

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.1639 OF 2016
IN
FIRST APPEAL NO.54 OF 2000

Zina Margaret Fernandes .. Applicant

Versus

Mary Paul D'Mellow (since deceased through
LRs) 1(a) Mrs.Carol Pereira & Ors. .. Respondents

...

Mr.D.B.Pereira i/b Mr.Deepak Lulia for the Applicants.

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CORAM: BHARATI DANGRE, J.
DATED : 21st OCTOBER, 2021

P.C:-

1. On 26/04/2019, notices were issued to the Respondents. The office note records that the Respondents are duly served and an affidavit of service has been placed on record on 11/07/2019. As per the Bailiff Report, Respondent Nos.1a, 1b, 8 & 7b but as far as Respondent Nos.2 to 6, 7a, 7d is concerned, the notice has returned back with remark "Not Found" and notice to Respondent Nos.1c & 1d is yet to be returned. The Application is pending since the year 2016.

2. I have heard learned counsel for the Applicant in absence of the served Respondents, since despite service, none is representing them.

3. Perused the application, seeking restoration of the First Appeal, which came to be dismissed in default by order dated 29/01/2016.

When the application is perused, it can be seen that the Applicant was diligent in prosecuting the First Appeal through his counsel and since the counsel was engaged by him to attend the proceedings, he was not remaining present in the Court on each and every date, being a senior citizen and an octogenarian . The reasons cited for seeking restoration are to be found in paragraphs 3 to 5 of the application where it is stated that inadvertently, his counsel missed the listing of the First Appeal and was not able to present himself. Resultantly, the First Appeal was dismissed in default.

4. On perusal of the said reasons, I am of the firm opinion that the Applicant cannot be put to inconvenience on account of his counsel's mistake and if the counsel has missed the dates, the Applicant necessarily cannot miss the bus and cannot be ousted out of *lis* between him and the other side. The reasons cited in the application persuade me to restore the First Appeal to its file.

Resultantly, the impugned order dated 29/01/2016 is set aside. First Appeal No.54 of 2000 is restored to its file.

5. Issue notice to the Respondents on the First Appeal. Notice is made returnable on 20/12/2021.

6. Civil Application No.1639 of 2016 stands disposed of.

(SMT. BHARATI DANGRE, J.)