

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3183 OF 2016

Kiran Vijay Vyavhare
Age 26 years, Occ. Business
R/o Aadarsh Nagar, Vaijapur,
District Aurangabad.

..Petitioner

Versus

Tarabai Shantilal Tilekar
Age 35 years, Occ. agriculture
and household, R/o Shivrai Road,
Vaijapur, Dist. Aurangabad.

..Respondent

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Advocate for Petitioner : Shri Sonavane Narendra D.
Advocate for Respondent : Miss Godsay N.S.
h/f Shri Godsay S.M.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 08, 2017

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ORAL JUDGMENT :-

1. I have heard the strenuous submissions of the learned
Advocates. for the respective parties.

2. Rule.

3. By consent, Rule is made returnable forthwith and the petition
is taken up for final disposal.

4. The petitioner is aggrieved by the order dated 2.2.2016, by

which, the trial Court has condoned the delay of 10 months and 1 day in filing the restoration petition MARJI 68 of 2016.

5. Shri Sonawane has placed reliance upon the judgment of the Honourable Supreme Court in the matter of Mahabir Singh Vs. Subhash and others [AIR 2008 SC 246]. Miss Godsay has relied upon the following judgments:-

- (i) Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others [(2013) 12 SCC 649],
- (ii) Brijesh Kumar and others Vs. State of Haryana and others [2014 (2) CCC 13 (SC),
- (iii) Collector, Land Acquisition Anantnag and another Vs. Mst. Katiji and others [(1987) 2 SCC 107],
- (iv) N. Balkrishnan Vs. M. Krishnamurthy [1998 AIR SCW 3139], and
- (v) Manoharan Vs/ Shivrajan [2014 (5) Mh.L.J. SC 3].

6. There is no dispute that Special Civil Suit No.11 of 2014 preferred by the petitioner was decreed ex-parte. The said judgment dated 16.9.2014 was subject matter of Special Darkhast No.1 of 2015, vide which the petitioner had sought execution. Notice in the execution proceedings was served on the husband of the petitioner on 7.2.2015. He sought time to file his say on four dates and finally, submitted his say on 15.6.2015. On 4.7.2015, the husband of the petitioner, who was judgment debtor, consumed

poison purportedly due to the harassment caused by the petitioner and passed away on 8.7.2015. He had left a suicide note blaming the petitioner and a crime has been registered against the petitioner along with another person in the concerned police station.

7. The respondent widow preferred MARJI No. 68 of 2015 on 14.8.2015 praying for setting aside the ex-parte decree dated 16.9.2014. An application for condonation of delay of 10 months and 1 day was also filed. By the impugned order, the delay has been condoned.

8. Shri Sonawane strenuously submits that even if it is presumed that the deceased husband of the respondent had no knowledge about the ex-parte decree, he was made aware of the decree, after he was served on 7.2.2015. The respondent was also party to the suit along with her husband. Time to file say was sought over four months and after the say was filed, the husband of the respondent is alleged to have committed suicide. The delay of ten months, therefore, ought not to have been condoned under Section 5 of the Limitation Act.

9. He places reliance upon the judgment of the Honourable Supreme Court in the case of Mahabir Singh (supra) to support his contention that the limitation for setting aside the ex-parte decree

was only 30 days. He, therefore, submits that Article 123 of the Limitation Act cannot be applied so liberally so as to condone the delay deliberately caused by a litigant. He, therefore, submits that the impugned order deserves to be quashed and set aside.

10. Having considered the submissions of the learned Advocates and having gone through the judgment cited, it is apparent that the respondent and her husband appeared to be under great stress and pressure. After the ex-parte decree was passed against them and after they were served by Court notice in the execution proceedings, the pressure seems to have taken its toll when the husband of the respondent is said to have committed suicide. This incident cannot be brushed aside lightly as being a negligible piece of evidence since it speaks volumes about the pressure and stress suffered by the respondent and her husband. The respondent widow's miseries grew after the tragic death of her husband.

11. Shri Sonawane is right in submitting that delay cannot be condoned out of sympathy. However, this submission may not come to the aid of the petitioner for the reason that the delay of ten months cannot be termed as being inordinate. Laches have not been attributed to the conduct of the respondent. It also cannot be ignored that when the delay is not inordinate and deliberate, it needs to be scrutinized as to whether the applicant would be

rendered remediless if the delay is not condoned.

12. It also cannot be ignored that the Special Civil Suit No.11 of 2014 was filed on 9.6.2014 and the ex-parte decree was passed on 16.9.2014 i.e. in 3 months and 7 days from the date of filing of the suit. It therefore, cannot be said that the respondent or her deceased husband have been avoiding the trial Court and that an old suit was being unnecessarily delayed or prolonged. In the backdrop of the suit having been decreed in 3 months and 7 days, only because the claim has gone unchallenged, is one factor which needs consideration.

13. It is trite law that in execution proceedings, the executing Court cannot go behind the decree. Refusal to condone the delay would, therefore, amount to the respondent being practically rendered remediless and will have to suffer the ex-parte decree. Considering the principles culled out by the Honourable Supreme Court in the case of Esha Bhattacharjee (supra) keeping in view it's earlier judgment in the matter of Collector, Land Acquisition, Anantnag (supra), I find that the ends of justice have been met by condoning the delay of ten months.

14. Shri Sonawane, in the alternative has prayed for costs to be paid by the respondent, since the delay was condoned without

imposition of costs. Miss Godsay suggests that an amount of Rs.1,000/- would be appropriate costs. I find that costs of Rs.2500/- would be appropriate.

15. This petition is, therefore, partly allowed. Clause (3) of the impugned order is modified and the respondent is directed to pay costs of Rs.2,500/- (Rs. Two Thousand and Five Hundred only/-) by depositing the same before the trial Court within a period of four weeks from today, failing which, the defense of the respondent would be struck off. After the costs are deposited the petitioner will be at liberty to withdraw the said amount, without conditions.

16. Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

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