

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO. 2492 OF 2021

Jagdish s/o Motiram Meshram

Vs.

Vijay s/o Jagan Kawale and anr.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. B.N. Mohta, Advocate for petitioner.

Mr. U.M. Aurangabadkar, Advocate for respondent No.1.

CORAM : MANISH PITALE J.

DATE : 20.07.2022.

By this writ petition, the petitioner has challenged order dated 22.06.2017, passed by the District Court at Nagpur, whereby an application at Exhibit 42 has been rejected. The said application was an application seeking leave to seek rehearing of an appeal by invoking power under Order 41 Rule 21 of the Code of Civil Procedure (CPC).

2. It is the case of the petitioner that the original respondents in the appeal had bequeathed the property in question in favour of the petitioner and upon the death of the respondent in the said appeal, the appellants i.e. respondents in the present

writ petition, ought to have brought the petitioner on record in the pending appeal. According to the petitioner, instead of taking such steps, the respondents caused a public notice to be issued in newspapers asking if there be any legal heirs of the said deceased respondent in the appeal, they should come forward to contest the appeal before the Court. According to the petitioner, this was an act of fraud and suppression on the part of the respondents herein and in such circumstances, on 10.04.2006, the appeal bearing Regular Civil Appeal No.481/1998 stood allowed in favour of respondents herein. As a consequence, the decree passed by the trial Court in favour of the original respondent Madhukar Urkuda Mandape, the predecessor of the petitioner was set aside and the suit was dismissed.

3. In such circumstances, the petitioner moved an application under Order 41 Rule 21 of the CPC, along with an application under Section 5 of the Limitation Act, 1963, for seeking condonation of delay in moving the said application, for the reason that while the appeal was disposed of on 10.04.2006, the said application could be filed only in July 2012. It appears that during the pendency of the said applications, in the year 2021, the petitioner

filed aforesaid application at Exhibit 42 seeking leave to seek rehearing of the appeal under Order 41 Rule 21 of the CPC. It is the said application, which is dismissed by the District Court by the impugned order.

4. Mr. Mohta, learned counsel appearing for the petitioner submitted that a perusal of the impugned order itself would show that the petitioner or his counsel were not heard in the matter. The Court below mis-directed itself by not considering the contentions raised in the application at Exhibit 42 and instead concentrating more on the aspect of delay and the fact that the delay was yet to be condoned. As a consequence, according to the learned counsel for the petitioner, the contentions raised in the application at Exhibit 42, have not been considered and opportunity, which ought to have been granted to the petitioner to demonstrate the fraud committed by the respondents, was taken away.

5. On the other hand, Mr. Aurangabadkar, learned counsel appearing for respondents submitted that a perusal of the Order 41 Rule 21 of the CPC itself would show that such an application for

rehearing of an appeal can be moved only by the respondents in the appeal against whom an *ex-parte* judgment has been pronounced. According to the learned counsel for respondents, when admittedly the petitioner herein was not a respondent in the original appeal, there was no question of invoking the said provision and hence, the impugned order was justified. It was submitted that the petitioner was also required to explain the delay of almost six years in moving the said application.

6. This Court has considered the impugned order after hearing the learned counsel in the context of the material placed on record. A perusal of the judgment and order dated 10.04.2006, passed by the District Court in Regular Civil Appeal No.481/1998, would show that the said Court observed that the respondent therein died during pendency of the appeal and the appellate Court proceeded on the basis that the said respondent died leaving behind no legal heir and that the respondents therefore, could not bring on record any legal heir. It was then recorded that the Court caused a public notice to be issued in newspapers asking if there were any legal heirs of the deceased respondent in the appeal and if so they could come

forward to contest the proceedings. When none appeared, the Court proceeded to consider the appeal on merits and eventually allowed the appeal, dismissing the suit filed by the original plaintiff.

7. The petitioner herein alleges that the respondents herein, who were appellants in Regular Civil Appeal No.481/1998, indulged in fraud and suppression because they were well aware about the existence of a Will executed by the said respondent in the appeal, in favour of the petitioner, as there was a parallel proceeding in the form of a suit filed by the petitioner, wherein the respondents were allegedly aware about the fact that the said respondent in the appeal, Mudhukar Urkuda Mandape, had executed a Will in favour of the petitioner. It is in these circumstances, that the petitioner was constrained to move the application for grant of leave to invoke Order 41 Rule 21 of the CPC, for the reason that, according to the petitioner, upon the death of the original respondent in the said appeal, he ought to have been brought on record and he would rightly have been respondent in the said appeal.

8. These factors have not been adverted to at all by the District Court while passing the impugned order. Apart from the fact that the petitioner alleges that neither he nor his counsel were heard when the impugned order was passed, a perusal of the impugned order shows that there is no reference to the background in which the petitioner was constrained to move the application at Exhibit 42, seeking leave for rehearing of the appeal by invoking Order 41 Rule 21 of the CPC. The District Court appears to have concentrated more on the question of delay in moving the Court and only on that basis, the application at Exhibit 42 has been rejected. There is no consideration of the specific contentions raised in the said application.

9. Therefore, this Court is convinced that the present petition deserves to be partly allowed by setting aside the impugned order and remitting the matter back to the District Court for deciding the application at Exhibit 42 afresh. This Court is not making any comment on the contents of the application filed by the petitioner under Order 41 Rule 21 of the CPC and the application moved under Section 5 of the Limitation Act, 1963, seeking condonation of delay in moving the application

under Order 41 Rule 21 of the CPC. The stage to consider the said applications will arise only after the District Court considers the application at Exhibit 42 in the proper perspective.

10. In view of the above, the writ petition is partly allowed. The impugned order is quashed and set aside. The matter is remitted back to the District Court for deciding the application at Exhibit 42, afresh. This Court has made no comments on the merits of the said application. It would be appropriate, if the appellate Court decides the said application on merits and, if necessary, grants opportunity to the parties to lead evidence in that context.

11. Accordingly, the writ petition is disposed of in above terms.

JUDGE