

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

SECOND APPEAL NO. 684 OF 2022
WITH CA/14196/2022 IN SA/684/2022

NAGORAO MAROTRAO MULE AND ANOTHER
VERSUS
SANTABAI KARBHARI DUGANE AND OTHERS

...

Advocate for Appellants : Mr. Kalani Pravin N.
Advocate for Respondent Nos. 1 to 4 : Mr. Sudhir K. Chavan

CORAM : R.M. JOSHI, J.
DATE : 21st March, 2023

PER COURT :

1. Heard.
2. This appeal is filed by appellants / original defendant nos. 3 and 4 for setting aside order passed by first appellate Court in Regular Civil Appeal No. 117 of 2018, thereby, dismissing the appeal for want of prosecution.
3. It is the contention of the appellants that for the absence of lawyer, the appeal was dismissed and hence, the appellants cannot be made to suffer for the fault of their Advocate.
4. Learned counsel for the respondent nos. 1 to 4 opposed the said contention by stating that it was open for the appellant to make an application before the first appellate Court for setting aside the said

order, however, in order to cause delay present appeal is preferred.

5. No doubt, the judgment of the Trial Court is ex-parte against present appellants but they had challenged the said judgment by preferring RCA No. 117 of 2018. The impugned order is passed on 16th December, 2021. It seems that the Advocate for both sides were absent and hence, the appeal came to be dismissed. It is matter of common knowledge that the parties hardly remain present before the first appellate Court and the matter are conducted by the lawyers appointed. It is also settled position of law that instead of dismissal of the matter from technicalities, it is in the interest of the parties that lis between them it be decided on merits.

6. In such circumstances, question arises for consideration of this Court is as to whether the first appellate Court had committed error in dismissing the appeal for want of prosecution. The answer thereto needs to be recorded in affirmative. Consequently, the order dated 16th December, 2021, passed in Regular Civil Appeal No. 117 of 2018 is set aside.

7. The original proceeding is of the year 2014. It is the suit for partition. Learned counsel for the respondent nos. 1 to 4 makes grievance that the appellants herein are in the possession of the suit

property and thereby, denying the right of these defendants in respect of the same. He, therefore, seeks imposition of heavy costs for setting aside of the impugned order.

8. Considering the facts and circumstances of the case, the order dated 16th December, 2021, is set aside, subject to costs of Rs. 20,000/- (Rupees twenty thousand) payable by the appellants to the respondent nos. 1 to 4 within a period of two weeks.

9. In failure thereto, this order stands vacated without further reference to this Court and consequently, appeal shall stand dismissed.

10. If cost is paid, then the first appellate Court to decided the appeal within a period of three months from the date of receipt of the writ.

[R.M. JOSHI, J.]

SPChauhan