

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

913 WRIT PETITION NO.12818 OF 2022

GULAB DEVSING JADHAV AND ANOTHER
VERSUS
UTTAMSING KHADAKSING JADHAV

...
Advocate for Petitioners : Mr. Nikhil S. Tekale
...

CORAM : SANDEEP V. MARNE, J.

DATE : 15-12-2022

PER COURT :

. By this petition, petitioners have challenged the order dated 11.10.2022 passed by the 2nd Jt. Civil Judge Junior Division, Ambad allowing plaintiffs application for restoration of the suit against defendant no.4. The suit against defendant no.4 came to be dismissed on 29.11.2017 on account of failure on the part of the plaintiff to take steps for service of summons on her.

2. Though it was argued before the trial Court that in view of the decision of this Court in **Vishwanath Satwaji Gaikwad vs. Laxman Abaji Kavale and Ors, 2001 (Supp) Bom.C.R. 327** that after dismissal of the suit under the provisions of Order-IX, Rule-5 of the CPC plaintiff cannot seek restoration of the suit and only a fresh suit needs to be filed, Mr. Tekale, the learned counsel for petitioners fairly

concedes to the position that the Full Bench of this Court has held in **Hariba Tatyaba More & Ors vs. Dada Ekhatnath More & Ors, [2019 (6) Mh.L.J. 511]** that powers of the Court under Section 151 of the CPC can be invoked to seek restoration of the suit dismissed under the provisions of sub-rule (1) of Rule-5 of Order-IX of the CPC.

3. Mr. Tekale however invites my attention to the caveat prescribed by Full Bench of this Court while exercising power under Section 151 of the CPC. He submits that considering the conduct of plaintiff, the Court ought to have rejected the application for restoration of suit qua defendant no.4.

4. I have perused the order passed by the trial Court. A specific finding is recorded that there was no report available with the Court with regard to service/ non-service of summons to defendant no.4. In absence of such a report, it is doubtful whether Court could have dismissed the suit under the provisions of Order-IX, Rule-5 of the CPC. No doubt, there has been some delay on the part of plaintiff in applying for restoration of the suit by filing application on 12.12.2019 i. e. after a period of two years. At the same time the trial Court has considered the fact that the suit is for partition and defendant no.4 is one of the sisters. The other two sisters have been

served and on account of their non-participation in the proceedings, the suit is proceeded *ex parte* against them. In such a situation, defendant no. 4 needs to be brought on record so that there will be effective adjudication of the dispute relating to shares in the joint family property. The trial Court in my view has not committed any error in allowing the application of plaintiff.

5. The writ petition is devoid of merits and the same is dismissed without any orders as to costs.

(SANDEEP V. MARNE, J.)

GGP