

DDR

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

WRIT PETITION NO. 13947 OF 2018

Sardar Hasanbhai Attar

..Petitioner

vs.

Usman Papamiya Attar (since deceased)
through his legal heirs & ors.

..Respondents

....

Shri Shriram S. Kulkarni for petitioner.

Shri Ashok T. Gade for respondent Nos. 11 and 12.

Shri Girish R. Agrawal for respondent Nos.1A to 1C & 4.

....

CORAM : M.S.KARNIK, J.

DATE : 28th AUGUST, 2019

P.C. :

The petitioner by this Petition challenges an order dated 25th June, 2018 passed by the Appellate Court dismissing the Appeal for want of prosecution. It appears that on the date fixed for hearing of the Appeal the Advocate for the appellant insisted for calling record and proceeding of the Lower Court. The Appellate Court proceeded on the footing that as his predecessor had already heard the arguments without the records, the Appeal can be heard without calling for the record and proceedings. However, counsel for the appellant insisted for

the records and declined to argue in the absence of records. The Appellate Court dismissed the Appeal for want of prosecution.

2. Learned counsel for petitioner states that it was not his intention to prolong the proceeding. In fact he wants to contest the Appeal on merits. Learned counsel would submit that as the Advocate then thought that the records are necessary the submission was made for calling record and proceedings from the lower Court.

3. Be that as it may, learned counsel for the appellant submits that one opportunity be given to him to contest the Appeal on merits. He also agreed for schedule of the hearing of the Appeal and says that he will argue the matter on the date as fixed by this Court or the Appellate court.

4. Learned counsel for the respondents opposed this request. Learned counsel would submit that the arguments were heard by the learned Judge's predecessor without calling for the records. It is only with a view to stall the execution in respect of

37 year old decree that every possible attempt is being made to prolong the hearing of the Appeal. He therefore prayed that the Petition be rejected.

5. Heard learned counsel for the parties.

6. Considering the submissions made by learned counsel for the petitioner that there was no intention on his part not to proceed with the arguments in the Appeal but it was on a bonafide impression of the Advocate for the appellant that the records and proceedings are necessary that the arguments were not advanced. In my opinion, as the Appeal has been dismissed for non prosecution, only by a view of indulgence and for giving the appellant an opportunity to deal with the Appeal on merits that impugned order is interfered with. However, this would be subject to payment of cost of Rs.5,000/- (Rupees Five Thousand only) to the Chief Minister's Relief Fund. The cost to be paid by end of September, 2019.

7. The parties to appear before the Appellate Court on 16/9/2019. The Appellate Court may either hear the Appeal on

16/9/2019 or on any other convenient date as it may.

8. In the facts of the present case the Appellate Court is requested to hear Miscellaneous Civil Appeal No. 79 of 2016 within a period of 2 months from today.

9. The Lower Appellate Court is free to consider the question “whether the record and proceeding is necessary” while deciding the Appeal. It is however made clear that if at all lower Appellate Court does not feel it necessary to call records and proceedings the appellant will not insist for records and proceedings and will still proceed with the arguments in the Appeal.

10. The petitioner is always at liberty to produce the certified copies of the record for perusal.

11. The Petition is partly allowed. The impugned order is set aside.

(M.S.KARNIK, J.)