

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

**42 CIVIL APPLICATION NO.12062 OF 2019
IN FA/2948/2018**

VINAYAK SUKHDEO DHATBALE

VERSUS

BABULAL KAJJULAL BHARTIYA (DEAD) THR LRS MANMOHAN ANDORS

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Advocate for Applicant : Mr. Shelke Avishkar S.

Advocate for Respondent no. 1(a) to 1(d) and 1(f) to 1(h) : Mr. Manoj D.
Shinde

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CORAM : MANGESH S. PATIL, J.

DATE : 26.11.2019

PER COURT :

Leave granted to amend the prayer clause of the application.

2. The learned advocate for the applicant who is the original respondent no.1 in a reference under Section 30 of the Land Acquisition Act has preferred this appeal claiming to be the protected tenant of the mortgagee of land and Gut No.21. The learned advocate for the applicant points out that this Court by the conditional order dated 19.07.2019 directed that on failure of the appellant/applicant to take steps on or before 16.08.2019 the appeal would stand dismissed automatically. As a consequence, for failure to take steps as against the respondent no.3 who was the original respondent no.2 in the reference, appeal stood dismissed.

3. He submits that though initially by this application a prayer was made for recalling the order and permitting the applicant appellant to delete respondent no.3 from the array of the respondents, during the course of the

argument, as mentioned herein above a leave was sought to amend the prayer clause and to enable the applicant only to seek restoration of the First Appeal since according to him the respondent no.3 is not a necessary party to his first appeal.

4. The advocate for the other respondents opposes the request. He submits that the conditional order was passed specifically when the applicant/appellant had sought interim relief. Failure to comply the condition has resulted in dismissal of the appeal.

5. Without intending to indulge into any discussion on merits, the judgment and order passed by the reference Court *prima facie* demonstrates that the respondent no.3 was having concern with the land Gut No. 11 whereas the applicant/appellant has been claiming to have a share in respect of a portion of land acquired from Gut No.21. In view of such state of affairs, *prima facie* when according to the applicant/appellant the cause of action survives to the surviving respondents and the deceased respondent no.3 was merely a formal party, it would be appropriate to restore the appeal by keeping open the question as to if the cause of action would survive to the surviving respondents.

6. The application is allowed. The appeal is restored keeping open the point of its maintainability in the absence of respondent no.3. List the first appeal for admission on 07.01.2020.

(MANGESH S. PATIL, J.)

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