

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

**WRIT PETITION NO.5914 OF 2015**

**Ramchandra Kashinath Shinde and ors. : Petitioners**  
**versus**  
**Mrs. Tulsabai Bhaskarrao Marathe and ors. : Respondents.**

**Mr. R A Thorat, Senior Advocate i/by Mr. R.N.Gite for the Petitioners.**

**CORAM : R. M. SAVANT, J.**  
**DATE : 21<sup>st</sup> September 2015**

**P.C.**

1           The writ jurisdiction of this Court is invoked against the order dated 06/05/2015 passed by the learned Ad-hoc District Judge-2, Malegaon by which order the Civil Misc. Appeal filed by the Petitioners came to be dismissed and resultantly the order dated 28/01/2014 passed by the Trial Court rejecting the application filed by the Petitioners being Civil Misc. Application No.23 of 2006 came to be confirmed.

2           The Petitioners are the original Defendants and the Applicants who had filed the application in question being Civil Misc. Application No.23 of 2006 seeking condonation of delay of 351 days in filing the application for setting aside the ex-parte decree dated 01/03/2005 passed in Special Civil Suit No.141 of 1993. The said suit was filed by the sister of the Applicant Nos.1 and 2 for partition and separate possession of the suit property. In so far as the summons in the suit are concerned, they were served on the

Petitioners/Defendants. They appeared in the suit pursuant to the said summons and had engaged advocate Shri A.I.Wasif to defend them in the said suit by filing their Say and the Written Statement. It seems that the suit proceeded ex-parte against the Defendants in view of the fact that the said advocate Shri Wasif filed "No Instructions" purshis . The said suit ultimately came to be decreed on 01/03/2005 and a decree of partition came to be passed. The said application being Civil Misc. Application No.23/2006 was filed when on 04/03/2006 the notice of execution proceedings filed by the Plaintiff were served upon the Defendants. The instant application was filed immediately thereafter on 16/03/2006. Since the said application filed under Order IX Rule 13 for setting aside the ex-parte decree was belated, that the instant application for condonation of delay of 351 days came to be filed. The ground made out was that the son of the Applicant No.1 had committed suicide on 31/10/2002 the Applicant No.1 was mentally upset and that since the prosecution of the suit was looked after by the Applicant No.1, he did not participate in the prosecution of the suit resulting in decree dated 01/03/2005 being passed against the Defendants ex-parte. It was also stated that the Applicant No.1 was serving as a lecturer at Nandurbar and had retired in February 1996, and was therefore out of Malegaon till his retirement.

3           The said application seeking condonation of delay in filing the Application under Order IX Rule 13 was questioned by the Plaintiff on the

ground that the Applicant No.1 after his retirement is a permanent resident of Malegaon and has been residing there since last 10 years. The reasons given that on account of the death of the son of Applicant No.1, the Applicant No.1 was mentally upset was also questioned. The knowledge to the Applicant No.1 of various proceedings i.e. the instant Special Civil Suit No.141 of 1993, Regular Civil Suits Nos. 408 of 1990 and 527 of 1993 was attributed. It was also averred that the Applicant No.1 was prosecuting Special Civil suit No.153 of 1993 in which the Plaintiff was deliberately not made a party, and for which suit the Applicants had engaged the same advocate Shri A I Wasif. It was therefore sought to be contended that the case of the Applicants, that they were not aware of the stage at which the Special Civil Suit No.141 of 1993 was, is devoid of substance. It was lastly averred that the instant application has been filed so as to stall the execution of the decree passed in the instant Special Civil Suit No.141 of 1993.

4           The Trial Court considered the said application. The Trial Court adverted to the fact that in the suit filed by the Applicants i.e. Special Civil Suit No.153 of 1993, the Applicants had engaged advocate Shri A I Wasif and the Applicant No.1 had deposed in the said suit during the period from 15/03/2003 to 22/03/2005 and hence the case of the Applicant No.1 that he did not participate in the proceedings in view of the fact that he was mentally upset on account of the death of his son on 31/10/2002 could not be accepted.

The Trial Court also adverted to the case of the Plaintiff that her right to 1/4<sup>th</sup> share in the property left by her father has already been adjudicated in Regular Civil Suit No.408 of 1990 but to avoid technical hurdles in getting partition and separate possession thereof that she had filed the instant suit being Special Civil Suit No.141 of 1993. The Trial Court also adverted to the fact that it was the case of the Plaintiff that to prolong the factum of partition and separate possession, that the Applicants had avoided to file their written statement in the instant suit and had also not taken any steps to prosecute the suit. The Trial Court has also adverted to the fact that the instant suit was on the file of the said Court for a period of 10 years and 4 ½ months during which period the Applicants did not file their written statement. The Trial Court having regard to the aforesaid facts held that the conduct of the Applicant No.1 does not appear to be innocent but well calculated with an object to make capital of the withdrawal of the appearance of Shri Wasif with a view to seek setting aside of the exparte decree. The Trial Court also observed that there is no plausible explanation given by the Applicants as to why the Applicant No.1 prosecuted Special Civil Suit No.153 of 1993 but not the instant suit during the same contemporaneous period. The reasons put forth by the Applicants for seeking condonation of delay, therefore, did not commend acceptance to the Trial Court and accordingly by its order dated 28/01/2014 rejected the said Civil Misc. Application No.23 of 2006.

5           The Applicants/Defendants carried the matter by way of Civil Misc. Appeal No.15 of 2014. The Lower Appellate Court considered the judgments which were cited before it and observed that if the parties succeed to establish sufficient cause, then the Court should adopt liberal approach and parties should be given an opportunity to contest the proceedings on merits. The Lower Appellate Court was of the view that the said course of action could not be followed in the instant case as in the instant case it cannot be said that the Applicants were not aware about the stage of the court proceedings namely Special Civil Suit No.141 of 1993, and inspite of the same the Applicants had abstained themselves from the said proceedings. The Lower Appellate Court also reiterated the findings of the Trial Court based on the prosecution of the Special Civil Suit No.153 of 1993 by the Applicant No.1 in the same Court where the advocate engaged was also the same. The Lower Appellate Court therefore came to a conclusion that the order passed by the Trial Court rejecting the application seeking condonation of delay does not merit interference at the hands of the Appellate Court.

6           The learned Senior Counsel for the Petitioners Shri R A Thorat would seek to reiterate the case of the Petitioners/Applicants before the Courts below. The learned Senior Counsel would contend that the suit in question filed by the Applicant No.1 i.e. Special Civil Suit No.153 of 1993 was prosecuted in view of the fact that the Applicant No.1 wanted to protect the

properties as they are the same properties which are involved in the instant suit i.e. Special Civil Suit No.141 of 1993. The learned Senior Counsel would contend that it is in view of the death of the son of the Applicant No.1 that the Applicant No.1 was not prosecuting the instant suit i.e. Special Civil Suit No.141 of 1993 with due diligence.

7           In my view, it is not possible to accept the contentions urged on behalf of the Petitioners. It is required to be noted that the Applicant No.1 had deposed in the suit filed by him i.e. Special Civil Suit No.153 of 1993 immediately after the death of his son in October 2002 which deposition was recorded in the Trial Court in the year 2003. The fact that the Applicant No.1 was prosecuting the suit filed him renders the explanation given by the Applicant No.1 that it is on account of the death of his son that he did not remain present in the instant suit being not credible. It is also required to be noted that there is already a decree in favour of the original Plaintiff in an earlier proceeding being Regular Civil Suit No.408 of 1990 and her 1/4<sup>th</sup> share has been recognized. The said fact lends credence to the case of the original Plaintiff that the Applicant No.1 for some reason and probably with a view to see to it that the fruits of the said decree are not enjoyed by the original Plaintiff did not participate in the instant proceedings. The fact that the same advocate Shri Wasif was appearing for the Applicant No.1 in the suit filed by him i.e. Special Civil Suit No.153 of 1993 also cannot be lost sight of. It is well

settled that though in matters of condonation of delay a highly technical and pedantic approach should be eschewed and an approach which furthers the cause of substantial justice has to be adopted. However, there is no gainsaying about the fact that the delay can be condoned only if sufficient cause is shown. The facts in the instant proceedings are such that it cannot be said that the delay has been explained by the Applicants. In fact non-participation of the Applicant No.1 in the instant suit especially having regard to the fact that he was prosecuting the suit filed by him really dents the case of the Applicants in their endeavour to seek condonation of delay to say least the Application does not seem to be bonafide and the grounds do not inspire confidence. Hence no discretion can be exercised in favour of the Applicants. In that view of the matter no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

**[R.M.SAVANT, J]**

Certified to be true and correct copy of the original signed Order.