

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7574 OF 2016**

Shaikh Mohammed Safique and
Ors

Petitioners

Vs

Mohammed Sameem Mohammad
Yusuf

.. Respondent

Mr. G.S.Godbole, Senior Advocate, i/b Akshay Petkar and K. Thipsay, Advocates for Petitioners.

Mr. R.A.Thorat, Senior Advocate i/b Ms. Pratibha Shelke, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 28/07/2016

PC:

1. Heard Mr.G.S.Godbole, learned senior counsel for the petitioners and Mr.R.A.Thorat, learned senior counsel for respondent at length.
2. Rule. Ms. Shelke waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 5.5.2016 passed by the Appellate Bench of the Small Causes Court in Marji Application No.12 of 2016 in Appeal No.745 of 2004 arising from R.A.E. Suit No.482/904 of 1999. By that order, the Appellate Court allowed the Marji application filed by the respondent for condoning delay of 2120 days in filing the

application for restoration subject to payment of costs of Rs.50,000/- to the petitioners herein. Mr. Thorat states that pursuant to the impugned order, the respondent has deposited amount of Rs.50,000/- in the Court. Mr. Godbole states that the petitioners have not withdrawn the said amount.

4. In support of this Petition, Mr. Godbole submitted that by order dated 10.2.2010, Appeal No. 745 of 2004 was dismissed for want of prosecution as both the parties and Advocates remained absent. Respondent took out Marji Application No. 12 of 2016 for condoning delay of 2120 days in filing the application for restoration. The respondent has also filed separate application for restoration. In paragraph 18 of the impugned order, the Appellate Court specifically observed that the cause shown in the application for condonation of delay and the cause shown in restoration of delay are one and the same, viz. settlement between the parties. The reasons in both the applications are common. Unless the delay is condoned and the application for restoration of Appeal is registered, the matter cannot be decided on merits. He submitted that once the Appellate Court recorded a categorical finding that the cause shown in both the applications is one and the same, the Appellate Court should have clubbed both the applications together and heard and disposed of together. By allowing the application for condonation of delay, it has caused prejudice to the petitioners as in view of the impugned order the

Appellate Court is bound to restore the Appeal. Having accepted the reasons for condoning delay which are selfsame reasons for restoration of the Appeal, the Appellate Court should have heard both the Applications together.

5. Mr. Godbole further submitted that the suit was decreed on 6.10.2003. The respondent filed application under Order IX, Rule 13 of C.P.C. He submitted that the suit was not decreed ex parte and in fact the learned trial Judge while rejecting the application under Order IX, Rule 13, held that, that application is not maintainable. He further submitted that the respondent also preferred substantive Appeal under Section 96 of C.P.C. challenging the decree passed by the trial Court and the Appeal was dismissed on 1.3.2005 as Advocate and the appellants were absent and objections were not removed. He submitted that as the substantive Appeal against the trial court's decree is dismissed, even otherwise the application under Order IX, Rule 13 is not maintainable.

6. On the other hand, Mr. Thorat supported the impugned order. He further submitted that the decree passed by the trial Court is exparte decree and, therefore, the application under Order IX, Rule 13 is perfectly maintainable. He further submitted that Appeal (ST) No. 3194 of 2004 filed under section 96 of C.P.C against the trial court's decree was not dismissed on merits and was dismissed in default as the appellants and advocate

remained absent and objections were not removed. He, therefore, submitted that the trial court's decree cannot be said to have merged after dismissal of the appeal on 1.3.2005.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, Appeal No. 745 of 2004 was dismissed for want of prosecution on 10.2.2010 as both the parties and Advocates remained absent. The respondent has filed two applications, one for condonation of delay and another for restoration of the appeal. In paragraph 18 of the impugned order, the Appellate court has observed thus:

“ All the contentions made by the appellant and the respondents are actually towards the merits of the main application for restoration of appeal which is yet to be registered and heard on merits. The cause shown in this application for the condonation of delay and the cause shown for the restoration of appeal are one and the same that of settlement between the parties. The reasons in both the applications are common. Unless the delay is condoned and the application for restoration of appeal is registered, the matter cannot be decided on merits... ..”

8. Perusal of the above extracted portion shows that the cause shown in the application for the condonation of delay and the cause shown for the restoration of appeal are one and the same viz. settlement between the parties. The reasons in both the applications are common. Once the Appellate Court recorded this categorical finding, in my opinion, the Appellate Court should

have clubbed both the applications together and heard and decided together. By the impugned order, the Appellate Court has allowed the application for condonation of delay and condoned the delay of 2120 days in filing application for restoration. This has certainly caused prejudice to the petitioners as admittedly the reasons in both the applications are one and the same. Once having allowed the application for condonation of delay, it will not be possible for the Appellate Court to dismiss the application for restoration of the appeal as the grounds are one and the same. In my opinion, the Appellate Court should have, therefore, clubbed the applications together and heard and decided together. On this ground alone, the impugned order deserves to be set aside and is accordingly set aside, thereby, restoring Marji Application No.12 of 2016.

9. Mr. Godbole, upon taking instructions from Mr Mudassir shiakh, son of petitioner no.1, states that till the decision of the applications for condonation of delay and restoration of the appeal, the petitioners will not execute the trial Court's decree provided the respondent does not create third party interest as also does not part with possession. Mr. Thorat states that the respondent is in possession. Respondent has neither created third party interest nor parted with possession. Respondent will hereafter neither create third party interest nor part with possession. The statements made by the learned counsel are

accepted. Hence, the following order.

- (i) Impugned order dated 5.5.2016 passed by the Appellate Court is quashed and set aside. Marji Application No. 12 of 2016 is restored to the file of the appellate Court.
- (ii) Marji Application No. 12 of 2016 and Application for restoration of the Appeal shall be clubbed together. The Appellate Court shall hear and decide both the applications together and pass appropriate orders in accordance with law. All contentions of the parties in that regard are expressly kept open. The Appellate Court will decide the said applications uninfluenced by the observations made herein.
- (iii) Till applications for condonation of delay and restoration of appeal are heard and decided, the petitioners shall not execute the trial Court's decree subject to the respondents neither creating third party interest nor parting with possession.
- (iv) Amount of Rs. 50,000/- shall be invested for appropriate period by the Appellate Court and while deciding the application for condonation of delay and application for restoration of appeal, the Appellate Court shall pass appropriate order as regards deposit of amount of Rs.50,000/- along with accrued interest.
- (v) Rule is made absolute accordingly with no order as to costs.

(R.G.KETKAR, J.)