

SPChauhan

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

APPEAL FROM ORDER NO. 25 OF 2016
WITH
CIVIL APPLICATION NO. 5091 OF 2016
AND
APPEAL FROM ORDER NO. 27 OF 2016
WITH
CIVIL APPLICATION NO. 5103 OF 2016

Sanjay Deorao Tompe and another ... Appellants

Versus

Trimbak Deorao Tompe ... Respondent

....
Mr. V.C. Solshe – Advocate for Appellants
Mr. S.B. Bhapkar – Advocate for Respondent
....

CORAM : GAURI GODSE, J.
DATE : 10th January, 2023

PER COURT :

1. Both the Appeal from Orders are filed for challenging order dated 29th June, 2015, passed by the learned District Judge – 1, Gangakhed, in Miscellaneous Application (RJE) No. 14 of 2014 and 15 of 2014.
2. By the impugned orders, applications filed by the present appellants for setting aside the order of dismissing the First Appeals for default and praying for re-admitting the First Appeals for hearing is rejected.

3. The appellants had filed Regular Civil Suit No. 118 of 2004 for injunction as well as partition with respect to suit property bearing Survey No. 46 of 2001, situated at Village Nalanda, before the Civil Court at Gangakhed. The respondent had filed the Regular Civil Suit No. 150 of 2008 for declaration of ownership and perpetual injunction with respect to the same suit property in the Civil Court at Gangakhed. By common judgment and decree dated 31st December, 2009, the suit filed by the appellants was dismissed and the suit filed by the respondent was decreed. The appellants filed two separate Civil Appeals in the District Court at Gangakhed. Regular Civil Appeal No. 03 of 2010 was filed against dismissal of the appellant's suit and Regular Civil Appeal No. 02 of 2010 against the decree passed in the suit filed by the respondent.
4. Since the Advocate for the appellants was absent both the appeals were dismissed for want of prosecution on 08th August, 2014. The appellants filed two separate applications for setting aside the order of dismissal and for re-admitting the appeals filed by the appellants. The Miscellaneous Applications filed by the present appellants were dismissed by order dated 29th June, 2015. Being aggrieved by the dismissal of the applications,

appellants filed two separate appeals. Appeal from Order No. 25 of 2016 is filed against rejection of the Miscellaneous Application (RJE) No. 14 of 2014 and Appeal from Order No. 27 of 2016 is filed against rejection of the Miscellaneous Application (RJE) No. 15 of 2014.

5. The learned counsel appearing for the appellants state that his Advocate was absent on the concerned date due to his illness. Hence, in such circumstances, the appellants were entitled to an opportunity for getting the dismissal order set aside and re-admit his appeals for hearing. The learned counsel for the appellants submit that the reasons given for rejecting the application are harsh and appellants will suffer hardship and serious prejudice, if their appeals are not heard on merits.
6. Learned counsel appearing for the respondents submit that on earlier occasions also none had appeared for the appellants before the District Court. He further submits that though the Advocate for the appellants was unavailable, it was the obligation of the appellants to remain present before the Court. Hence, he submits that the learned District Judge has rightly rejected the applications filed by the appellants. There is no merit in the present appeals and hence, the Appeal from Orders may be dismissed.

7. I have perused the record. It appears that only due to illness of the Advocate, none had appeared on behalf of the appellants. There is no other ground for dismissal of the appellant's appeals. There is no dispute that the appellants Advocate was unwell and hence, he had not appeared on the concerned date. In such circumstances, there is no reason that the ground pleaded on behalf of the appellants should be disbelieved. Hence, I find that the impugned order passed in both the appeals are required to be quashed and set aside and the appellants are required to be given an opportunity to argue the appeals on merits. Hence, following order is passed :

ORDERS

- i. Both the Appeals from Orders are allowed.
- ii. The impugned judgments orders dated 29th June, 2015, passed by District Judge – 1, Gangakhed, in Miscellaneous Appeal (RJE) No. 14 of 2014 and 15 of 2014 are quashed and set aside.
- iii. Miscellaneous Application (RJE) No. 14 of 2014 and Miscellaneous Application (RJE) No. 15 of 2014 are allowed and Regular Civil Appeal No. 02 of 2010 and Regular Civil Appeal No.03 of 2010 are restored to file.

- iv. The appellants shall pay costs of Rs. 3,000/- to the respondent as and by way of condition for re-admitting the appeals for hearing on merits.
- v. The amount of costs will be deposited by the appellants before the District Court within a period of four weeks from today.
- vi. On production of the proof of payment of costs, the appeals will be restored to file and will be heard on merits.

[GAURI GODSE]
JUDGE