

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2222 OF 2017

Sambhajirao Kondiba Dhangekar	]	
(since deceased)	]	
Suman Sambhajirao Dhangekar	]	
and others.	]	Petitioners
Vs.		
Khashaba Dnyanoba Thorat	]	
(since deceased)	]	
Bhagirathibai Khashaba Thorat	]	
and others.	]	Respondents

.....

Mr. N.R. Bubna, Advocate for the Petitioners.
Mr. Dilip Bodake, Advocate for Respondent No.2.
Mr. Ravindra S. Pachundkar, Advocate for Respondents No.3 to 5.

.....

CORAM : R.G. KETKAR, J.

DATE : 10th JULY, 2019.

P.C.

Heard Mr. Bubna, learned Counsel for the petitioners and Mr. Bodake, learned Counsel for respondent No.2 and Mr. Pachundkar, learned Counsel for respondents No.3 to 5, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged;

[a] order dated 15th April, 2005 passed by the 5th Additional Small Causes Judge & Joint Civil Judge, Senior Division, Pune below Exhibit 1 in Civil Suit No.288 of 1999;

[b] order dated 6th September, 2013 passed by the learned District Judge-13, Pune below Exhibit 1 in M.A. No.546 of 2005;

[c] order dated 24th September, 2016 passed by the learned District Judge-7, Pune in Application No.5 of 2016.

3. By order dated 15th April, 2005, the learned trial Judge dismissed the suit in default under Order-XXXIX, Rule-11 of the Code of Civil Procedure, 1908 (for short 'C.P.C') as the petitioners/plaintiffs failed to comply the order dated 11th January, 2005 passed below Exhibit 63,64 and 67. By order dated 6th September, 2013, Misc. Application No.546 of 2005 filed by the petitioners for condoning delay was dismissed in default. By order dated 24th September, 2016, learned District Judge-7, Pune rejected Application No.5 of 2016 filed by the petitioners under section 114 r/w Order-XLVII of the C.P.C for review of the order dated 6th September, 2013.

4. Rule. Mr. Bodake waives service. Mr. Bubna seeks leave to delete rest of the respondents. Leave as prayed for granted. Amendment shall be carried out within one week from today.

5. The petitioner Sambhajirao Kondiba Dhhangekar (for short 'Sambhaji') (since deceased) has instituted Civil Suit No.288 of 1999 against Khashaba Dnyanoba Thorat (since deceased) (for short "Khashaba"), through his heirs and legal representatives and others for recovery of possession of Shop No.5 admeasuring 15 square feet, Rooms No.6,7 and 8 admeasuring 240 square feet situate on the ground floor in C.T.S No.823 within the Municipal Limits of Pune Municipal Corporation, Pune, more particularly described in paragraph 1 of the plaint (for short 'suit premises').

6. During pendency of the suit, applications Exhibit 63, 64 and 67 were made by defendants No.1-A, 1-B and 3 to 5 under Order-I, Rule-XIII of the C.P.C on the ground that one of the co-owners Ramchandra Pandharinath Dhone (for short 'Ramchandra') is a necessary party in the suit. In the absence of the necessary party, the suit is liable to be dismissed. By order dated 11th January, 2005, the learned trial Judge directed the plaintiffs to implead Ramchandra in the array of the plaintiffs as a co-owner and take necessary steps to secure his presence in the suit within one week from the date of the order.

7. As the plaintiffs did not implement the order dated 11th January, 2005, by order dated 15th April, 2005, the learned trial Judge dismissed the suit in default under Order-XXXIX, Rule-11 of the C.P.C. The plaintiffs preferred Misc. Appeal against that order. Since, there was delay in filing the appeal, they took out Misc. Application No.546 of 2005 on 16th July, 2005. By order dated 6th September, 2013, the application was dismissed for want of prosecution. The plaintiffs filed Misc. Civil Application No.641 of 2015 under section 114 r/w Order-XLVII of the C.P.C seeking review of the order dated 6th September, 2013 which was dismissed on 11th June, 2015. Aggrieved by this order, the plaintiffs instituted Writ Petition No.8889 of 2015 in this Court. By order dated 2nd December, 2015, this Court set aside the order and condoned delay of 10 days subject to payment of costs of Rs.3,000/-. Review Application was restored to the file of the District Court. In pursuance thereof, the learned District Judge heard the Review Petition. By order dated 24th September, 2016, District Judge dismissed the Review Petition. The Petition was heard on 19th June, 2019.

Order XXXIX, Rule-11 (2) of the C.P.C of Bombay High Court amendment reads thus;

“(2)The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court”.

8. In view thereof, during the course of hearing, I made inquiry with Mr. Bubna as to whether the plaintiffs are ready and willing to implement the order dated 11th January, 2005 by impleading Ramchandra as one of the plaintiffs. Upon taking instructions, Mr. Bubna states that the plaintiffs are ready and willing to amend the plaint by impleading Ramchandra as one of the plaintiffs in terms of order dated 11th January, 2005. He, therefore, submitted that the impugned orders may be set aside.

9. On the other hand, Mr. Bodake submitted that the present Petition is not maintainable. He submitted that by refusing to condone the delay by order dated 16th September, 2013 in substance, the appeal preferred by the plaintiffs is dismissed in default. The plaintiffs, therefore, have to invoke the provisions of Order-XLI, Rule-17 and 19 of the C.P.C and approach the Appellate Court for re-admission of the appeal.

10. Mr. Bodake further submitted that having regard to the conduct of the plaintiffs, this is not a fit case for interfering with the impugned orders. Because of delay on the part of the plaintiffs in prosecuting the suit, respondents No.2 and 3 to 5 have been put to heavy and irreparable loss and

hardship. He further submitted that the Appellate Court was justified in dismissing the application for condonation of delay in default as on several dates the plaintiffs were absent at the time of hearing of the Misc. Application filed for condonation of delay. He relied on the following decisions;

[1] **D. Dayabhai and Co. Vs. Narayan, 2019 (3) Mh.L.J 360 and in particular paragraph 18, clause (ix)** which reads thus;

“ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach”.

[2] **Chandrakant Vs. State of Maharashtra, 2015 (2) Mh. L.J, 323.**

11. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. I have already extracted provisions of Order-XXXIX, Rule-11 (2) of the C.P.C. As the plaintiffs are now ready and willing to implead Ramchandra as one of the plaintiffs, in my opinion, the impugned orders deserve to be set aside. Mr. Bodake submitted that the plaintiffs are at liberty to make that request before the trial Court instead of this Court entertaining request in this Petition. I do not find any merit in this submission. Wording employed in Order-XXXIX, Rule-11 (2) of the C.P.C empowers this Court also to exercise power thereunder. In so far as reliance placed by Mr. Bodake on the decisions referred hereinabove is concerned, in my opinion, the said decisions are against him. Clauses (i) and (ii) in paragraph 15 of the decision in **D. Dayabhai and Co** (supra) read thus;

- (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the Courts are not supposed to legalise injustice but are obliged to remove injustice.
- (ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation”.

12. As mentioned earlier, there is delay of hardly 7 days in filing the appeal. Instead of dismissing the application in default on 6th September, 2013, in my opinion, the District Court should have adopted liberal approach and condoned the delay of 7 days. The Courts must realize that by adopting hyper technical approach, it gives rise to the multiplicity of the proceedings.

13. In view thereof, the Petition succeeds. The impugned orders are set aside. It is reported that Ramchandra expired during pendency of the proceedings. In view thereof, the plaintiffs are at liberty to bring legal representatives of deceased Ramchandra within 4 weeks from today. Ramchandra had died without leaving behind legal representatives, the plaintiff will file pursis to that effect. Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]