

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4113 OF 2014

Sakharam Sabhaji Bibe and another

.. Petitioners

Versus

Savita Bhaskar Bibe

@ Savita Sanjay Bodkhal and others

.. Respondents

Shri. P L. Bhujbal, for the Petitioner.

Shri. S. M. Sabrad, for the Respondent Nos.1 to 4.

CORAM : R.M. SAVANT, J.

DATE : 2nd SEPTEMBER, 2015

PC.

1. The order dated 03.02.2014 passed by the Learned District Judge-1, Niphad, rejecting the application for condonation of delay in filing the Appeal filed by the Petitioners being Misc. Civil Application No.26 of 2011 is taken exception to by way of the above Petition. The Petitioners are the original Defendants in Special Civil Suit No.64 of 2002 filed by the Respondents for partition of the suit properties. The said suit came to be decreed on 21.07.2005. It appears that in the interregnum the daughter of the Petitioner No.1 one Lahanubai filed Regular Civil Suit No.137 of 2005 challenging the decree dated 21.07.2005 passed in the said Special Civil Suit No.64 of 2002. It seems that the said Regular Civil

Suit No.137 of 2005 came to be dismissed for non-prosecution. In so far as the decree passed in Special Civil Suit No.64 of 2002 is concerned, the said decree was set in execution by the Plaintiffs and on the execution proceedings having substantially progressed and the Defendants being noticed in the said execution proceedings that the Defendants sought to file an Appeal against the said decree dated 21.07.2005. In view of the fact that there was delay of 5 years and 11 months in filing the Appeal that the instant application being Misc. Civil Application No.26 of 2011 came to be filed for seeking condonation of delay. The ground set out was that the Defendant No.1 is an old person and was not aware of the decreeing of the Special Civil Suit No.64 of 2002 and therefore, did not take steps to file the Appeal in question. The reason given by the Defendants in the said Misc. Civil Application No.26 of 2011 did not commend acceptance to the Lower Appellate Court. The Lower Appellate Court took into consideration the fact that in the suit filed by Lahanubai being Regular Civil Suit No.137 of 2005, the Defendants had filed their written statement on 08.02.2006 as is disclosed by the Roznama of the said suit wherein they had referred to the decree dated 21.07.2005 passed in the said Special Civil Suit No.64 of 2002 and therefore, the Defendants i.e. the Petitioners herein were very well aware of the said decree dated 21.07.2005. The Lower Appellate Court also held that the Defendant No.2

is the son of the Defendant No.1 could have filed the Appeal in question, but there is no plausible reason as to why the Defendant No.2 did not file the Appeal. The Lower appellate Court accordingly by the impugned order dated 03.02.2014 rejected the application seeking condonation of delay.

2. The Learned Counsel appearing on behalf of the Petitioners Shri. P. L. Bhujbal would contend that the Lower Appellate Court failed to appreciate that there was merit in the challenge of the Defendants to the decree dated 21.07.2005 as the said decree has been passed without the daughter of the Defendant No.1 Lahanubai being joined as a party to the suit and also not joined the other family members and therefore the suit suffered from non-joinder of necessary parties. Hence, according to the Learned Counsel for the Petitioners the said decree is a nullity.

3. In my view, it is not possible to accept the said contention of the Learned Counsel for the Petitioners. The instant case is not a case where on account of unavoidable circumstances that the Defendants did not participate in the proceedings. This is a case where the Defendants had participated in the proceedings resulting in the decree dated 21.07.2005 being passed. The Defendants were also aware of the said decree as can be gathered from the Written Statement which they had filed in the suit filed by the said Lahanubai being Regular Civil Suit

No.137 of 2005. Hence, it is not open for the Defendants to now contend that the delay is required to be condoned on the ground that their challenge to the decree is meritorious. As indicated above the Appeal against the said decree was sought to be filed only after the notice in the execution proceedings was received by the Defendants. In my view, therefore, the impugned order dated 03.02.2014 passed by the Learned District Judge-1, Niphad rejecting the said Misc. Civil Application No.26 of 2011 does not suffer from any error of jurisdiction or any other illegality or infirmity for this Court to interfere in its Writ Jurisdiction. The Writ Petition is accordingly dismissed.

[R.M. SAVANT, J]