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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4048 OF 2014

Shriram s/o Jagannath Kharade,
Age: 58 years, Occu: Agri.,
R/o: Yelapane, Tq. Shrigonda,
Dist. Ahmednagar

..PETITIONER
(Orig. Respondent)

VERSUS

01. Popat s/o Jagannath Kharade,
Age: 61 years, Occu: Agri.,
R/o: Yelapane, Tq. Shrigonda,
Dist. Ahmednagar

02. Jagannath s/o Bapu Kharade,
Deceased

03. Laxmibai Jagannath Kharade,
Deceased through L.Rs.

3-A Anjanabai w/o Bhikaji Machale,
Age: 73 years, Occu:
R/o: Imamagaon, Tq. Shirur,
Dist. Pune

3-B Sou. Jijabai w/o Sonyabapu Ghadge,
Age: 73 years, Occu: Household,
R/o: Imamagaon, Tq. Shirur,
Dist. Pune

04. The Manager,
Maharashtra State Agriculture &
Rural Development Co-operative Bank,
Branch Shrirampur,
Dist. Ahmednagar

..RESPONDENTS
(Res. No. 1 is Orig. Plaintiff)

Mr N. V. Gaware, Advocate for petitioner;
Mr P. B. Shirsath, Advocate for respondent No. 1

CORAM : N.W. SAMBRE, J.

DATE : 9th December, 2015

ORAL ORDER :

A suit for partition, separate possession and injunction was decreed, against which an appeal bearing R.C.A. No.289 of 2004 was preferred by the present petitioner before the District Judge. The said appeal came to be dismissed in default on 4th March, 2011, as the petitioner – appellant failed to deposit the paper-book charges.

2. The present petitioner thereafter filed an application for restoration of appeal along with the application for condonation of delay of 303 days, caused in preferring an application for restoration of appeal, which came to be rejected by an order dated 3rd October, 2013 by District Judge-4, Ahmednagar. Thus, the present petition.

3. Mr Gaware, learned Counsel appearing on behalf of the petitioner would urge that the Court below has committed an error of law in refusing the prayer for condonation of delay, as according to him, the Court has failed to consider the aspect as regards settlement talks going on between the parties to the appeal. He would then urge that the suit is for partition and separate possession and on technical ground, i.e. non-deposit of paper-book charges, the appeal was dismissed. According to him, an appeal, which is a statutory right vested in the petitioner, be permitted to be exercised by condoning the delay. In support thereof, learned Counsel has placed reliance on the judgment dated 25th February, 2014, rendered by this Court, in Writ Petition No.6293 of 2013 and other connected matters,

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condoning the delay, subject to payment of costs.

4. Learned Counsel for the petitioner submits that the petitioner is ready to abide by such conditions, as shall be imposed by this Court.

5. Learned Counsel appearing on behalf of respondent no.1 – decree holder would urge that it is about thirty years back, the preliminary decree in the matter was passed and respondent no.1 – plaintiff is agitating for his right since then, fruits of which are yet to be honoured. He would then urge that the application for condonation of delay was not moved *bona fide* and from the pleadings of the petitioner in the application, it could be borne out that on 8th August, 2011, the petitioners were having knowledge about the fact as regards dismissal of the appeal. According to him, the Court below was right in dismissing the application. In support thereof, learned Counsel has placed reliance on the judgment of this Court in the matter of ***Pushpaben Dayashankar Pandya & ors. vs. Jagannath Valji Kapadia***, reported in **1987 Mh.L.J. 209** and the order of rejection passed by this Court in Civil Revision Application No.216 of 2014 on 5th February, 2015, against an order of refusing to condone delay, which according to him is affirmed by the Apex Court.

5. From the submissions of the respective parties, it is required to be analyzed, as to whether there is sufficient cause shown for condonation of delay and there was a *bona fide* approach on the part of the petitioner in taking out such prayer before the Court below.

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6. It is not in dispute that the decree for declaration, injunction and possession was passed in Regular Civil Suit No.74 of 1986 and the respondent no.1-plaintiff is pursuing his rights since 1986, for having his share in the suit property. It is also required to be noted that the preliminary decree in the suit for partition has gained appropriate momentum and has reached to a concluding stage, in the sense, the Tahsildar has already earmarked the portion of each party on the partition chart and the matter is ready for delivery of possession after partition of the suit property. At this stage, the petitioner preferred an application for restoration of the appeal. Though the petitioner has entered into witness box to substantiate his claim for delay condonation, yet from the evidence of rival parties, the Court below has inferred that no efforts were made on the part of the parties to settle the matter and in view thereof, the said ground is unbelievable. It is also required to be noted here that on 8th August, 2011, the petitioner was having knowledge about the order of dismissal of the appeal, for want of payment of charges of paper-book and the application for condonation of delay and restoration came to be filed on 31st January, 2012, for which period there is no explanation on record.

7. In my opinion, in the above background, reliance placed by the learned Counsel appearing on behalf of the petitioner on the judgment of this Court in Writ Petition No.6293 of 2013 (supra), is wholly misplaced, as in that matter it was not the case that the parties have adduced evidence in support of the claim for condonation of delay and delay was not properly explained thereunder. In my opinion, learned Counsel appearing on behalf

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of respondent no.1 was right in relying on the judgment in the matter of Pushpaben Dayashankar Pandya (supra), of which paragraph 6 is worth relevant, which reads thus :-

“As rightly contended by Shri N.V. Walavalkar, the circumstance that the suit involves substantial questions of law and fact, cannot be sufficient cause for condoning delay under section 5 of the Limitation Act. Sufficient cause contemplated by section 5 of the Limitation Act, must be such as prevented the appellant or applicant from preferring appeal or making an application within the prescribed time. Section 5 of the Limitation Act does not lay down that the period of limitation can be extended under that provision by the Court for any sufficient cause. It lays down that any appeal or application, other than under any of the provisions of Order XXI of C.P.C. may be admitted after prescribed period, if the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The satisfaction of the Court contemplated by this provision is about the existence of sufficient cause for not preferring appeal or making application within such period. The Court is not competent to extend the period for any other cause, however weighty it may be. The cause must be such as resulted in the delay sought to be condoned. The cause must have nexus with the delay. Hence, the fact that suit involves substantial questions of law and fact, cannot by any stretch of the relevant provisions of section 5 can be considered as sufficient cause for extension of the prescribed period. The learned Addl. District Judge was, therefore, wrong in condoning the delay on this ground.”

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8. In view of above, in my opinion, it was well within the knowledge of the Trial Court that although the petitioner was aware about dismissal of the appeal, yet was not diligent in pursuing the said matter with *bona fide* intention, as the delay, in spite of there being knowledge, is not properly explained. The fact remains that the plaintiff is agitating for his rights since last about thirty years.

9. In that view of the matter, in my opinion, no case for interference in the extraordinary jurisdiction of this Court, is made out. Thus, the petition fails and stands dismissed with no order as to costs.

10. At the request of the learned Counsel appearing on behalf of the petitioner, interim relief to continue for a period of four weeks.

(N.W. SAMBRE, J.)

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