

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.2858 OF 2019

IN

FIRST APPEAL NO.519 OF 1998

B. A. Sharma

since deceased through legal heirs

Rakesh B. Sharma & Ors.

: Applicants/Appellants

Vs.

M/s. Rizvi Builders Prop. Concern

of Shri Akhtar Hasan Rizvi

: Respondent

Adv. R. R. Sharma, for the Applicants/Appellants.

Adv. Joel D'Souza i/by Adv. Zakir K. B. for the Respondent.

CORAM : KISHORE C. SANT, J.

DATE : 7TH MARCH, 2024

PC. :

1. This Application is filed for the restoration of the First Appeal No.519 of 1998 that was dismissed in default by this Court by order dated 20th June, 2019. This Court in the order dated 20th June, 2019 has categorically observed that the Appellants are not interested in prosecuting the Appeal.

2. It is stated in the Application that the Sister-in-Law of the concerned Advocate was admitted in the hospital and therefore he had

instructed another lawyer to attend the Court. The another lawyer, however, could not attend the Court, neither informed about the next date to the advocate for the Applicant. The Advocate was therefore not aware of the date of 20th June, 2019. It is stated that for this reason the matter remained unattended. It is submitted that the Applicant may be given an opportunity to contest the Appeal on merits.

3. The Application is vehemently opposed by the learned Advocate for the Respondent. In the reply he has given a chart to show that the Applicant is not prosecuting the matter diligently. For the convenience the chart is reproduced below:-

Sr. No.	Date	Coram	Remarks
1	30.4.2004	Kakade, J.	Appeal is expedited.
2	7.3.2007	Oak, J.	Appellant warned if compliance is not made within time, Appeal will stand dismissed for non prosecution without further reference to the Court.
3	8.12.2008	D.G. Karnik, J	None present for the appellant. Appeal dismissed.
4	7.10.2009	Bhatia, J	It is explained that relative of the advocate was not keeping well and was in hospital and therefore advocate could not appear. Application allowed and First Appeal is restored to file.

5	11.3.2011	Oak, J.	None appears for the Appellant.
6	16.1.2015	Tated J.	Office directed to place First Appeal on board for final hearing as per its turn.
7	22.2.2017	Sonak J.	To place matter for final hearing
8	5.7.2018	V. M. Deshpande J.	Mrs. Gaidhani is unable to attend the court and prays time.
9	13.6.2019	Prabhudessai J.	None present for appellant. By way of indulgence and final opportunity s/o 1 week under caption for dismissal.
10	20.6.2019	Prabhudessai J.	None present for appellants. It appears that the appellants are not interested in prosecuting the appeal. Hence appeal is dismissed for non-prosecution.

From the chart it is seen that this Court had already dismissed the Appeal for default by order dated 8.12.2008. By order dated 7.10.2009, the Appeal was restored for the reason that the relative of the advocate was not keeping well and was in hospital and for that reasons could not attend the Court. In spite of restoration of the Appeal to the original position again the matter was not prosecuted diligently and for this reason this Appeal is dismissed for default for the second time.

4. Learned Advocate for the Respondent therefore has serious objection to restore the Appeal. He submits that, since long the Appellant is enjoying possession of the property and deliberately they are prolonging

the hearing of the Appeal. He points out that in a rejoinder to his reply again the same reasons are stated of illness of the relative i.e. sister in law. He submits that even reply is not consistent as at some places it is stated that learned Advocate was required to be in hospital with his cousin and at some places, it is stated that his sister in law was admitted to the hospital. Submission is therefore made that the application lacks the bona fides.

5. From the record it is seen that the Appeal is dismissed for the second time, wherein the Appellant has lost in the suit filed by Respondent for possession and thus is depriving the Plaintiff and the possession and delaying the matter. This Court is of the opinion that the Appeal requires to be heard on merits, at the same time the Respondent/Original Plaintiff needs to be compensated sufficiently. Hence the following order.

ORDER

- a) Application stands allowed.
- b) First Appeal No.519 of 1998 stands restored to its original position, subject to payment of costs of Rs.1,00,000/- (Rupees One Lakh only) to be deposited in this Court within two weeks. After the cost is deposited the Respondent/Original Plaintiff

shall be entitled to withdraw the same without any formal Application.

- c) If, no costs is deposited, the Application shall stand dismissed without further reference to the Court.
- d) Application stands disposed of.

(KISHORE C. SANT, J.)