

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.4159 OF 2012
IN SAST/5994/2012
WITH CA/4160/2012 IN SAST/5994/2012
WITH SAST/5994/2012

REKHA W/O DNYANOBA SHINDE AND ORS
VERSUS
SHEETAL D/O DNYANOBA SHINDE AND ANR

...
Mr. P. D. Jarare h/f Mr. S. S. Thombre, Advocate for applicants.
Mr. A. S. Shivpuje, Advocate for respondent No.1.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 13.08.2021

ORDER :-

- . Civil Application No.4159 of 2012 has been filed for getting the delay of 266 days condoned in filing second appeal.
2. Heard learned Advocate Mr. P. D. Jarare holding for learned Advocate Mr. S. S. Thombre for applicants and learned Advocate Mr. A. S. Shivpuje for respondent No.1.
3. Applicant No.1 is contending that she is a poor lady and having 3 minor children, could not contact lawyer after the decision of the first Appellate Court. The delay is unintentional and according to her, she has a good case on merits.

4. The applicants are original defendant Nos.1, 2 and 4. Present respondent No.1 is the original plaintiff, who had filed Regular Civil Suit No.94 of 2003 for partition and separate possession before learned Joint Civil Judge Junior Division, Georai. The said suit came to be decreed on 22.11.2006. Present applicants challenged the said decree in Regular Civil Appeal No.07 of 2007 before the learned District Court, Beed. The said appeal was heard by learned District Judge-1, Beed and it was dismissed on 13.03.2011.

5. Taking into consideration the reasons stated and taking liberal view, the delay of 266 days deserves to be condoned. Accordingly, it is condoned.

6. With consent of both the parties, the Second Appeal is taken for admission immediately, since the applications are pending since 2012. Submissions on behalf of both sides have been heard.

7. According to appellants, substantial questions of law are arising in this case. It has been stated that the suit itself was not maintainable in view of the fact that the suit was filed through guardian grandmother, who was not got appointed by order of Court. Both the Courts below have not considered the facts and circumstances properly, so also the law points involved in the same. The Courts below failed to consider

that defendant No.3 i.e. present respondent No.2, who is the father of deceased Dnyanoba, is also having share in the suit properties, as he is Class-II heir of deceased Dnyanoba. In fact, the guardian grandmother Laxmibai Asaram Kale is not the real grandmother of the plaintiff and, therefore, she was unable to represent the interest of the plaintiff.

8. Learned Advocate for respondent No.1 supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case.

9. Admittedly, plaintiff was minor when the suit was filed. The title of the suit shows that the minor is through guardian grandmother. The point raised by learned Advocate for the appellants has no force of law for the simple reason that a suit by minor is to be filed through next friend and not a guardian in view of Order XXXII Rule 1 of Code of Civil Procedure, which runs thus :-

“1. Minor to sue by next friend.—

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.”

The legislature has intentionally not used the word guardian in Rule 1. Further, there is no mandatory provision that the said next friend of the minor should be got appointed through Court. However,

the further rules i.e. Rule 2 and 2A of Order XXXII makes safeguards in respect of the suits, which have been instituted without next friend and there is provision of taking security from next friend at any stage of the suit either by the Courts own motion or on the application filed by any defendant. Thereby, by this provision, the interest of the minor in the property or the subject matter of the suit can be protected, however, appointment of guardian is mandatory in respect of suit against minor defendant. The procedure has been, therefore, prescribed in Order XXXII Rule 3. As regards the next friend is concerned, Order XXXII Rule 4A prescribes, who may act as next friend in the suit. It provides in sub-rule (1) of Rule 4 of Order XXXII that any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit. The only condition that has been put by way of proviso is that the interest of such person should not be adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff. Now, in this case, said Laxmibai Asaram Kale is not defendant in the suit and there was nothing before the Courts below to come to the conclusion that she has adverse interest against the minor plaintiff. Therefore, there is absolutely no legal lacuna that has been left at the time of institution of the suit.

10. Plaintiff claimed that the suit property is ancestral. She was the daughter of deceased Dnyanoba. Dnyanoba expired on 08.01.2003. The next friend Laxmibai was looking after the minor plaintiff. According to the plaintiff, Dnyanoba had illicit relations with defendant No.1. Defendant No.1 is not the legally wedded wife of deceased Dnyanoba. The plaintiff was honest in saying that her uncle had filed Regular Civil Suit No.29 of 2003, however, due to technical problem that suit was withdrawn. Thereafter, defendant No.1 got her name mutated to the suit lands and, therefore, she prayed that she is having half share in the suit property which should be separated and she should be put in possession.

11. Defendant Nos.1 and 2 had not denied the relationship in their written statement between minor plaintiff and Dnyanoba. It was claimed that defendant No.1 is the legally wedded wife of Dnyanoba. According to the defendants, another daughter by name Nikita who was born from deceased Dnyanoba has made party to the suit. After the evidence was led, the learned Trial Judge held that plaintiff has 1/4th share in the suit property and the suit came to be decreed accordingly. As regards non joining of Nikita as party, it appears that at a very late stage i.e. when the matter was posted for pronouncement of judgment, she came to be added as defendant. The first Appellate Court has also dealt with all

those points and arrived at the same conclusion and, therefore, appeal has been dismissed.

12. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case and, therefore, in view of *Kirpa Ram (deceased) through Lrs. and others Vs. Surendra Deo Gaur and others*, [2021 (3) Mh.L.J. 250], the second appeal stands dismissed at the admission stage.

13. Civil Application Nos.4159 of 2012 and 4160 of 2012 also stand disposed of.

[SMT. VIBHA KANKANWADI, J.]

scm