shall decide the application bearing Civil Misc. Application No. 14 of 2002 on its own merits within a period of three months from today.

VI. The Writ Petition is accordingly disposed off.

(V. K. JADHAV, J.)

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