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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.1199 OF 2004

Smt. Pratibha Baburao Burhade,
since deceased through her L.Rs.
Yashwant s/o Baburao Burhade,
Age: 53 years, Occ: Service,
R/o. Presently residing at Vidyut
Society, Laxmi Peth, Solapur,
Taluka and District Solapur.

..PETITIONER

VERSUS

1. Vidyut Karmachari Co-Op.
Housing Ltd., 309, situated
at Begumpura, Aurangabad
through its Secretary.
2. The Chairman,
Vidyut Karmachari Co-Op.
Housing Ltd., 309, situated
at Begumpura, Aurangabad.
3. The Secretary,
Vidyut Karmachari Co-Op.
Housing Ltd., 309, situated
at Begumpura, Aurangabad.
4. Narayan s/o Kisan Jaybhay,
Age: Major, Occ: Service,
R/o. Vidyut Karmachari Co-Op.
Housing Ltd., 309, situated
at Begumpura, Aurangabad. ...RESPONDENTS

Mr P.G. Rodge, Advocate for petitioner;
Mr H.M. Karwa, Advocate for respondent Nos.1 to 3;
Mr Sachin s/o V. Kuptekar, Advocate h/f Mr V.D.
Salunke, Advocate for respondent No.4;

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CORAM : NITIN W. SAMBRE, J.
DATE : 3rd OCTOBER, 2017

ORAL JUDGMENT :

Heard Mr. Rodge, learned Counsel for petitioner, Mr. Karwa, learned Counsel for respondent Nos. 1 to 3 and Mr Kuptekar, holding for Mr. V.D. Salunke, learned Counsel for respondent No.4.

2. It is case of present petitioner that her husband, ex-employee of Maharashtra State Electricity Board, died in the accident in 1966, which was founder member of the respondent No.1 Co-operative Housing Society.

3. The petitioner filed Dispute No.449 of 1983 under Section 91 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to 'Act' for sake of brevity) praying therein that possession of Plot No.10 in lay out of respondent No.1-society situated at Begumpura, Aurangabad be

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handed over to her.

4. The said dispute came to be dismissed by the Co-operative Court on 22nd August, 1985 for want of jurisdiction. However, the Co-operative appellate Court reversed the said finding vide judgment and order dated 14th January, 1988.

5. The Co-operative Court, thereafter, proceeded to decide the said claim vide its order dated 13th January, 1990. The claim of allotment of Plot No.10 was rejected, however, it was directed to respondent Nos. 1 to 3 to allot plot of Dr. Mehta if fallen vacant after 19th April, 1981.

6. Feeling aggrieved, the petitioner preferred another Appeal No. 60 of 1990, which was partly allowed by the Co-operative Appellate Court, whereby again remanding the matter back to the Co-operative Court for deciding the Dispute afresh after recording evidence as observed herein above. Pursuant to the order dated 17th July, 1992 passed

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by the appellate Court, the petitioner-disputant appeared before the Co-operative Court, however, on 3rd August, 2000 dispute came to be dismissed in default.

7. After period of about 19 months, the petitioner applied for restoration of the Dispute vide Application dated 31st October, 2001, which came to be rejected by learned Co-operative Court, which was further confirmed in appeal being Appeal No. 282 of 2002 by the appellate Court. As such, this petition questioning both these orders.

8. Mr. Rodge, learned Counsel for the petitioner would invite attention of this Court to the reasons for dismissal of the application for restoration thereby refusing to condone the delay by the appellate Court. He would urge that the applicant, aged lady, was required to shift to her son's place as she underwent cataract operation in 2000. She being alone, was unable to pursue the Dispute from Solapur, where her son was working.

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However, she engaged two lawyers for pursuing the Dispute, who have failed to inform her about order of dismissal. According to Mr. Rodge, learned Counsel for the petitioner, default on the part of lawyer should not cause prejudice to the litigant. He would then submit that day to day delay is not required to be examined. However, considering the fact that the petitioner is pursuing the Dispute since 1983, the Court must consider equity in favour of the petitioner. He would then submit that if put to condition, the petitioner is ready and willing to comply with, for order of condonation of delay and restoration of the Dispute.

9. Per contra, Mr. Karwa, learned Counsel for respondent Nos. 1 to 3 and Mr. Kuptekar holding for Mr. V.D. Salunke, learned Counsel for respondent No.4 would urge that the petition, in extraordinary jurisdiction, does not warrant any interference against concurrent findings recorded by Co-operative Court and appellate Court. It is claimed

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that neither separate application for condonation of delay was moved nor delay was properly explained, as is apparent from the observations made by both the Courts below. According to them, great hardship will be caused to the petitioner in case petition is allowed. They sought dismissal of the petition.

10. Considered rival submissions. It is unfortunate that the petitioner, a lady, after death of her husband in 1966, is pursuing present Dispute since 1983. Twice the matter was remanded back by the appellate Court to the Co-operative Court for deciding the claim of the petitioner afresh.

11. The fact remains that in both the orders, though it is held that no separate application for condonation of delay was required, however, the Courts below have held that the delay was not properly explained.

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12. Mr. Rodge, learned Counsel for the petitioner has invited attention of this Court to the reasons, which according to him, substantiate the delay; (a) that the applicant underwent cataract surgery which is not disputed by the respondents and (b) that she shifted to Solapur and her lawyer did not attend the proceedings.

13. Considering the law laid down by the Apex Court in the matter of **Rafiq & Anr vs Munshilal & Anr**, reported in **1981 SCR (3) 509**, it is required to be noted that the act of lawyer should not cause prejudice to his litigant like in the present case. It cannot be noticed from any of the pleadings that dismissal of the proceedings of which restoration was sought after delay of 19 months, the fact was within knowledge of the petitioner.

14. Apart from above, the fact remains that the equity in favour of the petitioner is required to be considered, who is litigating for her claim since 1983.

15. In the aforesaid background, the fact remains that since 1983 till dismissal of the Dispute in default on 3rd August, 2000, she was litigating before the Co-operative Court, thereafter in restoration proceedings till decision in this petition prompts this Court to take liberal view in favour of the petitioner. However, while striking out the equity in favour of the petitioner, this Court cannot loose sight of the fact that, the respondents are also litigating for the same period.

There is one more ground for considering equity in favour of the petitioner i.e. petitioner died during pendency of this petition and it is her legal heir, who is pursuing the present proceedings.

16. In the wake of above, it is ordered that delay of 19 months caused in preferring the application for condonation of delay for restoration of the Dispute stands condoned. The

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application for restoration is allowed by setting aside the order of dismissal being Dispute No.ACR/449/83 subject to payment of costs of Rs.12,000/-, of which Rs.3000/- be paid to each of the respondent. Costs of Rs.12,000/- be deposited before Co-operative Court, Aurangabad within period of ten weeks from today.

17. The Dispute of the present petitioner shall be restored to the file of Co-operative Court, who is directed to decide the same within six months thereafter.

18. The parties hereto assures this Court that they shall co-operate Co-operative Court in getting Dispute expeditiously decided and they shall appear before the Co-operative Court on 30th November, 2017.

19. Rule made absolute in above terms.

(NITIN W. SAMBRE, J.)