

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

923 APEAL FROM ORDER NO. 51 OF 2019
WITH CA/12976/2019 IN AO/51/2019

KISHAN S/O SONAJI MAGARE
VERSUS
DAYALSINGH S/O SHOBHASINGH RAGHI, DIED THROUGH LRS.
SULAKHAN KAUR W/O DAYALSINGH RATHI AND OTHERS

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Advocate for Petitioner : Mr. Jadhav Arvind G.
Advocate for Respondent Nos. 1A & 1B : Mr. S. S. Gangakhedkar

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CORAM : V. K. JADHAV, J.
DATED : 04th FEBRUARY, 2020

PER COURT:-

1. Heard both sides.
2. The appellant is the original defendant and respondent no.1 is the original plaintiff. Respondent no.1/original plaintiff instituted a civil suit bearing Regular Civil Suit No. 879 of 1999 before Civil Judge, Senior Division, Nanded for a decree of perpetual injunction in respect of the suit land ad-measuring 2 H. 25 R. out of land Gat No. 66 (survey no. 49) situated at Kakandi, District Nanded. The trial court, by judgment and decree dated 28.05.2004 decreed the suit. Being aggrieved by the same, the appellant preferred Regular Civil Appeal No. 90 of 2004. During

pendency of the appeal, respondent no.1/original plaintiff died on 13.12.2009. On 26.09.2010, the counsel for the respondent filed a pursis before the first appellate court informing about the death of respondent no.1/original plaintiff Dayalsingh. The Advocate for the appellant before the first appellate court moved an application Exhibit 24 for adjournment for taking steps in the matter and finally, on 19.01.2012, filed an application Exhibit 26 for bringing the legal representatives on record. However, on 02.02.2012, the first appellate court rejected the application since no separate application for condonation of delay was filed. Furthermore, the first appellate court also passed the order on the same day below Exhibit 1 and disposed off the appeal being abated. Hence this Appeal From Order.

3. Learned counsel for the appellant submits that the appellant is a poor and rustic person. The counsel representing him before the first appellate court has not informed the appellant about filing of the application for condonation of delay and as such, his application came to be rejected. Learned counsel submits that the appellant has filed the application on 23.04.2014 for setting aside the abatement order and for bringing the legal representatives of

deceased respondent no.1 (original plaintiff) on record along with an application seeking condonation of delay. Though the trial court has allowed the said application bearing Misc. Civil (RJE) NO. 78 of 2014 by order dated 18.04.2015 and condoned the delay of two years and two months in filing the restoration application, by the impugned order dated 19.12.2016, dismissed the petition on the ground that once the application for taking the legal representatives on record has been decided with reasoned order, no second application with the same prayer can be entertained. Learned counsel submits that the dispute pertains to the immovable property and if the appeal filed by the appellant against the decree passed by the trial court is not considered on merits, the appellant, who is a poor person, would face grave consequences.

4. Learned counsel for the respondent/original plaintiff submits that though the intimation about death of respondent no.1/original plaintiff was given to the first appellate court by filing pursis and even though the appellant herein had filed an application for taking steps to bring on record the legal representatives, he failed to do so for quite a long period and even thereafter, the application is filed for setting aside the abatement order and bringing on

record the legal representatives without filing an application for condonation of delay. The first appellate court has rightly rejected the application. There is no substance in the Writ Petition. In the alternate, learned counsel submits that in case this Court is inclined to allow this Appeal From Order, the appellant may be saddled with heavy costs.

5. The suit is of the year 1999 and the Regular Civil Appeal came to be preferred in the year 2004. The said suit was contested on merits. During pendency of the appeal, respondent no.1/original plaintiff died. Though the intimation about his death was given by filing a pursis, however, the information about the legal representatives was not given. Consequently, the counsel for the appellant took time from the court and finally filed the application, which was belated. The appellant ought to have filed the application for condonation of delay, however, his counsel has not taken care of the same and by order dated 02.02.2012, the first appellate court has rejected the application mainly on the ground that the application for condonation of delay was not filed. Furthermore, when the second application came to be filed alongwith an application for condonation of delay, though the

delay has been condoned, the application bearing Misc. Civil (RJE) NO. 78 of 2015 came to be rejected by the first appellate court. The dispute relates to the immovable property. The appellant herein gets the only opportunity to get the evidence reassessed before the first appellate court. Thus, considering the entire aspect of the case, I am inclined to allow this Appeal From Order. However, the appellant should be saddled with costs. Hence, I proceed to pass the following order:

ORDER

- I. The Appeal From Order is hereby allowed.
- II. The impugned order dated 19.12.2016 passed in Misc. Civil (RJE) NO. 78 of 2015 by learned District Judge-2, Nanded, is hereby quashed and set aside.
- III. The Misc. Civil (RJE) NO. 78 of 2015 is hereby allowed in terms of its prayer clauses in its entirety subject to costs of Rs.10,000/- to be paid to the legal heirs of respondent no.1/original plaintiff within a period of four weeks from today before the first appellate court.

IV. The Appeal From Order is accordingly disposed off.

V. In view of disposal of the Appeal From Order, nothing survives for consideration in Civil Application No. 12976 of 2019 and the same also stands disposed off.

(V. K. JADHAV, J.)

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