

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

WRIT PETITION NO. 3460 OF 2012

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

- 1) Narmadabai w/o Damodhar Sapkal
Age : 65 years, Occ: Household
- 2) Nanda w/o Ajay Talekar,
Age : 40 years, Occ: Household
- 3) Sangita d/o Damodhar Sapkal
age : 39 years, Occ: Household
- 4) Shivaji s/o Damodhar Sapkal
age : 37 years, occ: Advocate
- 5) Parmeshwar s/o Damodhar Sapkal
age : 33 years, occ : Education
- 6) Maya d/o Damodhar Sapkal
age : 34 years, Occ : Education
- 7) Chhaya d/o Damodhar Sapkal
age : 31 years, Occ : Education

All resident of Karajna Road,
Beed, Tq. & Dist. Beed.

... Petitioners

Versus

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

... Respondent

.....

Mr. S. V. Deshmukh, Advocate h/f Mr. V. D. Salunke, Advocate
for petitioners

Mr. P. D. Dawalkar, Advocate for respondent-sole

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CORAM : V. K. JADHAV, J.

Date of reserving Judgment : 01.10.2015
Date of pronouncing Judgment : 07.10.2015

JUDGMENT :-

1. Rule. Rule made returnable forthwith. By consent of learned counsel for the parties, matter is taken up for final hearing at admission stage itself.

2. The deceased Damodhar, who was husband of petitioner No.1 and father of petitioner Nos. 2 to 7, was the original defendant in Regular Civil Suit No. 8 of 1992 filed by the respondent herein for possession and mandatory injunction. The trial court, by judgment and decree dated 02.09.1993, decreed the suit. Being aggrieved by the same, the petitioners preferred the Regular Civil Appeal No. 48 of 1994. By order dated 10.06.2008 passed below Exh. 1, the appeal came to be dismissed for want of prosecution. The petitioners have filed Miscellaneous Civil Application No. 326 of 2008 for re-admission of the appeal alongwith an application for condonation of delay. The said application for condonation of delay also came to be dismissed in default by order dated 24.02.2010. The petitioners thereafter, filed

Miscellaneous Civil Application No. 83 of 2010 for setting aside the said dismissal order and to restore the M.C.A. No. 326 of 2008. The learned District Judge, by order dated 10.12.2010, dismissed the said application. Being aggrieved by the same, the petitioners preferred writ petition No. 128 of 2011 before this Court. This Court, by order dated 02.12.2011, quashed and set aside the order dated 10.12.2010 passed in M.C.A. No. 83 of 2010 and thereby restored the M.C.A. No. 326 of 2008 in the files of the appellate court subject to payment of cost.

3. The appellate court, by the impugned order dated 30.03.2012, dismissed the application for condonation of delay filed under Section 5 of the Limitation Act and thereby refused to entertain the Miscellaneous Civil Application No. 326 of 2008. Hence this writ petition.

4. The learned counsel for the petitioners submits that there is delay of only two months and some odd days in filing the application for restoration of the appeal. The learned counsel further submits that the petitioners have satisfactorily explained the delay. The learned counsel further submits that the writ petition, against the order passed on application under

Section 5 of the Limitation Act, is maintainable. The learned counsel, in support of his submissions, placed reliance on a judgment in a case of ***Shahurao Sitaram Bhalerao and Others V/s Vishwanath Rama Jadhav and Others***, reported in ***2014 (2) Bom.C.R. 389***.

5. The learned counsel for the respondent submits that the delay is not satisfactorily explained. The appeal is of the year 1994. The petitioners are not diligent to prosecute the appeal. The learned counsel further submits that the application for re-admission of appeal is required to be presented before the court which has passed the dismissal order. Thus, there is no need to apply for certified copies of the order of dismissal of appeal in default. However, after obtaining certified copies, the petitioners have not filed an application for re-admission of appeal within the stipulated period of one month. The petitioners have also not given satisfactory and justifiable reason which prevented them from filing an application for re-admission of appeal within the period of limitation. The learned counsel further submits that by the impugned order, application for condonation of delay in filing application for setting aside the order of dismissal of appeal came to be dismissed and the same amounts to dismissal of appeal itself.

The learned counsel thus submits that the writ petition, therefore, is not maintainable. The learned counsel, in support of his submissions, places reliance on a judgment in a case of ***Syed Takhleekh Hyder Zaidi and Others v/s Naziruddin and others*** reported in ***AIR 2003 Allahabad 56*** and ***Sathyadasan v/s sudeepkumar and Another*** reported in ***AIR 2011 Kerala 102***. Learned counsel further submits that there is no substance in the writ petition and the writ petition is thus liable to be dismissed.

6. So far as maintainability of this writ petition is concerned, this Court, in a case of ***Shahurao Sitaram Bhalerao and Others*** (*supra*), relying upon the judgment of the Division Bench of this Court, has taken a view that writ petition is maintainable and not an appeal under Order XLIII or under Order XLII of the Code of Civil Procedure. This Court, in paragraph No. 8 of the judgment in the above cited case, made the following observations :

“8. Under section 5 of the Limitation Act, application for condonation of delay is moved and the said provision is not listed in Rule 1 of Order XLIII of the C.P.C. Though there is provision of appeal against order of refusal of application for

readmission/restoration, made under Rule 19 of Order XLI of the C.P.C., there is no provision of appeal against order of rejection of application for condonation of delay. Thus, Rule 1(t) of Order XLIII of the C.P.C. specifically covers order of refusal under Rule 19 of Order XLI to readmit, or under Rule 21 of Order XLI to re-hear an appeal. Therefore, submission of Mr. Thigle that the petitioners ought to have filed appeal from order under Order XLIII, Rule 1(t) of the C.P.C., is not sustainable within the folds of Order XLIII of the C.P.C.”

7. The appellate court, by giving reference to the order passed in M.C.A. 83 of 2010, has observed that the petitioners are not diligent to prosecute their appeal. The appellate court has also observed that the act of the petitioners is intentional and deliberate to prolong the matter.

8. I do not find any substance in the same, as the petitioners have preferred an appeal against the judgment and decree of possession and mandatory injunction. It appears that twice the petitioners lost the opportunity to argue the appeal on merits. It also appears that the appeal came to be dismissed for want of presence of the advocates when the appeal was called for hearing. The petitioners were engaged in their agricultural work and hence, they could not remain

present. So also, their counsel was engaged in another court when the appeal was called for hearing. The petitioners have applied for certified copies of the order and received the same after a period of one month. It is true that certified copies are not required to prefer an application before the appellate court for re-admission of appeal. It also appears that the petitioners have submitted an application with a misunderstanding that the time spent in obtaining certified copies shall be excluded in counting the period of limitation while filing application for re-admission of appeal. The petitioners, on 09.09.2008, did not press their application for the purpose of filing the same alongwith an application under Section 5 of the Limitation Act. Thus, bonafide, this understanding on the part of the petitioners and their counsel is a sufficient cause to condone the delay. Thus, considering all these aspects of the matter, I am inclined to condone the delay subject to payment of cost of Rs.5,000/-. Hence, the following order :

ORDER

- I. The impugned order dated 30.03.2012 passed by the learned District Judge-2, Beed, in Misc. Civil application No. 326 of 2008, is hereby quashed and set aside subject to payment of cost of Rs.5000/- (Rupees five thousand only).

- II. The cost shall be deposited in the appellate court within a period of six (06) weeks from the date of this order.
- III. The respondent is entitled to withdraw the said amount of cost.
- IV. The application under Section 5 of the Limitation Act, for condonation of delay in preferring Miscellaneous Civil Application No. 326 of 2008 for re-admission of appeal, is hereby allowed and the delay stands condoned.
- V. The lower appellate court is hereby directed to decide the Miscellaneous Civil Application No. 326 of 2008 on its own merits without being influenced by the observations made by this Court.
- VI. Rule is made absolute in the above terms. Writ Petition is disposed of.

(V. K. JADHAV, J.)

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