

DDR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 14314 OF 2018

Nitin Bhausahab Tengle & ors. ..Petitioners.

vs.

Vithal Khandu Tengle & ors. ..Respondents

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Shri A.A. Joshi for petitioners.

Shri A.B. Avhad a/w. Shri M.V. Rawool for respondent No.1.

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CORAM : M.S.KARNIK, J.

DATE : 18th SEPTEMBER, 2019

P.C. :

Heard learned counsel for the petitioners.

2. The challenge in this Petition is to an order passed below Exhibit 1 in Civil Miscellaneous Application No. 61 of 2014 by the First Appellate Court refusing to condone the delay of 830 days in filing the application for restoration and to restore the Regular Civil Appeal No. 35 of 2007 which was dismissed for want of prosecution on 2/3/2012.

3. The petitioners are the legal heirs of original defendant. The plaintiff had filed a suit alleging that the defendant encroached upon his suit property to the extent of 12 R and for removal of encroachment.

4. The trial Court decreed the suit on 28th February, 2007. The defendant therefore filed the Appeal before the First Appellate Court.

5. Learned counsel for the petitioner – original defendant submits that the defendant was not keeping good health as he was suffering from cancer. The defendant was admitted in the hospital sometime in January 2012. The Appeal was dismissed due to non prosecution on 2nd March, 2012. The defendant expired on 27th June, 2012. Learned counsel would submit that it was due to the illness of the defendant that the Appeal could not be attended. Learned counsel submitted that the notice of the execution came to their knowledge for the first time on 27th December 2012 when the notice on the application made by the plaintiff for bringing the legal heirs of the

defendant was received by them. It is pointed out that again they received the notice on 22nd April, 2014 whereafter steps were taken to file application for restoration and this resulted in delay of 830 days in filing the application for restoration. Learned counsel submitted that as the defendant was not well and subsequently he succumbed to his illness that the Appeal came to be dismissed for default.

6. Learned counsel for the respondents vehemently opposed the Petition. He invited my attention to the findings of the Appellate Court. He submitted that even in the application for restoration the petitioners are guilty of suppression of the receipt of the notice dated 22nd December, 2012. It is his case that the delay during the period from 22nd December, 2012 to 22nd April, 2014 is not at all explained. He would further submit that even during the cross examination of the defendant, the defendant has admitted the encroachment. He therefore submits that no useful purpose would be served by allowing the Petition and this is just another attempt on the part of the petitioners is

to deprive plaintiff fruits of the litigation which he is pursuing since the year 2012.

7. I have gone through the order passed by the Appellate Court. The Appeal was filed by the Appellant within limitation. The defendant succumbed to illness of cancer on 27th June, 2012. In the meantime, the Appeal came to be dismissed on 2nd March, 2012.

8. It is true that the receipt of the notice for bringing the legal heirs of defendant on record in the execution proceedings on 22nd December, 2012 is not mentioned in the application for restoration. The plaintiffs have proceeded on the footing that they have received the notice only on 22nd April 2014.

9. Be that as it may, considering that the petitioners are the legal heirs of the defendant and that the Appeal was being pursued by the defendant since 2007, the Appeal is dismissed for non prosecution as during that time the defendant was not

keeping well and he has succumbed to his illness. No doubt, there is delay of 830 days which has not been explained very satisfactorily. However, there are some reasons given in the application for delay. In my opinion, the petitioners should not be deprived of the opportunity to contest the Appeal on merits only on the ground of delay of 830 days which cannot be said to be so gross in the facts of the present case, when the respondents can be adequately compensated with the cost. Subject to the petitioners paying cost of Rs.25,000/- to the respondents within a period of 2 weeks from today, the delay is condoned.

10. In the execution proceedings the petitioners are already on record as judgment debtors. The technical objection regarding petitioners not being on record in the Regular Civil Appeal No. 35 of 2007 will be satisfied by the petitioners by making a formal application for bringing them on record.

11. The Petition is allowed in terms of prayer clause (a).

12. Considering the Appeal is of the year 2007, it is made clear that the petitioners would co-operate with the Appellate Court in expeditious disposal of the Appeal.

13. Learned counsel for the petitioners on instructions of the petitioners undertakes that petitioners will not to seek unnecessary adjournments before the Appellate Court. The Appellate Court is requested to decide the Appeal expeditiously and in any case within a period of 6 months from today.

14. Ad-interim relief already in operation to continue till disposal of the Appeal.

15. The Petition is allowed with no order as to costs.

(M.S.KARNIK, J.)

Diksha
Rane

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signed by
Diksha Rane
Date:
2019.09.18
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