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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 3680 OF 2022

SHRI. DHANAJI GOVIND KADAM AND ORS PETITIONERS

V/s.

SHRI. SHIVAJI GANPAT KADAM AND ORS RESPONDENTS

Mr. Shailesh D. Chavan Advocate for the Petitioners

Mr. Ajit J. Kenjale Advocate for the Respondent Nos. 1 & 4

CORAM : NITIN W. SAMBRE, J.

DATE: APRIL 7, 2022.

P.C.:

1) In R.C.S. No. 79/2008, Application Exh. 78, 80 & 82 are taken out for condonation of delay in setting aside abatement and bringing legal heirs on record of Plaintiff no. 1 and Defendant no. 4 which is rejected vide order impugned dated 16/11/2017 passed by Jt. Civil Judge Jr. Division, Koregaon. As such, this Petition.

2) The aforesaid order I am informed was confirmed in Misc. Civil Appeal No. 64/2018 vide order dated 31/08/2019 passed by District Judge-5, Satara.

3) The contentions of counsel for the Petitioners are, inspite of death of Petitioner no. 1, right to sue survives in favour of Petitioner-Plaintiff against surviving defendants. It is claimed that in a Suit, recording of evidence of Plaintiff is going on and as such if Application is granted, no prejudice will be caused to the other side.

4) Counsel for Respondent would strenuously oppose the aforesaid prayer as according to him, son of Plaintiff No. 1 is holding power of attorney in the Suit, who has already tendered his evidence. According to him, delay caused in taking steps for bringing legal heirs of the parties is intentional, that too delay is not explained. He would claim that construction is already completed prior to initiation of the Suit. Right is accrued in favour of Respondent-Defendant qua failure on the part of the Petitioner in taking steps for bringing legal heirs on record. It is also claimed by the Respondent that joint Application for bringing legal heirs of Defendant no. 4 is not maintainable. As such, he claims that Petition is liable to be dismissed.

5) Having regard to the claim in the Suit as referred to above, in my opinion, right to sue survives in favour of Plaintiff no. 2 and that being so, Suit won't abate at the behest of Plaintiff no. 1 so also

against Defendant no. 4 particularly when Defendants are inter-se related. The claim put forth in the Plaint appears to be removal of encroachment and damages for which joint and several Decree is sought. In that view of the matter, even if there is delay of about 7 years in taking steps, same can be condoned as Suit is maintainable at the behest of Plaintiff no. 2 and against the Defendants other than Defendant no. 4.

6) As far as the contention regarding maintainability of joint Application for bringing legal heirs on record is concerned, it hardly has any significance over the merits of the matter as Application preferred under Order XXII of Code of Civil Procedure, 1908 for bringing legal heirs is part of procedure to be adopted while deciding the Suit claim and as such, even if joint Application is made, Respondent cannot be said to be put to prejudice.

7) As such, order impugned passed below Exhibit Nos. 78, 80 & 82 in R.C.S. No. 79/2008 vide order dated 16/11/2017 so also by the Appellate Court in Misc. Civil Appeal No. 64/2018 vide order dated 31/08/2019 are hereby quashed and set aside. Exhibit Nos. 78, 80 & 82 are allowed subject to payment of cost of Rs. 15,000/- to be

deposited in the pending Suit to which contesting Respondent-Defendants will be entitled to withdraw. Once cost is deposited, Petitioner will be entitled to carry out amendment.

8) Petition is allowed in the above terms. Hearing of the Suit is expedited.

[NITIN W. SAMBRE, J.]