

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7087 OF 2014

1. Bhausahab Laxman Barde,
Age : 35 years, Occu. Agriculture,
R/o Sonak Pimpalgaon,
Tal. Ambad, Dist. Jalna
2. Kasturbai Laxman Barde,
Age : 51 years, Occu. Household,
R/o As above
3. Chandrakala Laxman Barde,
Age : 30 years, Occu. Household,
R/o As above
4. Meena Laxman Barde,
Age : 27 years, Occu. Household,
R/o As above
5. Laxman Rangnath Barde,
Age : 60 years, Occu. Agriculture,
R/o As Above

..PETITIONERS
(Original Plaintiffs)

VERSUS

1. Gorakhnath Sahebrao Hamne,
Age : 50 years, Occu. Agriculture
R/o Zirpi, Tal. Ambad,
Dist. Jalna
2. Narayan Natha Bhawar,
Age : 60 years, Occu. Agriculture,
R/o Modi Khana,
Tal. & Dist. Jalna

..RESPONDENTS

Mr Satyajit S. Bora, Advocate for petitioners;
Mr B.R. Kedar, Advocate for respondent no.1

CORAM : N.W. SAMBRE, J.

DATE : 26th February, 2015

ORAL JUDGMENT :

By this writ petition, the petitioners/original plaintiffs seek to challenge the order dated 3rd July, 2014, passed by District Judge-1, Jalna, in Civil Misc. Application No.181 of 2013, whereby delay of six years, caused in filing the appeal, challenging the judgment and decree dated 29th September, 2007, passed by Joint Civil Judge Junior Division, Ambad, in Regular Civil Suit No.12 of 1999. came to be condoned.

2. The petitioners/plaintiffs instituted Regular Civil Suit No.12 of 1999 for partition and separate possession. The suit came to be decreed on 29th September, 2007. The execution of the said decree for partition came to be initiated by the plaintiffs in 2009.

3. The respondents/original defendants preferred Misc. Civil Application No.181 of 2013, seeking condonation of delay caused in filing the appeal, along with memo of appeal questioning the decree for partition and separate possession. It was claimed by the respondents that delay of six years is caused in filing the appeal. It is further claimed by the respondents that delay caused was unintentional and *bona fide* and to support the said cause as sufficient for condoning the delay, reliance was placed on the medical certificate issued by Dr. Yashwant Kulkarni.

4. After hearing the parties, learned District Judge-1, Jalna by order dated 3rd July, 2014 allowed Civil Misc. Application No.181 of 2013 and condoned delay, subject to payment of costs of Rs.5,000/-. Hence, the present writ petition.

5. Upon hearing the parties, this Court, by an order dated 4th September, 2014, has issued Rule in the matter and the respondents/defendants have waived service.

6. Mr Bora, learned Counsel appearing on behalf of the petitioners/plaintiffs, while questioning the legality of the impugned order would urge that perusal of the application for condonation of delay in preferring appeal would reflect that no sufficient cause was furnished by the respondents herein in support of claim for condonation of delay. In support of his contention, he has taken me through the cause cited in the application in support of condonation of delay, which could be noticed at page 19 of the paper-book of the present writ petition. He has also taken me through the say filed by the present petitioners resisting the application for condonation of delay and would urge that the delay of six years was condoned by the learned District Judge merely for asking. He would urge that it is not necessary that day to day delay must be explained, however, what is noticed according to him, in the present case is that the medical

certificate discloses only six months illness, which was formed to be the basis for condonation of delay of six years by the learned District Judge.

7. Mr Kedar, learned Counsel appearing on behalf of the respondents/defendants, while supporting the impugned order, has raised preliminary objection to the tenability of the instant writ petition. According to him, having regard to the nature of the impugned order passed in exercise of appellate jurisdiction, a Civil Revision Application is tenable and not a writ petition. He further urged that this Court should be slow in interfering with the discretion exercised by the learned District Judge in condoning delay and in support thereof, has sought to place reliance on the judgment of this Court in the matter of **Parighabai Laxman Turakane vs. Ashabai Raosaheb Lasure & anr.**, reported in **2012 (3) Mh.L.J. 201**. So far as the preliminary objection is concerned, learned Counsel for the respondents has sought support from the judgment of this Court in the matter of **Nandkishor Kanhyalal Agrawal vs. Dhule Municipal Corporation & ors.**, reported in **2012 (1) Mh.L.J. 918**. He would further urge that the application gives voluminous cause for condonation of delay. According to him, against a decree in a suit for partition, the statutory right of first appeal is rightly permitted by the learned District Judge by condoning delay. He, therefore, prayed for dismissal of the writ petition.

8. Having considered the contentions raised by the learned Counsel appearing on behalf of the parties and having gone through the Civil Misc. Application preferred before the learned District Judge, it is noticed that the respondents herein, who were defendants to the suit, claim to have suffered an ex parte decree passed way back in 2007. However, the fact remains that the said ex parte decree was sought to be questioned only in 2013, though execution proceedings pursuant to the decree for partition was already initiated in 2009. It is also required to be taken note of the fact that Civil Misc. Application along with memo of appeal was preferred in 2013, i.e. after a period of six years. Even presuming that the Doctor's certificate was rightly taken into account by the learned District Judge for considering the claim of the respondents herein for condonation of delay, on perusal of the impugned order it is noticed that the said certificate issued by the Doctor certifies illness for a period from 24th November, 2007 to 10th May, 2008. For the subsequent period, i.e. from 11th May, 2008 till the date of filing of the application, i.e. October, 2013, but for the time consumed in obtaining the certified copies of the documents from the Court, there is no whisper as regards the cause for condonation of delay.

9. In the light of above, I am of the considered view that the learned District Judge has illegally exercised the discretion vested in him for the purpose of condonation of delay. Though the decree in question, i.e. subject-matter of challenge before the appellate Court was passed on

29th September, 2007, the respondents/defendants have sought to explain the said delay based only on a Doctor's certificate certifying illness for a period from 24th November, 2007 to 10th May, 2008. Apart therefrom, no more cause is shown by the respondents in support of condonation of delay, but for the time consumed in obtaining certified copies of the documents which were required for the purpose of filing of appeal. Presuming the said cause even to be correct one, still it is really hard to digest that the respondents took 5-1/2 years to get the certified copies from the Trial Court so as to file the appeal.

10. In my opinion, the case in hand is a fit one wherein it can be *ex facie* noticed that while condoning inordinate and unexplained delay caused in filing the appeal, the learned District Judge has illegally exercised the discretion vested in him. Consequently, the instant writ petition deserves to be allowed. Further, it is not in dispute that the suit property has been sold by respondents herein in the year 2003 and as such, very bona fides of the respondents in preferring the appeal cast serious doubt about their conduct.

11. So far as reliance sought to be placed by the learned Counsel appearing on behalf of the respondents on the judgments cited *supra* is concerned, it is required to be noted that while exercising the discretion in the matter of Parighabai (cited *supra*), Court was alive to the fact as

regards the age of the applicant seeking condonation of delay, the medical certificate and the Doctor's advice in support thereof, whereas in the case in hand, it is required to be noted that neither the age factor nor the explanation or the Doctor's certificate supports the case of the respondents in toto. As such, reliance placed by the respondents on the case cited *supra*, is wholly misconceived.

12. So far as the reliance placed on the judgment in the matter of Nandkishor (cited *supra*), on the aspect of maintainability of the writ petition against an order of condonation of delay is concerned, it is required to be noted that the view taken by the Court in that matter is in relation to dismissal of the suit in which an *ex parte* decree was passed and an application under Order IX, Rule 13 of the Code of Civil Procedure was moved for setting aside the same. In the said case, the Court has considered the claim in the light of the development as narrated herein above, so also the factual matrix of the said case. In my opinion, eventuality considered by the Court in the matter of Nandkishor (cited *supra*) is altogether different than that of the case in hand. As such, the reliance placed on the said judgment by the learned Counsel for the respondents as regards maintainability of the writ petition, in my opinion, has hardly any application to the instant case.

13. One more aspect of which this Court must take note is that when this Court issued Rule in the matter, the respondents had not raised any objection to the jurisdiction of this Court or rather maintainability of writ petition. In that view of the matter, in my opinion, it is not open for the respondents to raise objection to the the tenability of writ petition now at the stage of final hearing of the matter.

14. In the light of above discussion, the writ petition stands allowed. Rule is made absolute in terms of prayer clause (B) with no order as to costs.

(N.W. SAMBRE, J.)

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