

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10072 OF 2024

~~Dnyanoba Tukaram Bhosale~~ (Deceased)

Through Legal Heirs

Kamal Dnyanoba Bhosale and Ors.

.. Petitioners

Versus

Vasantrao Tukaram Bhosale and Ors.

.. Respondents

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• Mr. Nagesh Y. Chavan, Advocate for Petitioners.

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CORAM : MILIND N. JADHAV, J.

DATE : JULY 23, 2024.

P.C.:

- 1.** Heard Mr. Chavan, learned Advocate for Petitioners.
- 2.** Present Writ Petition takes exception to the impugned order dated 05.03.2024 appended at Exhibit “H” – page No.96 of the Writ Petition.
- 3.** In the present matter, by order dated 02.08.2013, Suit of the Plaintiff was dismissed for default by the Trial Court. Thereafter Plaintiff filed Application seeking restoration of the Suit proceedings. However, by order dated 28.07.2017 Trial Court dismissed that Application on the technical ground that the Application was not maintainable in terms of the provisions of the Code of Civil Procedure, 1908 (for short “**CPC**”) as stated in that Application. Plaintiff being aggrieved filed Misc. Civil Appeal immediately before the District

Court, which was decided after a hiatus of 7 years and it upheld the order of the Trial Court.

4. It is seen that reason for passing the order dated 02.08.2013, which is appended at page No.61 of the Writ Petition, that the Suit was dismissed and the Plaintiff attempted to protract the hearing of the Suit. The Suit is filed in the year 2000 for partition of ancestral Suit properties. In a partition Suit, admittedly parties are all family members and nomenclatured as i.e. Plaintiff and Defendant, but all the parties in the shoes of a Plaintiff. Considering the substantive relief of partition prayed for in the Suit proceedings, Plaintiff cannot be non-suited. It is a fact that Plaintiff has derelicted and protracted the hearing of the Suit proceedings. The order dated 02.08.2013 when read shows that Plaintiff had made an adjournment Application on that date also.

5. On 02.08.2013 also, Plaintiff filed adjournment Application and it was held that the Plaintiff was intentionally delaying the trial and was not interested in the proceedings. Pursuant to the order dated 02.08.2013, it is seen that Plaintiff filed Application for setting aside of the order which was also rejected by order dated 28.07.2017. That order is appended at Exhibit "F" - page No.81 of the Writ Petition. Perusal of the said order shows that said Application is dismissed on the ground that Plaintiff ought to have filed an Appeal before the

District Court and not the said Application. However, I find that the order dated 28.07.2017 has been correctly passed by the Trial Court.

6. Plaintiff thereafter approached the District Court and filed Appeal under Section 104 and Order XLIII Rule 1(c) of the CPC being Misc. Civil Appeal No.122 of 2017. The said Appeal has been dismissed on the ground that Application filed by Plaintiff is not maintainable in view of the provisions of Order IX of the CPC since the Plaintiff was actually and infact present on the date which the Suit was dismissed on 02.08.2013, but his Advocate was absent on that date and the Suit was dismissed for want of prosecution despite the Court urging the Plaintiff to go on with the Suit proceedings. In such a case, provisions of Order XVII Rule 3 of the CPC ought to have been applied and the Court ought have to consider that the Plaintiff had filed the Suit by applying Section 151 of the CPC and a lenient view ought to have been taken.

7. In view of the above observations and findings, the order dated 02.08.2013 and the order of the District Court 05.03.2024 are not sustainable and deserve to be set aside, however subject to the Plaintiff paying costs of Rs.15,000/- to the Defendants @ Rs.3,000/- per branch to the original 5 Defendants and/or their legal heirs as available on record in the Suit proceedings. The costs shall be deposited within a period of two weeks from today in the Trial Court if

the Defendants refuse to accept the same. Defendants shall be at liberty to withdraw the said amount on the basis of a server copy of this order and on making a simple Application to the Trial Court and the Trial Court shall permit the Defendants to withdraw the same.

8. In view of the above, the order dated 02.08.2013 is quashed and set aside. Resultantly, the order dated 05.03.2024 is also quashed and set aside. Suit is restored to the file of the Trial Court subject to payment of costs as directed above.

9. Suit is restored to the record and file of the Trial Court. Since the Suit is of the year 2000, learned Trial Court shall expedite the hearing of Suit proceedings as expeditiously as possible and in any event within a period of four (4) months from today positively.

10. It is clarified that parties shall not take any unnecessary adjournments and the Trial Court shall grant adjournment only if it is utmost necessary.

11. Parties and especially the Plaintiff are directed to cooperate with the Trial Court for expeditious disposal of the Suit proceedings.

12. All contentions of the parties are expressly kept open before the learned Trial Court.

13. Writ Petition is disposed of in the above terms.

[MILIND N. JADHAV, J.]