

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

APEAL FROM ORDER NO.11 OF 2020

WITH

CA/3559/2020 IN AO/11/2020

1. Vishwanath s/o Tukaram Chavan,
Age; 73 years, Occ; Agri,
2. Gurunath s/o Vishwanath Chavan,
Age; 53 years Occ; Agri,
3. Raghunath s/o Vishwanath Chavan,
Age; 51 years, Occ; Agri,
4. Ramrao s/o Vishwanath Chavan,
Age; 49 years, Occ; Agri,
5. Shamrao s/o Vishwanath Chavan,
Age; 47 years, Occ; Agri,
6. Bhimrao s/o Vishwanath Chavan,
Age; 45 years, Occ; Agri,
7. Hawagirao s/o Vishwanath Chavan,
Age; 38 years, Occ; Agri,

All residents of Laxman Tanda under
village Vilegaon Tq. Deoni,
District; latur.

...APPELLANTS
(Original Defendants)

VERSUS

Bhaskar s/o Mansing Rathod,
Age; 58 years, Occ; Agri,
R/o; Laxman Tanda under village
Vilegaon, Tq. Deoni,
District; Latur.

...RESPONDENT
(Original Plaintiff)

...
Advocate for Petitioners : Mr. Sanket Palnitkar h/f Mr. C.R.
Deshpande and Mr. C.C.Deshpande.
Advocate for Respondent : Mr. Govind A. Kulkarni
...

CORAM : VINAY JOSHI, J.

DATE : 28th FEBRUARY 2022.

ORAL JUDGMENT :

1. Heard finally with the consent of the learned counsel for the parties.
2. This appeal claims an exception to the judgment and order in M.C.A. No. 21 of 2016, dated 25.04.2017, passed by the District Judge - 2, Udgir, District Latur, whereby, the Court has declined to restore appeal in terms of order 41 Rule 19 of the Code of Civil Procedure, 1908 (for short "C.P.C.").
3. The facts in brief are that, initially the respondent Bhaskar has filed R.C.S. No. 42 of 2008, for removal of encroachment and for possession. On full fledged trial, the suit was decreed on 29.11.2011 directing the present appellants to hand over the possession of the encroached area, ad-measuring 71R, within two months from the order. Being aggrieved by the said possession decree, the appellants (Original defendants) have filed R.C.,A. No. 39

of 2011. The Court has kept said appeal for hearing on 27.04.2016, however, none appeared. The District Judge, on the same date by passing an order on Exh. 1 has dismissed the appeal for want of prosecution, in terms of order 41 Rule 11 of C.P.C. In turn, the appellants have filed an application for restoration of appeal as provided under Order 41 Rule 19 of the C.P.C. The said application came to be rejected vide order dated 25.04.2017, which is impugned herein.

4. The appellants' learned counsel has submitted that the appellate Court erred in holding that there was delay in seeking for restoration. He would submit that after dismissal of suit the appellants have applied for certified copies on 02.05.2016, which they received on 23.05.2016. Since there was Summer Vacations, after reopening of Civil Court on 06.06.2016, they were filed restoration application on 09.06.2016. Thus, according to him, there was no delay in seeking for restoration. The respondent's learned counsel resisted the said submission by contending that though there was delay, the appellant has not sought for condonation while filing the application. Considering the time consumed in obtaining certified copy, it reveals that there was no delay.

5. It required to see whether the appellants have made out the sufficient cause by which they were prevented for appearing in

the appeal when it was taken out for hearing. On perusal of the application it reveals that according to the appellants one of them i.e. appellant No. 2 Gurunath was looking after the Court proceedings and he was unable to attend the Court and their Advocate was engaged in another Court when the appeal was dismissed in default. It appears that the said submission is not refuted by the respondent (Plaintiff) in the trial Court by filing reply.

6. Basically, there was decree for removal of encroached, area ad-measuring 71 R against the appellants. The judgment of the trial Court discloses that the appellants have resisted the suit by denying the alleged encroachment. The rights of immovable property are involved in the proceedings. Having regard to the said fact, it is desirable that the order passed by the trial Court shall be tested on legal touch stone before the First Appellate Forum. However, it shall be noted here that the respondents have initially filed regular Civil Suit for the removal of encroachment and for possession in the year 2000. It was later on numbered as Regular Civil Suit No. 42 of 2008. Though the respondent obtained possession decree in the year 2011, still, the matter is pending. Moreover, it is to be taken into account that this appeal is filed in the year 2017, in which, the appellants have not sought for stay but when they received notice in execution proceedings, this appeal appears to have been moved.

7. Considering all these circumstances, I am of the view that the appellants shall get a chance for adjudication of the matter on merits before the First Appellant Court. However, considering all these aspects, they shall pay costs to the other side, since they would be required to face one another round of litigation after re-rejuvenating the first Appeal. Considering the nature of the dispute and the appellants' conduct, it is appropriate that they shall pay costs of Rs. 20,000/- (Rupees Twenty Thousand Only) to the other side. In view of that following order is passed :

ORDER

- a. Appeal stands allowed.
- b. The impugned judgment and order passed in Misc. Civil Application No. 21 of 2016 dated 25.04.2017 is hereby quashed and set aside.
- c. Civil application stands allowed subject to costs of Rs. 20,000/- (Rupees Twenty Thousand Only) to be paid to the other side, within four weeks from today.
- d. The costs amount shall be deposited in the First Appellate Court for disbursement to the original plaintiff/s.
- e. The deposit of costs amount shall be condition precedent and on its failure, the appeal

shall stand automatically dismissed.

f. The appeal shall be re-admitted at its original stage and the appellate Court shall expeditiously proceed with the appeal and decide it not later than six months from the receipt of record.

g. Appeal stands disposed of.

h. Consequently, all pending Civil Applications if any, are disposed of.

i. The parties to act on the authenticated copy of this decision.

(VINAY JOSHI, J.)