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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8068 OF 2016

Madhav Sidram Ghate and Another

PETITIONERS

VERSUS

Manik Sidram Ghate and Others

RESPONDENTS

Mr. Ajinkya Kale h/f Mr. S. B. Talekar, Advocate for the petitioners
Mr. S. W. Munde, AGP for respondent - State
Mr. Yashwant P. Jadhav, Advocate for respondents No.1 to 3

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 6th MARCH, 2023

ORDER :

1. Petitioners impugn order dated 31st October, 2015, passed by learned Civil Judge, Junior Division, Omerga below Exhibit-1 in Miscellaneous Civil Application No. 37 of 2012, thereby rejecting the application filed by the petitioners – original plaintiffs for restoration of Special Civil Suit No. 23 of 2004 which was dismissed in default.

2. Petitioners /original plaintiffs filed suit for declaration of ownership of the suit property, including half share in two wells and two tube wells in the suit property. In the alternate, a prayer for partition and separate possession of 7/8th share of plaintiff

No.1 in the suit property was sought. The suit is dismissed in default on 17th April, 2010. Hence this petition.

3. Heard learned advocate for the petitioners and learned advocate for respondents No.1 to 3. Perused the impugned order and the documents placed on record.

4. It appears from record that, Special Civil Suit No. 23 of 2004, filed by the petitioners, was earlier dismissed in default, on 6th January, 2007, as the petitioners – plaintiffs were absent. CMA No. 3 of 2007 filed by the petitioners for setting aside order of dismissal of the suit in default, was allowed with costs in the year 2007. Again, Special Civil Suit No. 23 of 2004 was dismissed in default, as the petitioners were absent, when the suit was kept for hearing on 17th April, 2010. Present CMA No. 37 of 2012 was filed for restoration of the same which is rejected. Thus, it is clear that for two times, the suit was dismissed in default due to the absence of the petitioners – plaintiffs.

5. It appears that petitioner No.2 – plaintiff No.2 is the wife of petitioner No.1 – plaintiff No.1. According to the petitioners, due to census work, petitioner No.1 could not appear before the Court in the suit. However, there is no explanation as to why plaintiff No.2 – petitioner No.2 was absent on that day. Both the

petitioners and their advocate were absent on the day when the suit was dismissed in default on 17th April, 2010. The Trial Court has observed that the learned advocate for the petitioners was absent due to death of his relative, as he had gone to attend the funeral. It further appears from the record that the petitioners were negligent in prosecuting their own suit and twice the suit was dismissed in default.

6. Learned advocate for the petitioners strenuously submits that the petitioners will lose the opportunity to claim the relief of declaration of ownership and partition, if the order, impugned in the present writ petition, is maintained. He submits that the suit may be restored by imposing exemplary costs.

7. Learned advocate for respondents No.1 to 3, on the other hand, vehemently opposed the prayer, by relying on the decision of the Apex Court in **"Shiv Cotex V/s Tirgun Auto Plast P.Ltd and Others" 2011 (9) SCC 678**, wherein it is held -

"Trial Court given more than sufficient opportunity to plaintiff – respondent No.1 to produce evidence in support of its case. Adjournments have grown like cancer corroding entire body of justice delivery system. Despite of three opportunities, no evidence was let in by plaintiff, deserves no sympathy in second appeal. High Court was clearly in error in giving plaintiff opportunity to produce evidence when no justification for that course existed. Appeal allowed and judgment of High Court is set aside"

8. Aforesaid observations of the Apex Court are squarely applicable to the facts of the present case.

9. Apart from this, learned advocate for the respondents points out that the defendants in the suit have already filed Regular Civil Suit No. 646 of 2022 for partition of the suit properties and the petitioners will get the relief of partition in RCS No. 646 of 2022.

10. The Trial Court has rightly appreciated the rival submissions and has assigned proper reasons while rejecting MCA No. 37 of 2012. The Trial Court was justified in rejecting MCA No. 37 of 2012 holding that the petitioners were negligent in prosecuting the Suit. No illegality or perversity is found in the order, impugned in the present writ petition. Writ petition being devoid of merits, is dismissed. No costs.

[NITIN B. SURYAWANSHI]
JUDGE