



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Writ Petition (WP) No. 3531 of 2021

Smt. Kunda W/o Balkrishna Parande and another
Versus
Smt. Rukhminibai Wd/o Shrirang Bawiskar and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri Akhtar Ansari, Advocate for the petitioner.
Ms. Anushree Bangde h/f Shri Shyam Dewani,
Advocate for the respondent nos. 2 to 4, 10 and 12.
Shri Abhay Saxena, Advocate for the respondent nos. 2
to 4, 10 and 12.

CORAM : ANIL S. KILOR, J.
DATED : 14th FEBRUARY, 2024.

Heard.

2. Learned counsel for the respondent nos. 2 to 4, 10 and 12 filed a pursis dated 14th February, 2024 stating that the respondent nos. 2 to 4 and 10 and 11 have taken back the file from the learned counsel on 27th December, 2023. Accordingly, a prayer is made for discharge from this proceeding.

3. In view of the pursis dated 14th February, 2024 and acknowledgment, Shri Dewani, learned counsel is discharged.

4. The pursis is taken on record and marked 'X' for identification purpose.

5. I have heard learned counsel for the petitioner and Shri Abhay Saxena, learned counsel on behalf of the respondent nos. 2 to 4, 10 & 11.

6. This writ petition raises a question to the validity of the order below Exhibit 101 dated 13th June, 2019 passed by the 6th Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No. 248 of 2004 rejecting the application for restoration of the suit and thereby dismissing the suit in default passed below Exhibit 1.

7. Shri Saxena, learned counsel for the respondent nos. 2 to 4, 10 and 11 submits that on rejection of the application for restoration application, the remedy is available by way of appeal before the District Judge. He, accordingly, submits that the present writ petition is not maintainable.

8. I have perused the record from which it is evident that, chief of the plaintiff was completed on 10th March, 2015 and thereafter the matter was posted for cross-examination. However, on 28th April, 2015 the

defendant no.1 died and therefore the cross was not conducted. Thereafter, the application for bringing legal heirs of defendant no.1 was filed which was allowed and the notices were issued to the proposed legal heirs and since the service was not made, again a notices were issued on 19th January, 2019 and the service report was awaited on the date when the impugned orders were passed.

9. The suit was dismissed for want of prosecution on 13th June, 2019 and on the same date immediately, the application for restoration was moved which was rejected by recording following reasons:

“Perused the application and record of the case.
Heard learned counsel for the plaintiff.

After passing the order for dismissal of suit in default, this application came be preferred at 4.30 p.m.

Record of the case would demonstrate that at no point of time plaintiff has taken any care to proceed with the suit. Matter is about 15 years old. The suit is pending without any progress for years together for want of effective steps on behalf of the plaintiff. Even, this Court on its own motion has issued notices to the plaintiffs. The report Exh.99 and 100 makes it clear that plaintiffs are not residing at their registered address. Therefore, it is clear that plaintiffs even did not communicate this fact of change of address to the Court.

It appears that matter was kept for dismissal since the year 2014 as per the orders passed below Exh-1 by the then Learned Presiding Officer. Today

also no steps are taken. Plaintiffs are absent. Present application is moved with the signature of learned counsel for plaintiffs. The contents of the application does not demonstrate to the satisfaction of this court, that there was any sufficient cause for the non appearance of the plaintiffs for the years together and today also. Hence, no case is made out under the provision of order 9 Rule 9 of Civil Procedure Code for setting aside the order of dismissal. In the result, following order is hereby passed.....”

10. The fact that the chief was recorded and thereafter before the cross was conducted, the defendant no.1 had died. Despite steps taken by the plaintiff, service could not be made on the legal heirs of the defendant no.1 and lastly on 19th January, 2019 afresh notices were issued by the learned trial Court and the service report of which was awaited and without considering the above referred facts the application for restoration was rejected on the grounds which are contrary to the record.

11. In the circumstances, since there is no complete bar to entertain the writ petition and further considering the fact that the order was passed without application of mind and contrary to the record and also without considering the fact that on the same day the application for restoration was filed, it is clear that, the order is perverse. Hence, the writ petition is maintainable and accordingly it is decided.

12. In that view of the matter, I am of the opinion that the present matter needs to be allowed by setting aside the impugned orders dated 13th June, 2019. Accordingly, I pass the following order.

- i. Writ petition is allowed;
- ii. The impugned order below Exhibit 101 dated 13th June, 2019 passed by the 6th Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No. 248 of 2004 and impugned order below Exhibit 1 dated 13th June, 2019 are hereby quashed and set aside. Consequently, the application Exhibit 101 for restoration of the suit is allowed.

[ANIL S. KILOR, J.]