

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

WRIT PETITION NO.3036 OF 2014

Sarubai w/o Dattu Parse,
Died. Through Power of Attorney:
Yallappa s/o Dattu Parse
Age 72 years, Occ. Pensioner,
R/o Anand Nagar, Osmanabad,
Tq. & Dist. Osmanabad.

...Petitioner

Versus

Latabai w/o Sudhakar Rao Tirthkar
Through Power of Attorney,
Sudhakar s/o Baliram Tirthkar
Age 59 years, Occ. Service,
R/o. Anand Nagar, Osmanabad
Tq. & Dist. Osmanabad.

...Respondent

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Mr. Sanjay A.Wakure, Advocate, for petitioner.
Mr. A.S.More, Advocate, for sole respondent.

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CORAM: SUNIL P. DESHMUKH, J.

DATE : December 13th, 2017

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith.
2. Heard learned Counsel for the parties finally by consent.

3. Regular Civil Suit No.170/1996 had been instituted by the present respondent seeking recovery of possession of encroached portion of suit house from petitioner-defendant. The suit was decreed on 13.12.2004. The writ petitioner had preferred an appeal there-from bearing Regular Civil Appeal No.11/2014, however, the appeal came to be dismissed in default on 23rd August, 2011. The petitioner, under the circumstances, had lodged an application for restoration of the appeal, along with an application bearing Miscellaneous Civil Application No.34/2012, on 27.1.2012, for condonation of delay, which had occurred in filing the application for restoration of the appeal, stating therein that the petitioner had not been keeping good health and, under the circumstances, had not kept up with the progress of the appeal, and the order passed therein, as the appeal had been pending since 2004. Learned Counsel for the petitioner submits that the application for condonation of delay had been dismissed by the trial Court under order dated 9.8.2012, observing that the reason assigned by the petitioner that he was not keeping good health is not sufficient, since the same had not been supported by any documentary evidence.

4. Learned Counsel points out that against rejection of application for condonation of delay in preferring restoration application, belatedly, Appeal from Order was filed in this Court. This Court, under its order dated 27th February, 2014, condoned the delay in approaching this Court under Appeal from Order, however, also held that the Appeal from Order is not maintainable and, had granted liberty to the petitioner to make appropriate approach against order dated 9.8.2012 passed by the trial Court. Accordingly, present writ petition has been filed.

5. Learned Counsel for the petitioner Mr. Sanjay A. Wakure refers to that the petitioner-defendant was not conversant with the legal procedure, and had been lying indisposed for quite some time while the order of dismissal in default had been passed and even thereafter. He submits that the proceedings had been lingering on since 2004 and, as such, the petitioner, who had been initially diligently following the proceedings had subsequently become little lax; may be that the petitioner had not been kept informed about the progress in the matter. He submits that there had been no deliberate intention underlying in getting the Regular Civil Appeal dismissed in default, nor in making the approach belatedly,

and further that genuine and honest reasons have been put forth, and as such, the applications for delay condonation and restoration of the appeal, deserve to be allowed. He, therefore, entreats the Court to allow the writ petition and to restore Regular Civil Appeal.

6. Learned Counsel for respondent Mr. A.S.More, however, finds it difficult to accede to the request made in the Writ Petition contending that it was expected that the petitioner ought to be diligent in the proceedings and that while the matter had been dismissed in default in the year 2011, the proceedings for restoration had been initiated quite belatedly without submission of any material in support of the contentions taken up for restoration as well as for delay condonation and, in the circumstances, the impugned order is not liable to be interfered with. Although learned Counsel for respondent had submitted so, he is not in a position to deny that the Regular Civil Appeal had been pending since 2004 to 2011, without effectively being heard and to challenge veracity of the reasons which had caused delay in making the restoration application.

7. In the circumstances, it appears to be expedient to

accede to the request made for condonation of delay in restoration and for restoration of Regular Civil Appeal in the interest of justice in order to have decision on merits in the appeal. It is not the case of the respondent that any particular advantage has been gained by the petitioner because of approaching belatedly for restoration of the appeal. In view of the fact that Regular Civil Appeal is pending since 2004 till 2011, and for lapse on the part of petitioner occurring for smaller period thereafter, it would not be proper to block the decision of the appeal on merits.

8. In the circumstances and in the interest of justice, the impugned order dated 23.8.2011, dismissing the appeal in default, and order dated 9.8.2012, refusing to condone the delay, are set aside. Regular Civil Appeal is restored to its original position as has been subsisting before 23.8.2011. Regular Civil Appeal to be proceeded with expeditiously.

Rule made absolute in the aforesaid terms. Writ Petition stands disposed of.

(SUNIL P. DESHMUKH)
JUDGE

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