

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1553 OF 2015**

Hirabai Narayan Powar & Ors. ... Petitioners
V/s.
Manohar Sakharam Shinde & Ors. ... Respondents

Mr.Mandar Limaye for the Petitioners.
Mr.Rishikesh Mohite for the Respondents.

CORAM : MADHAV J. JAMDAR, J.

DATE : 10TH MARCH, 2021.

P.C:-

1. Heard learned Advocate Mr. Mandar Limay for the Petitioners and Mr. Rishikesh Mohite for the Respondents.

2. By this Petition filed under Article 227 of the Constitution of India, the Petitioners have challenged the order dated 23rd April, 2014 passed by the learned 15th Joint Civil Judge, Junior Division, Kolhapur below Exhibit-1 in Misc.Civil Application No.393 of 2012. The said Misc. Civil Application was filed by the Petitioners seeking condonation of delay and for restoration of Regular Civil Suit No.137 of 2007, which was dismissed for default.

3. Mr.Mandar Limaye, learned Advocate appearing for the Petitioners submitted that the learned Trial Court has not at all taken into consideration the reasons set out in the application.

4. On the other hand Mr.Rishikesh Mohite, learned Advocate for the

Respondents vehemently opposed the prayers in the Petition and pointed out the conduct of the Applicants/Petitioners as noted by the learned Trial Court in paragraph 12 of the impugned order.

5. The factual position on record show that the, Regular Civil Suit No.137 of 2007 was dismissed for want of prosecution by the order dated 29/11/2010. The application for restoration was filed on 17/10/2012. In the application, it is inter alia stated that the issues were framed on 25/06/2010 and during that period agricultural work was going on and therefore the Petitioners could not attend the Court work. It is also mentioned that there were talks going on for settling the dispute between the parties and therefore the Petitioners were under the impression that the dispute would be settled. It is further stated that however when the Petitioners came to know that the settlement was not possible, immediately, they approached the Advocate for taking further steps and the Advocate informed that the suit was already dismissed for default and thereafter immediately Misc. Civil Application was filed.

6. It is significant to note that the Respondents i.e. Original Defendants have neither filed any reply to the said Misc. Civil Application nor filed evidence affidavit. In the Misc. Civil Application, the Petitioners have filed evidence affidavit of the Petitioner No. 4. The Respondents have not even cross examined the Petitioner No.4. In fact, in paragraph 11 of the impugned order, it is specifically recorded by the learned Trial Court that the Respondents have neither resisted the Misc. Civil Application nor challenged oral testimony of the Applicant No.4 i.e. Petitioner No.4. Thus, the contentions raised in the Misc. Civil Application have remained uncontroverted. It is specifically mentioned in Misc. Civil Application by the Petitioners that the settlement talks between the parties were going on

and that is not controverted by the Respondents.

7. The learned Trial Court has not at all taken into consideration any of the reasons given by the Applicants and rejected the Application by mentioning that reasons given are general reasons. Another reason given by the learned Trial Court was that the Applicants were grossly negligent in prosecuting Regular Civil Suit No.137 of 2007.

8. There is some substance in the contention of Mr.Rishikesh Mohite, learned Advocate for the Respondents that the Petitioners were negligent in prosecution of said suit, however, it is also to be noted that they have given reasons for their absence and said reasons are not at all taken into consideration. The fact that the Respondents have not controverted said reasons by filing reply or by cross examining the witness of the Petitioners clearly shows that the reasons given have remained uncontroverted and therefore they are required to be accepted. It is also to be noted that there are no malafides alleged against the Petitioners and the Petitioners are not benefited by the order of dismissal of the suit.

9. In view of above discussion, following order is passed:-

ORDER

- (i) The judgment and order dated 23/04/2014 passed by the learned 15th Joint Civil Judge, Junior Division, Kolhapur in Misc. Civil Application No.393 of 2012 is quashed and set aside and said Misc. Civil Application No.393 of 2012 is allowed subject to the Petitioners paying costs of Rs.10,000/- to the Respondents.

- (ii) The learned Advocate for the Petitioners to handover a cheque of Rs.10,000/- issued in favour of the Respondent No.1 – Manohar Sakharam Shinde on or before 9th April, 2021, which the Respondent No.1 to accept on behalf of all the Respondents.
- (iii) Regular Civil Suit No. 137 of 2007 is restored to the file of the learned Civil Judge, Junior Division, Kolhapur.
- (iv) Both the parties or their Advocates shall remain present before the Learned Civil Judge, Junior Division, Kolhapur on 20th April, 2021.
- (v) The undertaking of the Petitioners given through their Advocate Mr.Mandar Limaye is recorded that hereinafter they will prosecute said Regular Civil Suit No.137 of 2007 diligently.
- (vi) The learned Civil Judge, Junior Division, Kolhapur to decide Regular Civil Suit No.137 of 2007 expeditiously and in any case within two years from the date of appearance of the parties.
- (vii) Writ Petition is disposed of in above terms.

[MADHAV J. JAMDAR, J.]