

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

WRIT PETITION NO. 11473 OF 2016

1. Tukaram s/o Sudam Jadhav
Age 40 years; Occu-Labour;
R/o Bhakaskheda, Tq. Udgir
Dist. Latur at present Quick
Courier, Mukhtar Gunj, Kedia
Building, Hyderabad.
2. Kantabai w/o Shrirang Jadhav
Age 63 Years; Occu-Household;
R/o Bhakaskheda (W), Tq. Udgir;
District Latur.

... **Petitioners**
(Orig.Applicants)

VERSUS

1. The State of Maharashtra
through Collector, Latur;
District Latur.
2. The Tahsildar
Tahsil Office, Udgir;
District Latur.
3. Gram Panchayat Office
Bhakaswadi (W), Tq. Udgir;
Dist. Latur, Through
Gramsevak/Sarpanch.
4. Taterao s/o Venkat More
Age 47 Years, Occu-Service;
R/o Bhakaskheda (W),
Tq. Udgir; Dist. Latur.

... **Respondents**
(Orig.Defendants)

Mr. A. N. Sabnis h/f Mr. V. D. Gunale for Petitioners.
Mr. A. P. Basarkar, AGP for Respondent – State.

CORAM : NITIN W. SAMBRE, J.

DATE : 18th September, 2017.

ORAL ORDER

. The present Writ Petition raises an issue as regards the legality and validity of the impugned order dated 4th March 2016 passed by the learned Civil Judge Senior Division, Udgir in Misc. Application No. 16 of 2013, refusing to condone the delay caused in preferring a prayer for restoration of suit which was dismissed in default.

2. The Petitioners are Plaintiffs in Regular Civil Suit No. 19 of 2006 (Old) and 38 of 2010 (New), which was initiated on the file of Civil Judge Senior Division, Ahemadpur Camp at Udgir. The suit was for declaration of ownership and perpetual injunction.

3. After the issues were framed, the Petitioners – Plaintiffs through their Lawyer remained absent. As such, suit came to be dismissed in default on 28th June 2012. An Application (Exhibit – 1-B) came to be moved by the Petitioners – Plaintiffs praying for condonation of delay of 16 months 10 days caused in moving the restoration application. Vide impugned order, the Application came to be rejected.

4. Mr. A. N. Sabnis, the learned Counsel for Petitioners – Plaintiffs would urge that the suit was preferred by the Petitioners, claiming declaration of ownership of Gram Panchayat House No. 314/326 admeasuring 33 x 33 ft.

with an order of injunction against the Respondents – Defendants from interfering with peaceful possession of the Plaintiffs. According to him, it was never brought to the notice of the Petitioners that the suit was fixed for recording of evidence, by the Lawyer engaged by the Plaintiffs – Petitioners. He would then urge that a specific ground in the Application for condonation of delay was raised to the above effect and would make a legal submission that for default of a Lawyer, the Petitioner – litigant cannot be made to suffer. According to him, even if the prayer for condonation of delay was objected, the evidence was adduced in support of condonation of delay, which is not properly appreciated. He submits that the order impugned calls for an interference.

5. Per contra, Mr. A. P. Basarkar, the learned AGP would urge that no interference is warranted in the order impugned. According to him, the court below has appreciated the cause for delay and has rightly rejected the same. He would submit that this Court, if intent to order condonation of delay, same be granted after putting the Petitioners to certain strict conditions.

6. Considered rival submissions.

7. From the available, it is noted that the suit of the Petitioners was pending for recording evidence of the Plaintiffs' side and the Petitioners – Plaintiffs remained absent. As such, the suit came to be dismissed in default.

In an Application for condonation of delay, it is specifically pleaded by the Petitioner No.1 that he is residing at Hyderabad for private job. According to him, Adv. Shri M. S. Motirave engaged to plead their case was negligent, as neither the fact about fixing the matter for recording of evidence, nor the dismissal of the suit for default on 28th June 2012 was communicated. The Petitioner No.1 – Tukaram Sudam Jadhav entered into witness-box and deposed in support of above issue. He has also deposed that the Petitioner No.2 – Aged lady is not keeping good health and as such was unable to communicate with the Lawyer. In cross-examination, the case put-forth by the Petitioners was not demolished by the Respondents. Though it is stated that a criminal case being No. 141 of 2010 is pending against the Petitioners, however, there is hardly any material to infer that the Petitioners attended the said criminal case regularly and not the suit in question.

8. The Apex Court in the matter of ***Rafiq & Anr. V/s Munshilal & Anr.***¹ has observed that an innocent litigant cannot be made to suffer for inaction of the Lawyer.

9. In the present case, not only the inaction of the Lawyer is established through evidence, but it is also established that there is no further remedy available to the Petitioners *qua* the claim made in the suit.

10. The Petitioners in clear terms have assured this Court, if given chance, they shall not seek any adjournment and shall adduce evidence on

1 AIR 1981 SC 1400

day-to-day basis before the learned trial court. The said statement is accepted as an undertaking.

11. In view of above, the order impugned dated 4th March, 2016 passed by the learned Civil Judge Senior Division, Udgir refusing to condone the delay is hereby set-aside and the Application (Exhibit - 33) in Misc. Application No. 16 of 2013 seeking condonation of delay stands allowed, subject to following conditions :-

- (a) The Petitioners shall deposit costs of Rs. 3000/- before the court of Civil Judge Senior Division, Udgir in Misc. Application No. 16 of 2013 to which each of the Respondents will be entitled to withdraw in equal proportion.
- (b) In case the suit is restored to the file, the undertaking given by the Petitioners that they shall not seek any adjournment and shall co-operate in expeditious disposal of the suit, is accepted.
- (c) If the Petitioners flouts the undertaking, the learned court below will be at liberty to take such steps including that of dismissal of the suit without being influenced by the findings recorded herein above.

12. Writ Petition stands disposed of accordingly.

(NITIN W. SAMBRE, J.)

sut.