



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

WRIT PETITION NO.5588 OF 2024

(Vinayak s/o Balkrushna Ambadkar and others Vs. Pandhari s/o Namdeo Ambadkar
and others)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. Masood Shareef, Advocate for Petitioners.
Mr. S. S. Shingane, Advocate with Mr. V. B. Mahant, Advocate for Respondent
Nos.1, 2a to 2d and 3.

CORAM: N. R. BORKAR, J.

DATE: 27th NOVEMBER, 2024.

This petition takes exception to the order dated 04.09.2024 passed by the Ad-hoc District Judge-2, Nagpur below Exhibit-27 in Civil Misc. Application No.825/2022.

2. The respondents herein had filed a suit for partition and separate possession against the petitioners. The trial court decreed the suit by judgment and decree dated 09.03.2017.

3. The petitioners being aggrieved by the said judgment and decree passed by the trial court filed the first appeal before the District Court.

4. By order dated 27.07.2017 the first appellate court granted stay to the decree passed by the trial court. The appeal was, thereafter, not prosecuted diligently and

thus the first appellate court dismissed the appeal by order dated 01.07.2022. The said order reads thus:

“The appellants and their learned counsel absent. Since last so many dates, the appeal is fixed for dismissal order. Today also, no one is present on behalf of the appellants. Steps not taken by them, in pursuance of pursis (Exh-14) dated 20.1.2021. Thus, it appears that the appellants are not interested in prosecuting this appeal. Therefore, the appeal is liable to be dismissed.

Therefore, the appeal is dismissed for default.

No order as to costs.”

5. The petitioners filed an application for re-admission of the appeal along with an application for condonation of delay. In the meantime, the revenue authorities demarcated the shares in terms of the decree passed by the trial court. The petitioners apprehending that the possession would be delivered to the respondents filed an application for stay of the decree, in the proceedings filed by them for re-admission of the appeal. The first appellate court rejected the said application by the order impugned.

6. I have heard the learned counsel for the petitioners and the learned counsel for the contesting respondents.

7. The learned counsel for the petitioners submits that the first appellate court rejected the application on

erroneous ground that stay can not be granted when the application for condonation of delay is still pending. It is submitted that the Division Bench of this Court in ***Bhagwan s/o Ganpatrao Godsay v. Kachrual s/o Bastimal Samdariya*** **1987 SCC OnLine Bom 32** held that the Order 41, Rule 3A of the Code of Civil Procedure is directory and not mandatory. It is submitted that the delay in filing the application for re-admission of the appeal is only 37 days. It is submitted that considering the overall facts and circumstances, the order impugned be set aside and the decree passed by the trial court be stayed.

8. On the other hand, the learned counsel for the respondents submits that some of the respondents are senior citizens. It is submitted that after obtaining the stay, no steps were taken for prosecuting the appeal for approximately five years and thus, the first appellate court was constrained to dismiss the appeal. It is submitted that the case of the petitioners is based on the unregistered relinquishment deed and therefore after obtaining the stay the appeal was not prosecuted on merit. It is submitted that no interference is thus called for in the impugned order.

9. I have perused the judgment and decree passed by the trial court. The trial court has recorded the following finding:

“21. Apart from it in the case at hand defendant contended that Namdeo and Gulab have relinquishment their share on the basis of

relinquishment deed. In the case hand if for the sake of discussion it is assumed that Namdeo and Gulab relinquished their shares as contended by defendants, even though also the entries reflected in the revenue record shows that it was recorded on the basis of unregistered deed of relinquishment. It is pertinent to note here that as per section 17(1)(b) of Indian Registration act, 1908, in the case of other non-testamentary instrument which purports or operate to create, declared, assign, limit or extinguish whether in present or future, any right, title or interest whether vested or contingent, of the value of Rs.100/- to or in immovable property shall compulsorily be by registered document. However, in the case at hand the defendants have not produced such registered document to show that Namdeo and Gulab relinquished their share. Therefore, it appears that the entry shown in Exh. 44-A as well as Exh. 64 is not taken on the basis of valid and legal document. Hence, in my view the entries of the revenue record of the suit property cannot be believe to be true and correct.”

10. From the order dated 01.07.2022 passed by the first appellate court it is apparent that appeal was dismissed after it was kept for dismissal on many dates. The possibility of deliberately not prosecuting the appeal on merit can not be ruled out as the claim of the petitioners is based on the unregistered relinquishment deed. Considering the overall facts and circumstances, I am not inclined to interfere with the impugned order. The petition is dismissed.

11. At the request of the learned counsel for the petitioners to enable the petitioners to approach the Hon'ble

Supreme Court against this order, the possession of the suit properties in terms of the decree passed by the trial court shall not be delivered to the respondents for the period of six weeks.

(N. R. BORKAR, J.)