

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6615 OF 2014**

Sawalaram Anand Kambli	)	
Age 50 years, Occupation Service,	)	
resident Kedgaon, Taluka Daund	)	
Dist Pune	)	..Petitioner

Versus

1 Mrs. Vaneeta Vijay Bhiramal	)	
Age 62 years Occ Agriculture	)	

2 Mr. Vijay Ramchandra Birmal	)	
age 68 years, Occ Agriculture	)	
All residing at 403, DSK Chandradeep	)	
Mukund Nagar, Pune 411 037	)	

3 Kantilal Dinkar Kambale	)	
age 50 years occ Labour	)	
resident of village Kedgaon	)	
Tal Daund, Dist Pune	)	

4 Dada Soma Mahar	)	
Age 40 years,	)	

5 Narayan Soma Mahar	)	
Age 35 years,	)	

6 Shankar Soma Mahar	)	
Age 33 years,	)	

7 Vijay Soma Mahar	)	
Age 31 years,	)	

8 Sanjay Soma Mahar	)	
age 29 yrs	)	
Opponent No.3 to 7 are residing at Loni	)	
Kalbhor Tal Haveli Dist Pune	)	

9 Shakuntala Popat Shelar	)	
age adult, Occ Household	)	
residing at Loni Kalbhor Tal Haveli	)	
Dist Pune	)	
10 Smt. Rukmini Soma Kamble	)	
Age adult, Occ Household	)	
residing at Village Loni Kalbhor	)	
Talukar Haveli Dist Pune	)	
11 Shevantabai Bhika Kambale	)	
age 58 years Occ Nil	)	
R/o Beside R. K. Shedia above State Bank)	)	
of India, Opp Devnar Bus Stop, Chembur)	)	
Mumbai	)	
12 Ramkrishna Divekar Age 40 yrs.	)	
occ Agriculture	)	
13 Laxman Krishna Divekar	)	
age 35 yrs., Occ Agriculture	)	
Both Occupant No.11 and 12	)	
are residing at Village Varwand	)	
Tal Daund Dist Pune	)	..Respondents

Mr. Y. J. Master for the Petitioner
 Mr. V. B. Rajure for the Respondent Nos.1 & 2

CORAM : R. M. SAVANT, J.
 DATE : 10th MARCH, 2015

ORAL JUDGMENT

1 At the outset, the Learned Counsel appearing for the Petitioner seeks deletion of the Respondent Nos.3 to 13 as in the context of the challenge raised in the present Petition they are not contesting parties. The said Respondents are accordingly deleted at the risk of the Petitioner.

2 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

3 The above Petition takes exception to two orders i.e. order dated 3-10-2013 and the order dated 2-12-2013. In so far as the order dated 3-10-2013 is concerned, the application being Misc Application No.38 of 2012 filed by the Respondent Nos.1 and 2 herein came to be allowed and resultantly, the Special Civil Suit No.43 of 2005 came to be restored to its original stage. By the second order i.e. order dated 2-12-2013 Misc Application No.48 of 2011 filed under Order IX Rule 13 of the Civil Procedure Code came to be disposed.

4 In so far as the application being Misc Application No.38 of 2012 is concerned, the same was field for condonation of delay in filing the Misc Application No.48 of 2011, which was filed invoking order IX Rule 13 of the CPC for setting aside the exparte decree and for restoring the Suit to its original stage. In the said Misc Application No.38 of 2012, the reasons why there is delay in filing the application under Order IX Rule 13 being Misc Application No.48 of 2011, were mentioned. It was incidentally averred in the said Misc Application No.38 of 2012 as to why the decree which has been passed exparte was required to be set aside.

5 In so far as the Misc Application No.48 of 2011 is concerned, as indicated above the same was filed under Order IX Rule 13 of the CPC and the decree passed in the Suit in question being Special Civil Suit No.43 of 2005, and the setting aside of the decree was sought on the grounds mentioned in the application. The reasons for the non appearance of the Respondent Nos.1 and 2 i.e. the Defendant Nos.11 and 12 were also mentioned in the application. The said Misc Application No.38 of 2012 was opposed to on behalf of the original Plaintiff i.e. the Opponent in the said application by filing their reply which was marked as Exhibit 8. It was the case of the Plaintiff that the judgment rendered by the Trial Court in the said Special Civil Suit No.43 of 2005 was rendered on merits and after considering the material which was placed on record i.e. the documents which were filed by the Plaintiff. The parties also led evidence. The Trial Court considered the said application being Misc Application No.38 of 2012 and by the first order dated 3-10-2013 allowed the same. The reasons for the delay in filing the Misc Application No.48 of 2011 commended acceptance to the Trial Court. However, whilst allowing the said application, the Trial Court also set aside the decree passed by it and restored the Suit to its original stage. This was notwithstanding the fact that the Misc Application No.48 of 2011 filed under Order IX Rule 13 was pending in the Trial Court. The said Misc Application No.48 of 2011 was thereafter placed before the Trial Court on 2-12-2013 when the Trial Court in view of the order dated 3-10-2013 (wrongly referred to as 4-10-2013) disposed of the said

Misc Application No.48 of 2011, in view of the order passed on Misc Application No.38 of 2012. The said Misc Application No.48 of 2011 was disposed of by the second impugned order dated 2-12-2013.

6 The question that is posed in the above Petition is whether the Trial Court could have set aside the decree at the time of considering the application for condonation of delay, the answer has to be obviously in the negative. In so far as the said Misc Application No.38 of 2012, the Trial Court was only required to consider as to whether the delay in filing Misc Application No.48 of 2011 was required to be condoned. Therefore in setting aside the decree passed at the stage of considering the application for condonation of delay, the Trial Court had exceeded its jurisdiction more so when the Misc Application No.48 of 2011 for setting aside the decree was pending.

7 In my view, therefore, the impugned order dated 3-10-2013 is required to be set aside only in so far as it sets aside the decree passed in Special Civil Suit No.43 of 2005 and would be restricted only to the aspect of delay being condoned in filing the Misc Application No.48 of 2011. The second impugned order dated 2-12-2013 would also have to be consequentially set aside as after the condonation of delay in filing the said application which delay has been condoned by the first impugned order dated 3-10-2013. The said Misc Application No.48 of 2011 would be required to be considered on

merits. Hence the second impugned order dated 2-12-2013 is set aside and the said Misc Application No.48 of 2011 is restored to file and to be considered on merits. Needless to state that the said Misc Application No.48 of 2011 would be considered on its own merits and in accordance with law uninfluenced by the earlier adjudication by the first impugned order dated 3-10-2013. The contentions of the parties in respect of the said Misc Application No.48 of 2011 are kept open for being agitated before the Trial Court. Since the decree is passed on 28-2-2011, the Trial Court is directed to hear and decide the said Misc Application No.48 of 2011 as expeditiously as possible and not later than 31-8-2015. It is clarified that the delay in filing Misc Application No.48 of 2011 stands confirmed, however setting aside of the decree dated 28-2-2011 stand set aside. The order dated 2-12-2013 passed in Misc Application No.48 of 2011 would stand set aside and the said Misc Application No.48 of 2011 stands restored for being decided on merits. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]