

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO.10360 OF 2022

WITH

INTERIM APPLICATION NO.10356 OF 2022

WITH

INTERIM APPLICATION NO.10351 OF 2022

IN

SECOND APPEAL NO.694 OF 2015

Ramchandra Barku Gatkai

(Since deceased) thr. Legal Heirs

1 A. Lankabai Ramchandra Gatkai & Ors.

...Applicants

Versus

Alka Sakharam Pacharne

...Respondent

WITH

INTERIM APPLICATION NO.10356 OF 2022

IN

SECOND APPEAL NO.694 OF 2015

Sukhdeo Devram Dhabale & Ors.

...Applicants

In the matter between

Ramchandra Barku Gatkai

(Since deceased) thr. Legal Heirs

1 A. Lankabai Ramchandra Gatkai & Ors.

...Appellants

Versus

Alka Sakharam Pacharne

...Respondent

Mr. Surel S. Shah i/b Mr. Rahul P. Kasbekar for the Applicants.

Mr. Prashant D. Patil for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : JANUARY 16, 2024

P. C. :

1. Interim Application has been preferred seeking recall of the order dated 9th March, 2020 by which the Appeal came to be dismissed for non prosecution.

2. The submission of learned counsel for the Applicant is that the Appeal came to be dismissed as the Appellant No. 1 was pursuing the litigation including the Second Appeal and after his demise, lock-down was imposed due to Covid-19 Pandemic and as such, instructions could not be given for filing of the Application for recall of the order. He would further submit that sufficient cause has been made out for recalling the order of 9th March, 2020.

3. *Per contra*, learned counsel for the Respondent has vehemently opposed the Application pointing out to the Affidavit-in-reply which has been filed. He submits that the Applicants intentionally allowed the present appeal to be dismissed. He further points out that after death of the original Appellant No. 1, the Appellant No. 1A to 1E, 2A, 3, 4 and 6 have executed release deed in respect of the suit properties along with the other properties and have also executed a family partition with the sole intention to deprive the right of the Respondent. He further submits that subsequently, the legal heirs of the deceased, Appellant No. 1 have

executed lease deed in favour of the property, mortgaged the property and thereby third party rights have been created. He further submits that the entire litigation was being looked after by the Appellant No. 6 and not by Appellant No. 6 as falsely stated on oath as it was the Appellant No. 1 who was holding the Power of Attorney on behalf of all the Applicants include the Applicant No. 1. He submits that even on merits, the Trial Court as well as the Appellate Court has held in his favour and no cause has been made out for explaining the delay. He further submits that, all these facts have been suppressed in the Application seeking restoration and no indulgence ought to be granted to the Applicants.

4. Considered the submissions and perused the record.

5. The Application seeking recalling of the order of dismissal appears to be innocuous Application. However, considering the Affidavit-in-reply filed by the Respondent, it appears that the Applicants intentionally allowed the present appeal to be dismissed and has thereafter created third party rights in respect of the suit properties by executing release deeds and mortgaging the suit properties. It is also pleaded that the Appellant No. 6 was pursuing the litigation since inception and as such, the Applicants have made a false statement on oath that it was the Appellant No. 1 who was pursuing the litigation and upon his death, the other Applicants were unaware of the procedure of the Court and therefore appropriate

instructions could not be given. The submissions in the Affidavit-in-reply have not been controverted by filing any rejoinder by the Applicant.

6. The submissions of learned counsel for the Respondent that it is only with the intention to prolong the execution the present Application had been filed, deserves consideration considering the facts which have pleaded in the Affidavit-in-reply. Even on merits there are concurrent findings in favour of the Respondent and decree for specific performance has been granted. Pending the hearing it appears that the third party rights have been created just to frustrate the rights of the Respondent. None of these facts have been brought on record by the Applicant. Once, third party rights have been created in respect of the suit property there was no warrant for filing this application for recall of this order.

7. In view of the above, the application deserves to be rejected. Application stands dismissed.

8. In view of dismissal the application for seeking recall of the order, the pending applications does not survive for consideration and the same are also disposed of.

(SHARMILA U. DESHMUKH, J.)