IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

WRIT PETITION NO.128 OF 2011

Damodhar S/o Malharrao Sapkal (Died), through the legal heirs,

- Narmadabai W/o Damodhar Sapkal,
 Age-64 years, Occu: Household,
- Nanda W/o Ajay Talekar,
 Age-39 years, Occu: Household,
- Sangita D/o Damodhar Sapkal,
 Age-37 years, Occu: Household,
- Shivaji S/o Damodhar Sapkal,
 Age-35 years, Occu: Advocate,
- 5) Parmeshwar S/o Damodhar Sapkal, Age-31 years, Occu:Education,
- 6) Maya D/o Damodhar Sapkal, Age-32 years, Occu:Education,
- Chhaya D/o Damodhar Sapkal,
 Age-29 years, Occu: Education,
 - All Resident of Karanja Road, Beed, Tq. & Dist-Beed.

... PETITIONERS.

VERSUS

 Panch Committee, Line Galli, Beed, Tq. & Dist-Beed.

... RESPONDENT.

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Shri.V.D. Salunke Advocate for Petitioners. None present for Respondent.

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CORAM: NARESH H. PATIL, J.

DATE: 2ND DECEMBER, 2011.

ORAL JUDGMENT:

1. Heard Shri. Salunke, learned counsel for Petitioners. None appears for Respondent. By an order dated 11th January, 2011, notice for final disposal returnable on 7th March, 2011 was issued by this Court. By an order dated 7th March, 2011, it was recorded that none appears for Respondent inspite of service of notice. Thereafter the Petition was listed on 5th April, 2011 and again on 29th June, 2011.

- 2. Rule. Rule made returnable forthwith. By consent of the learned counsel for the petitioners, the matter is taken up for final hearing at the admission stage itself.
- 3. The Petitioner was defendant in a suit bearing R.C.S. No.8 of 1992 filed by Respondent through one Narayan Swami Nagappa Pille, for possession and mandatory injunction. By Judgment and order dated 2nd September, 1993, the trial Court decreed the suit. The Petitioners preferred Appeal against the said Judgment and decree, which was numbered as Appeal No.48 of 1994. The Appeal was pending before the District Judge, Beed. By an order dated 3rd March 1994, the Appeal came to be admitted.
- 4. The Appeal was listed for hearing but due to absence of Advocate for the Petitioners, it came to be dismissed in default on 10th June, 2008. The application for setting aside the

dismissal order, bearing Misc. Civil Application No.326 of 2008 along with the prayer for condonation of delay, was filed by the Petitioner. The said application also came to be dismissed in default by an order dated 24th February, 2010.

- 5. By filing Misc. Civil Application No.83 of 2010, the Petitioners prayed for setting aside the dismissal order and to restore the Misc. Civil Application No.326 of 2008. The learned District Judge, Beed, by an order dated 10th December, 2010, dismissed the said application.
- 6. Learned counsel for the Petitioners submitted that the Advocate of the Petitioners was busy in other Court, so he could not attend the matter when it was called out. It is submitted that desired diligence ought to have been shown in attending the Court matters, but the absence of the lawyer when the matter was called out, was not intentional and deliberate. In case the Appeal is

not restored, then the Petitioners' interest would be seriously prejudiced as the issue relates to the immovable property i.e. residential house of the Petitioners. The counsel submits that considering the peculiar facts of the case and interest of justice, an appropriate opportunity be provided to the Petitioners arque to the application filed earlier for restoration of the matter, along with the application for condonation of delay.

7. I have perused the impugned order and the other relevant documents placed on record. There cannot be two opinion on the issue that the matters which are pending since last so years, are required to be attended diligently whenever they are called out for otherwise, it results in multifarious litigations consuming valuable time of the Courts and hardship to the litigants.

- 8. In the present case, twice the Petitioners lost the opportunity to argue the Appeal and it resulted in dismissal in default for presence want of of the Advocate of the Petitioners. The Appeal is pending since the year 1994 which itself shows that it was required to be listed and heard finally. Nothing adverse is placed on record to show that absence of the Advocate in attending hearing of the Appeal was intentional to avoid the hearing of the Appeal.
- 9. The issue raised in the proceeding is related to the demolition of pillars, which affects the rights of the parties to the immovable property. Considering all these aspects of the matter, I am inclined to allow last opportunity to the Petitioners to argue the application filed for restoration of the Application, subject to payment of cost, so that the interest of the Petitioners to contest the Appeal and the matter is not prejudiced.

- 10. The impugned order dated 10th December, 2010 passed in Misc. Civil Application No.83 of 2010 is quashed and set aside. Misc. Civil Application No.326 of 2008 is restored to the files of the Appellate Court, subject to payment of cost of Rs.3,000/- (Rupees Three Thousands only). The cost shall be deposited in Appellate Court within four weeks from today. The Respondents are entitled to withdraw the amount of cost. The Appellate Court shall list the Misc. Civil Application No.326 of 2008 for hearing and dispose of the same within eight weeks, from the date of receipt of writ from this Court.
- 11. It is clarified that the Appellate Court shall deal with the issue without being influenced by the observations made by this Court in the impugned order. In case the Appellate Court decides to restore the Appeal No.48 of 1994 to its files, then it is directed that the Appeal shall

be disposed of finally on merits, within six months therefrom.

12. Rule is made absolute on the terms indicated above.

[NARESH H. PATIL, J.]

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