

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1995 OF 2014
WITH
CIVIL APPLICATION NO. 563 OF 2015

Narayan D. Gorad .. Petitioner /Applicant

vs.

Shivaji S. Pasalkar and ors. .. Respondents

Ms Shakuntala Wadekar for the Petitioner/Applicant.

Mr. Ravi Shinde for Respondent Nos.1,2 and 3.

CORAM : M. S. SONAK, J.

DATE : 7 April, 2015.

P.C. :-

1] The learned counsel for the petitioner, seeks leave to delete the respondent No.10, who was incidentally one of the appellants alongwith the petitioner in the appeal, which came to be dismissed for default. Leave is granted as prayed for. Amendment to be carried out forthwith.

2] By an order dated 25 February 2014, the parties were put to notice that this petition will be disposed of finally at the stage of admission itself.

3] Accordingly, Rule. Rule is made returnable forthwith, with the consent of and at the request of learned counsel for the parties.

4] This petition is directed against the order dated 10 September 2013 by which the learned District Judge, Pune has declined to condone delay of around 11 months in taking out an application for restoration of the petitioner's appeal which came to be dismissed for default on 8 September 2011.

5] The learned counsel for the petitioner placed reliance upon the decision of this Court in case of *Shahurao s/o. Sitaram Bhalerao and ors. vs. Vishwanath s/o. Rama Jadhav and ors.*¹, to urge that an order of this nature is not appealable and accordingly, the only remedy available for the petitioner is to institute a petition under Article 227 of the Constitution of India.

6] The petitioner, in support of the application seeking condonation of delay in filing restoration application had relied upon a medical certificate. The explanation offered by the petitioner has not been accepted by the learned District Judge, by observing that apart from the petitioner, there were atleast seven other appellants and no reason has been stated as to why such other appellants did not apply for restoration within the prescribed period.

1 Writ Petition No. 2729 of 2012 decided on 22 October 2013.

7] If the impugned order is perused, it would appear that the main case set out by the appellants in seeking condonation of delay for restoration of the appeal is that they were unaware of the order dismissing the appeal for default. Besides, the appellants had pointed out that most of them are senior citizens, illiterate persons and were consequently dependent upon their advocates for both advise and action in the matter. One of the grounds stated was that the petitioner herein, who was pursuing the matter was afflicted with illness and therefore, could not pursue the matter with the advocate. The application, seeking condonation of delay was filed, taking up all such grounds cumulatively.

8] In the matters of condonation of delay, the length of delay is only one of the relevant factor, but not the sole relevant factor. In matters of condonation of delay, there is bound to be some lapse on the part of the parties. But that by itself, is not sufficient to shut out the parties from presenting their case on the merits. Unless, the cause shown smacks of *mala fides* or the same is putforth as a part of some dilatory strategy, the Court is required to show utmost consideration to the suitor. Besides, the cause shown by the

appellants, ought to have been considered cumulatively. Applying all such principles, a case is made out for condonation of delay in seeking restoration, subject ofcourse to the payment of costs by the petitioner.

9] The costs in the present case shall have to be substantial considering the conduct of the petitioner. In the present case, the appeal instituted, questions the judgment and decree dated 22 March 2007. The appeal itself was instituted after some delay, though the said delay was condoned. Thereafter, the petitioner, obtained stay on the execution of the impugned decree some time in the year 2007. From the scanty records available, it does appear that the petitioner did not pursue the appeal with due diligence and after almost a period of four years, the same came to be dismissed for default on 8 September 2011. Again, the petitioner did not apply for restoration within the prescribed period, but applied for the same after delay of almost 11 months. In such circumstances, although the delay is liable to be condoned, the same shall be subject to the petitioner's paying costs of Rs.25,000/-, which the petitioner volunteers to pay, in favour of the respondent Nos.1 to 3 herein.

10] Now that the delay is being condoned, the learned District Judge, Pune shall consider the petitioner's application for restoration of appeal, on its own merits and in accordance with law, subject ofcourse to the petitioner's depositing costs of Rs.25,000/- within a period of four weeks from today. Once such costs are deposited, the respondent Nos.1 to 3 herein, shall be entitled to withdraw the same unconditionally. The application for restoration shall be taken up for consideration, provided that the costs are deposited within a period of four weeks from today. In case the costs are not deposited, this petition shall be deemed to have been dismissed.

11] Rule is made absolute to the aforesaid extent. There shall be no separate order as to costs in this petition.

12] In view of deletion of respondent No.10, Civil Application No. 563 of 2015 does not survive and is disposed of, accordingly.

(M. S. SONAK, J.)

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