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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 408 OF 2017

1. Ramesh Shivajirao Sutar

Aged 40 years, Occ: Service

2. Jayavant Shivajirao Sutar

Aged 50 years, Occupation Business

Both r/o Radhanagari, Tal. Radhanagari,
District Kolhapur.

3. Anantrao Shivajirao Sutar

[since deceased his legal heirs]

A] Smt. Madhavi Anant Sutar

Aged 57 years, Occ. Household,

B] Nilesh Anant Sutar

Aged: 29 years, Occupation Nil

C] Kishor Anant Sutar

Aged 24 years, Occ: Education,

(A) to (C) R/o. Saravade, Tq. Radhanagari,
District Kolhapur.

D] Sou. Megha Rajendra Sutar

Aged 27 years, Occ. Household,

R/o Pushpanagar, Tal. Bhudargad,
District Kolhapur.

4. Rangrao @ Suresh Shivajirao Sutar

[since deceased by his legal heirs]

A] Smt. Pavitra Rangrao @ Suresh Sutar,

Aged 45 years, Occupation Household,

B] Kum. Sarika Rangrao @ Suresh Sutar,

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Aged 25 years, Occupation Education

C] Kum. Pavan Rangrao @ Suresh Sutar
Aged 18 years, Occupation Education,
A to C R/o Radhanagari, District Kolhapur
[No. 4(C) being minor through mother Smt.
Pavitra Rangrao Sutar]

....Appellants

Vs.

1. Vitthal Ramchandra Potdar
(Since deceased by his legal heirs)

A] Smt. Rukmini Vitthalrao Potdar
(deceased)

B] Ravindra Vitthalrao Potdar
Aged 44 years, Occupation Business,

C] Gajanan Vitthalrao Potdar,
Aged 42 years, Occupation Business,

D] Anila Vitthalrao Potdar
Aged 38 years, Occupation Business
No. B, C & D all R/o Radhanagari,
Taluka Radhanagari, District Kolhapur

E] Sou. Indira Narayan Potdar – deleted
Age Adult, Occupation Household,
R/o Bazar Bhogav.
Tq. Panhala, District Kolhapur.

EE] Sou. Kanchan Vasantrao Potdar – deleted
Aged 48 years, Occupation Household
R/o H. No. 173, A-Ward, Phulewadi,
6th Bus Stop, Kolhapur.

P] Sou. Suman Anant Potdar – deleted
Aged 46 years, R/o Kasaba Tarale,
Tq. Radhanagari, District. Kolhapur.

2] Narayan Ramchandra Potdar
[since deceased by his legal heirs]

A] Smt. Laxmi Narayan Potdar,
Aged 75 years, Occupation Household
R/o. Radhanagari, District Kolhapur.

B] Prakash Narayan Potdar,
Aged 60 years R/o as above

C] Ramesh Narayan Potdar,
Aged 33 years, Occupation Agriculture
R/o as above.

D] Dilip Narayan Potdar
Aged 50 years, Rest as above

E] Dattatraya Narayan Potdar
Aged 42 years, Rest as above.

3] Krishna Ramchandra Potdar
[since deceased by his legal heirs]

A] Smt. Nirmala Krishnarao Potdar
Aged 70 years, Occupation Household
R/o Kasba Tarale, Tq. Radhanagari,
District. Kolhapur.

B] Rajendra Krishnarao Potdar
Aged 46 years, Occupation Business
R/o as above.

C] Bhalchandra Krishnarao Potdar,
Aged 38 years, Occupation Business
R/o 1182/35-E-Ward, Taluka Kolhapur

D] Sou. Vidhya Vishnupant Potdar
Aged 43 years, Occupation Household
R/o Kasba Tarale, Tq. Radhanagari,

District Kolhapur.

E] Sou. Shobha Sanjay Devrukhkar
Aged 40 years, Occupation Household
R/o Rangari Badak Chawl, Lalbag,
Mumbai.

4] Sudhir Jotiram Potdar,
Aged 33 years, Occupation Business,
R/o Radhanagari, District Kolhapur

5] Saraswati Jotiram Potdar
Aged 65 years, Occupation Household,
R/o Radhanagari, District Kolhapur.

....Respondents

Mr. Vinayak Kumbhar i/b Mr. Sagar Mane for appellants
Mr. Prashant Bhavake for respondents

CORAM : GAURI GODSE, J.

DATE : 20th MARCH 2025

ORAL JUDGMENT:

1. Heard learned counsels for the parties. This appeal is preferred by the original defendants to challenge the rejection of their application filed under Order 41 Rule 21 of Code of Civil Procedure, 1908 ('CPC') for re-hearing of the appeal which was decided by the first Appellate Court. The respondents' suit for injunction was dismissed. Hence, the appeal in the District Court was preferred by them. The present appellants–defendants appeared in the appeal; however, were absent when the appeal was finally decided. They, therefore, applied for

setting aside the ex-parte decree and re-hearing of the appeal. That application is rejected by the impugned order.

2. Learned counsel for the appellants relied upon various entries in the Roznama of the appeal. He submitted that the appeal was not listed for hearing and the application at Exhibit 46 filed by the respondents was listed for arguments and hearing. He submitted that on 16th September 2014, when the judgment in the appeal was declared, the appellants were absent as they were unaware about the date. He submits that on 3rd May 2014, the appeal was adjourned for preparation of paper book and the next date for arguments on Exhibit 46 was given as 10th June 2014. He points out the following dates from the Roznama:

A) 10th June 2014: It was adjourned to 21st August 2014 for arguments on Exhibit 46.

B) 2nd July 2014: Entry of receipt of paper-book and adjourned to 21st August 2014 for arguments on Exhibit 46.

C) 21st August 2014: Both the parties and their advocates were present, however, the Court was hearing another appeal, hence, the next date was granted as 4th

September 2014 for arguments on Exhibit 46.

D) 4th September 2014: present appellants and their advocate were absent. However, respondents and their advocate were present. The arguments of respondents was heard and it was adjourned to 11th September 2014 for arguments of present appellants.

E) 11th September 2014: Again present appellants and their Advocate were absent, however, the Court was busy in another matter. Hence, it was adjourned for appellants' arguments on 12th September 2014.

D) 12th September 2014: Again appellants and their advocate were absent, however, since the Court was hearing another matter, it was adjourned to 16th September 2014 for judgment.

E) 16th September 2014: Again the appellants and their advocate were absent and the Court pronounced the judgment in the main appeal.

3. Learned counsel for the appellants by referring to the aforesaid dates submits that the appellants were under impression that the appeal was never posted for hearing and the next dates were given

only for arguments and orders on Exhibit 46. He submits that lastly when the appellants and their advocate were present on 21st August 2014, the next date was granted for arguments on Exhibit 46. He, therefore, submits that the appellants carried an impression that the appeal was never posted for hearing.

4. Learned counsel for the appellants justifies the absence of the appellants on the next date by referring to the contents of the application for restoration. He submits that on 4th September 2014, the appellants and their advocate were absent due to their personal difficulty in view of the occasion of Gauri Ganpati Visarjan. He further submits that the appellants and their advocates were unaware about the next dates assigned and carried a *bonafide* impression that the appeal was not ready for hearing and the next dates were granted only for hearing on Exhibit 46. Learned counsel for the appellants further submits that Exhibit 46 though was adjourned for argument, the application was never decided by the Appellate Court. He, further, submits that as per the entries in the Roznama, even on the dates when the appellants and advocates were absent, the Court was busy in another matter, hence, the next date was granted. He submits that the entry dated 12th September 2014 also records that the Court was

hearing another matter. The Roznama records that the proceedings were adjourned for judgment on 16th September 2014. Learned counsel for the appellants, therefore, submits that even as per the entries in the Roznama, the appeal was not heard on 12th September 2014, however, it is shown as adjourned for judgment on 16th September 2014. Learned counsel for the appellants, thus, submits that the appellants and their advocates' absence on 16th September 2014 when the appeal was decided was only due to the *bonafide* impression that the appeal was never listed for hearing. He submits that in view of the earlier dates fixed for arguments on Exhibit 46, the appellants and their advocates carried a *bonafide* impression that the appeal was not yet listed for hearing.

5. Learned counsel for the appellants, therefore, submits that the appellants and their advocates' absence is due to sheer inadvertence and there is no negligence on the part of the appellants and their advocate. He submits that immediately after the knowledge of the decision of the appeal, the appellant challenged the first Appellate Court's decree by filing the second appeal in this Court. He submits that in view of the liberty granted by this Court vide order dated 4th February 2015, the appellants filed the application on 26th March 2015

for rehearing of the appeal before the District Court.

6. Learned counsel for the appellants submits that though the respondents filed the reply to oppose the application for restoration of the appeal, there was no specific denial on the grounds raised by the appellants regarding the listing of the proceedings only on hearing on Exhibit 46. He submits that there is no serious opposition raised on the grounds for absence as contended by the appellants in their application. He, thus, submits that the first Appellate Court while rejecting the application for restoration has not properly appreciated the grounds raised on behalf of the appellants justifying their absence before the Court. He submits that the filing of the paper-book is considered by the Court as the appeal being listed for final hearing. He submits that the first Appellate Court completely ignored that as per the dates entered in the Roznama, the dates were assigned for hearing of the application at Exhibit 46. He submits that the reasons recorded in the impugned order would amount to taking a hyper technical view on the reasons stated by the appellants. He, therefore, submits that considering the justification given by the appellants in their application, the impugned order deserves to be quashed and set aside for granting an opportunity to the appellants for hearing the

appeal before the District Court on merits.

7. Learned counsel for the respondents supports the impugned Order. He submits that the appellants were always negligent and never appeared before the Court on all the dates. He submits that even if application at Exhibit 46 was listed for arguments, the appellants never bothered to appear before the Court on the assigned dates. He submits that the paper-book was already filed on 2nd July 2014 and thus the appeal was ready for final hearing. He submits that the appellants are trying to take advantage of the entries in the Roznama recording the next date assigned in view of the Court being busy in hearing another matter. He submits that except for giving reasons for absence on 4th September 2014, there is no justification for remaining absent on 16th September 2014. He submits that serious prejudice would be caused to the respondents if the appeal is restored. He, thus, submits that the reasons given by the appellants are not justifiable and thus, the impugned order correctly rejected the appellants' application.

8. To consider the rival submissions, I have perused the papers of the appeal. I have examined the entries made in the Roznama. Learned counsel for the respondents may be right in submitting that the respondents and their advocates remained absent on four dates.

The grounds raised on behalf of the appellants regarding the dates assigned for arguments on Exhibit 46 are required to be taken into consideration. Though the entries in the Roznama indicates that the next dates assigned on 4th September 2014, 11th September 2014 and 12th September 2014 were for the arguments, the Roznama clearly records that the next date was assigned as the Court was busy in hearing another matter.

9. On 12th September 2014, the Roznama records that the Court is busy in hearing another matter, however, the Roznama also records that the proceedings are adjourned for judgment on 16th September 2014. Considering the entries in the Roznama, it appears that there is no clarity in the dates fixed for arguments or hearing of the appeal.

10. The reason given by the appellants regarding their absence on 4th September 2014 is not disputed by the respondents. Though there cannot be any justification for remaining absent on the dates assigned as per the Roznama, the entries in the Roznama cannot be completely ignored which indicates that the next dates were assigned for arguments on Exhibit 46. The Roznama nowhere clearly records that the appeal is ready for hearing and it is listed for hearing. The entry of 2nd July 2014 for recording receipt of paper-book was not the assigned

date for the appeal. Even after the said entry, the appeal is not seen posted for hearing/arguments on appeal.

11. The application for restoration of the appeal mentions the justification for remaining absent. The reasons stated in the application are not unbelievable.

12. Learned counsel for the appellants while justifying the reasons given in the application submitted that the learned Judge could have imposed cost for the absence of the appellants and their advocate. He submits that the appellants are agreeable to pay some reasonable cost to the respondents for the appellants' absence and the prayer for restoration of the appeal.

13. Considering the reasons stated in the application and the entries in the Roznama as recorded in the above paragraphs, I see no reason, to refuse to accept the arguments raised on behalf of the appellants that the appellants be granted an opportunity of hearing of the appeal on merits. Such applications cannot be decided on hyper-technical grounds. Hence, I find substance in the arguments raised on behalf of the appellants that the respondents can be compensated by payment of reasonable cost.

14. Hence, for the reasons stated above, the appeal deserves to be allowed by passing the following order:

ORDER

(I) The impugned order dated 31st January 2017 passed by District Judge-3, Kolhapur in Misc. Civil Application No. 153 of 2015 is quashed and set aside.

(II) Misc. Civil Application No. 153 of 2015 is allowed in terms of prayer clause (b) subject to payment of cost of Rs. 50,000/- by the appellants.

(III) Cost shall be deposited in the District Court, Kolhapur within six weeks from today.

(III) If the cost is deposited, the respondents are at liberty to withdraw the same.

(IV) On payment of cost, Regular Civil Appeal No. 458 of 2012 be restored for hearing on merits.

(V) It is clarified that if on the date assigned by the District Court for hearing of Regular Civil Appeal No. 458

of 2012, the appellants remain absent and not argue the appeal on merits, the learned District Judge would be at liberty to decide the appeal in the absence of appellants.

(VI) It is further clarified that the appellants shall not seek any unnecessary adjournment and would co-operate in early disposal of the appeal.

15. The appeal is allowed in the aforesaid terms.

[GAURI GODSE, J.]